

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **MAY 29 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen and a motion to reconsider, which the director granted. The director found that the grounds for denial had not been overcome. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a truck and trailer repair business. It seeks to employ the beneficiary permanently in the United States as a mechanic specialist. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not demonstrated that a bona fide job offer existed due to a familial relationship between the beneficiary and the owners of the petitioner's business and that the evidence did not show that DOL was aware of this relationship. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 22, 2009 denial, an issue in this case is whether or not the petitioner demonstrated that a bona fide job offer existed due to a familial relationship between the beneficiary and the owners of the petitioner's business and whether or not the evidence showed that DOL was aware of this relationship. The director denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

In its December 26, 2012 Notice of Intent to Dismiss/Notice of Derogatory Information (NOID/NDI), the AAO noted that *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of a petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

*Id.* at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

According to evidence in the record, the AAO stated that the petitioner’s business is owned 49% by [REDACTED] and 51% by [REDACTED] who uses the name [REDACTED]. [REDACTED] signed his name on the Form ETA 750 on April 27, 2001, under a declaration that the contents of the form are true and correct under penalty of perjury following section 23 in which he certified, among other things, that “[t]he job opportunity has been and is clearly open to any qualified U.S. worker.”

The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); see also 8 U.S.C. § 1361.

The record of proceeding contains a copy of the beneficiary’s birth certificate; a copy of [REDACTED] birth certificate under the name [REDACTED] a statement from [REDACTED] dated May 15, 2009, stating that the beneficiary is his brother; and a statement from counsel dated May 15, 2009, stating that the three men are brothers.

As the beneficiary is the brother of the owners of the petitioner’s business, which filed the labor certification in April of 2001 seeking to hire the beneficiary as a mechanic specialist, the AAO notified the petitioner that it does not appear that the job opportunity was clearly open to U.S. workers. If the job opportunity was not clearly open to any qualified U.S. worker, then the petitioner misrepresented the job opportunity on the labor certification.

In the director’s request for evidence (RFE) of April 6, 2009, the petitioner was asked to provide evidence that DOL was aware of the relationship. The petitioner submitted a written statement from [REDACTED] dated May 15, 2009, which states that he actively attempted to solicit American workers for the proffered position and, after finding no viable applicants for the position, the petitioner selected the beneficiary. The AAO finds that the petitioner failed to demonstrate how many applicants there were for the position and why they were rejected. No probative evidence was submitted to demonstrate that DOL was aware of the familial relationship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel, in his letter dated May 15, 2009, stated that valid attempts were made to comply with U.S. Citizenship and Immigration Services (USCIS) and DOL requirements. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that there were various issues with the recruitment for the proffered position. For example, the ads and posting were run in 2004, but the labor certification was filed in 2001. There is no evidence that this case involved DOL supervised recruitment which allowed for the ads to be placed later. In fact, if DOL directed the ads, they should include the DOL address where resumes should be submitted. See 20 C.F.R. § 656.21(g)(1). However, the ads submitted only include the petitioner's address.

The posting notice also states that the position requires two years of training, but the labor certification only states that one year is necessary. The petitioner failed to provide evidence discussing the recruitment results so as to demonstrate that the job offer was, in fact, open to U.S. workers. The petitioner also failed to demonstrate how many resumes it received and why any applicants were rejected. The petitioner submitted an undated, unsigned, and unaddressed letter stating that there were no other qualified applicants for the position, but the letter is not sufficient. The letter neither stated that there were no other applicants, nor stated the lawful business reasons why any other prospective applicants were rejected.

Therefore, counsel and the petitioner failed to demonstrate that there was a bona fide job offer as it has not been established that the proffered position was open to all U.S. workers.

On appeal, counsel referenced *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7<sup>th</sup> Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See INA Section 212(a)(6)(C), [8 U.S.C. 1182(a)(6)(C)], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the job opportunity was clearly open to any qualified U.S. worker. If the job offer was not open to any qualified U.S. worker, then the petitioner's claims that the job offer was *bona fide* and signing the labor certification under penalty of perjury constitutes an act of willful misrepresentation. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision."). Here, the claim that the job offer was *bona*

*fide* is a willful misrepresentation that adversely impacted DOL's adjudication of the ETA 750 and USCIS's immigrant petition analysis.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The regulation at 20 C.F.R. § 656.30(d) provides:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

In response to the AAO's December 26, 2012 NOID/NDI, counsel submitted a letter, stating that the beneficiary's familial relationship with the petitioner's owners is not alone sufficient to establish that no real bona-fide job opportunity exists and that the job offer was not open to qualified American workers. Counsel states that the petitioner was never engaged in willful misrepresentation regarding its owners' relationship with the beneficiary.

Counsel references a DOL Board of Alien Labor Certification Appeals (BALCA) case where it was made clear that a family relationship does not per se preclude a bona fide job offer from existing. Counsel cites a separate BALCA decision that encouraged the consideration of the totality of the circumstances when determining whether a bona fide job offer exists. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not

similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel notes and provides documentation showing that the petitioner sponsored other prospective alien workers for the same position as the beneficiary. Counsel asserts that this demonstrates that the job offer was bona fide and open to all qualified U.S. workers. The AAO does not find this to have any relevance to the instant case and whether the job offer was bona fide and open to all qualified U.S. workers.

The AAO finds that the petitioner failed to demonstrate that a bona fide job offer existed due to a familial relationship between the beneficiary and the owners of the petitioner's business and that the evidence did not show that DOL was aware of this relationship. The AAO further finds that the petitioner failed to demonstrate that the labor certification was filed in accordance with 20 C.F.R. § 656.21. The AAO finds that the director denied the petition accordingly. The AAO further finds that the petitioner willfully misrepresented a material fact in that the job offer was not open to all qualified U.S. workers. In view of the foregoing, the AAO concludes that, based on the material misrepresentation of a material fact, the labor certification will be invalidated.

Beyond the decision of the director,<sup>2</sup> the AAO stated in its December 26, 2012 NOID/NDI that the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

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<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.80 per hour (\$47,424.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires one year of training in auto mechanics and two years of experience in the job offered of mechanic specialist.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claims to have worked for the petitioner from 2001 to the present.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Forms W-2 Wage and Tax Statements issued by the petitioner to the beneficiary were submitted as shown in the table below.

- In 2001, the Form W-2 stated wages paid of \$26,250.00.
- In 2002, the Form W-2 stated wages paid of \$39,000.00.
- In 2003, the Form W-2 stated wages paid of \$38,205.45.
- In 2004, the Form W-2 stated wages paid of \$38,061.95.
- In 2005, the Form W-2 stated wages paid of \$38,542.80.
- In 2006, the Form W-2 stated wages paid of \$40,800.00.
- In 2007, the Form W-2 stated wages paid of \$41,600.00.
- In 2008, the Form W-2 stated wages paid of \$41,600.00.

- In 2009, the Form W-2 stated wages paid of \$43,648.40.
- In 2010, the Form W-2 stated wages paid of \$44,625.40.
- In 2011, the Form W-2 stated wages paid of \$44,586.10.
- In 2012, the Form W-2 stated wages paid of \$44,586.10.

Therefore, as the proffered wage was \$47,424.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2, and would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2001	\$47,424.00	\$26,250.00	\$21,174.00
2002	\$47,424.00	\$39,000.00	\$8,424.00
2003	\$47,424.00	\$38,205.45	\$9,218.55
2004	\$47,424.00	\$38,061.95	\$9,362.05
2005	\$47,424.00	\$38,542.80	\$8,881.20
2006	\$47,424.00	\$40,800.00	\$6,624.00
2007	\$47,424.00	\$41,600.00	\$5,824.00
2008	\$47,424.00	\$41,600.00	\$5,824.00
2009	\$47,424.00	\$43,648.40	\$3,775.60
2010	\$47,424.00	\$44,625.40	\$2,798.60
2011	\$47,424.00	\$44,586.10	\$2,837.90

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982); *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before

expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on January 26, 2013, with the petitioner’s submissions in response to the AAO’s December 26, 2012 NOID/NDI. The petitioner’s 2011 tax return is the most recent tax return in the record of proceeding.

The petitioner’s tax returns demonstrate its net income for 2001 through 2011, as shown in the below table.

- In 2001, the Form 1120S stated net income<sup>3</sup> of \$151,332.00.

<sup>3</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions, or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 16, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income,

- In 2002, the Form 1120S stated net income of \$95,357.00.
- In 2003, the Form 1120S stated net income of \$24,209.00.
- In 2004, the Form 1120S stated net income of \$36,543.00.
- In 2005, the Form 1120S stated net income of \$39,865.00.
- In 2006, the Form 1120S stated net income of \$62,362.00.
- In 2007, the Form 1120S stated net income of \$2,352.00.
- In 2008, the Form 1120S stated net income of -\$5,269.00.
- In 2009, the Form 1120S stated net income of -\$130,167.00.
- In 2010, the Form 1120S stated net income of -\$11,588.00.
- In 2011, the Form 1120S stated net income of -\$85,138.00.

Therefore, for the years 2007 through 2011, the petitioner did not demonstrate that it had sufficient net income to pay the difference between wages paid and the proffered wage.

USCIS records indicate that the petitioner has filed other Form I-140 petitions since the priority date, eight of which USCIS approved. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007 through 2011, as shown in the below table.

- In 2007, the Form 1120S stated net current assets of \$754.00.
- In 2008, the Form 1120S stated net current assets of \$11,067.00.
- In 2009, the Form 1120S stated net current assets of \$18,789.00.
- In 2010, the Form 1120S stated net current assets of -\$13,794.00.

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deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001, 2002, 2003, 2004, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax returns.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2011, the Form 1120S stated net current assets of -\$18,589.00.

Therefore, for the years 2007, 2010, and 2011, the petitioner did not demonstrate that it had sufficient net current assets to pay the difference between wages paid and the proffered wage. Although the petitioner's net current assets in 2008 and 2009 were greater than the difference between wages paid and the proffered wage, as noted above, the petitioner has filed multiple Form I-140 petitions since the priority date, eight of which USCIS approved. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay all of its beneficiaries their proffered wages as of the priority date through an examination of wages paid to the beneficiary, its net income, or its net current assets.

In response to the AAO's December 26, 2012 NOID/NDI, counsel's letter contends that the petitioner had the ability to pay the proffered wage. The petitioner submitted copies of its website, which counsel asserts establishes the achievements and growth of the petitioner's business. The AAO finds that the petitioner failed to provide evidence of its superior reputation within its industry, showing that it would have had the ability to pay the beneficiary the proffered salary despite the fact that it did not have sufficient net income or net current assets to pay the difference between wages paid to the beneficiary and the proffered wage for 2007, 2010, and 2011.

Counsel advised that the petitioner has paid the wages of other alien workers and therefore will have the ability to pay the proffered wage of the beneficiary. The record does not, however, state these workers' wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of these other workers involve the same duties as those set forth in the ETA 750. The petitioner has not documented the positions, duties, and termination of these workers. If these workers performed other kinds of work, then the beneficiary could not have replaced them.

Counsel's assertions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years

and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not demonstrate that it had sufficient net income or net current assets to pay the difference between wages paid to the beneficiary and the proffered wage for 2007, 2010, and 2011. The petitioner also did not demonstrate its ability to pay the proffered wages for all of its Form I-140 beneficiaries from the priority date or subsequently. The record does not contain evidence that the owners of the business were willing able to forego officer compensation to pay the proffered wage. There is insufficient evidence in the record of the historical growth of the petitioner's business or of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Also beyond the decision of the director, the AAO notified the petitioner in its December 26, 2012 NOID/NDI that petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires one year of training in auto mechanics and two years of experience in the job offered of mechanic specialist.

On the labor certification, the beneficiary claims to qualify for the offered position based on a certificate in mechanical training from [REDACTED] Poland awarded in 1998 as well as experience as: 1) a mechanic and trailer repair specialist working 40 hours per week for [REDACTED], Poland from November 1992 to January 1998 and 2) a mechanic and trailer repair specialist working 40 hours per week for the petitioner from an unnamed month in 2001 to the present.

Thus, the beneficiary has set forth on the Form ETA 750B at question 11, which asks for the name of the schools, colleges, and universities attended, including trade or vocational facilities, that his required one year of training in auto mechanics was earned at the same entity that the beneficiary also lists as the business of his prior employer. The record does not contain an explanation as to why the beneficiary listed the same entity as both a training facility and a place of employment where he gained the required experience for the proffered position.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. at 591-92.

The record contains a vocational school graduation certificate dated July 15, 1978 and a "Results of Final Classification" from the [REDACTED] Poland. The record also contains an educational evaluation written by [REDACTED] for the [REDACTED] on October 3, 2007 in which he references a copy of a maturity certificate from a technical secondary school issued by the [REDACTED] in Poland in 1983. [REDACTED] states that this certificate indicates that the beneficiary passed a final examination on January 16, 1983 and that the beneficiary was granted the title of automobile mechanic. [REDACTED] concludes that the beneficiary's education is the equivalent of graduation from an accredited vocational high school in the United States.

The AAO notes that this training in the field of auto mechanics is not listed on the Form ETA 750 at Part B, question 11 where the beneficiary is asked to list his education and training facilities, which qualified him for the proffered position. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Similarly, claimed training necessary to qualify the beneficiary for the proffered position which is not certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence. Further, a copy of the certificate referenced in the evaluation performed by [REDACTED] is not in the record of proceeding, and was awarded in 1983, whereas the vocational school graduation certificate in the record is dated July 15, 1978. The petitioner does not provide an explanation for this inconsistency in the record.

As previously noted, *Matter of Ho* states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *See Matter of Ho*, 19 I&N Dec. at 591-92.

The beneficiary’s claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer and a description of the beneficiary’s experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a work certificate dated February 12, 1998, signed by [REDACTED] containing the stamp of [REDACTED], Poland, which states that the beneficiary worked full-time as a mechanic from November 1, 1992 to January 1, 1998. The AAO notes that the certificate does not include the title of [REDACTED] or the duties of the beneficiary, and, thus, it does not meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a letter from [REDACTED] dated August 20, 2009, which states that the beneficiary has been working for the petitioner since April 26, 2001. However, this letter fails to describe the beneficiary’s experience and duties or to give [REDACTED] title, and thus it does not meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the record of proceeding contains a Form G-325A signed by the beneficiary on October 9, 2007 in which he states under penalty of perjury that he began working for the petitioner in February 1998, while on the labor certification, the beneficiary sets forth that he began working for the petitioner in 2001.

Furthermore, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer’s job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.<sup>5</sup>

In response to the AAO’s December 26, 2012 NOID/NDI, counsel admits that the same entity was listed on the labor certification as a prior training facility and place of employment for the beneficiary. Counsel states that his own office made a clerical error in this regard. Counsel

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<sup>5</sup> In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in [REDACTED] is not an exhaustive list. *See E & C Precision*.

contends that the petitioner submitted ample evidence that the beneficiary possessed the requisite training and experience for the proffered position as of the priority date. The petitioner re-submits the beneficiary's work certificate, and counsel notes that the DOL certified that the beneficiary was qualified for the offered position. Counsel admits that there was a discrepancy regarding the date in which the beneficiary began working for the petitioner between the labor certification and the Form G-325A. However, counsel states that the petitioner has overcome the inconsistencies in the record of proceeding by establishing that the beneficiary has been working for its business since April 26, 2001.

The AAO finds that the evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed with a finding that the petitioner willfully misrepresented a material fact.

**FURTHER ORDER:** The AAO finds that the petitioner's job offer was not *bona fide* based on the petitioner's failure to demonstrate that the offered position was open to all qualified U.S. workers, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States. The labor certification application (ETA Case Number [REDACTED]) is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's willful misrepresentation.