

(b)(6)

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



DATE: **NOV 27 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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:



INSTRUCTIONS:

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you

A handwritten signature in black ink, appearing to read "Just for".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Texas Service Center. On September 13, 2010 the director revoked the approval of the petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed on December 26, 2012. The petitioner filed a motion to reopen the AAO decision. On May 28, 2013, the AAO dismissed the motion, affirming its previous decision. The matter is now before the AAO on another motion to reopen. The motion is denied, the previous decisions of the AAO dated December 26, 2012 and May 28, 2013 will be affirmed, and the approval of the petition will remain revoked.

The petitioner describes itself as a liquor store. It seeks to permanently employ the beneficiary in the United States as an evening manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The director revoked the approval of the petition, finding that the beneficiary failed to demonstrate the requisite experience for the position offered. The director also stated that the petitioner failed to submit the original documents requested to establish the petitioner's ability to pay the proffered wage in response to his March 17, 2010 Notice of Intent to Revoke (NOIR). The director noted that the petitioner submitted only copies in response to the NOIR, and no explanation was provided to explain the absence of original documentation.¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. See 8 C.F.R. § 204.5(d).

In the director's September 13, 2010 revocation, the director determined that the petitioner failed to establish that the beneficiary possessed the requisite experience for the proffered position. The petitioner appealed the director's denial to the AAO. On December 26, 2012, the AAO dismissed the appeal under its authority for *de novo* review. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date, and failed to establish its ability to pay the beneficiary the proffered wage as of the priority date onwards and, therefore, the petition's approval was revoked for good and sufficient cause.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The AAO's prior decision found that the director's NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition

¹ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out the inconsistencies in the beneficiary's experience letter and lack of primary evidence of the petitioner's ability to pay the proffered wage for 2007 and 2008, that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

On January 28, 2013, the petitioner filed a motion to reopen. On May 28, 2013, the AAO dismissed the motion and affirmed its previous decision.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.²

On motion, counsel asserts that the beneficiary meets the minimum qualifications for the position, and the petitioner has the ability to pay the proffered wages, including years 2001 and 2003. In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion, and in response the AAO's Notice of Intent to Deny (NOID), was previously available and could have been discovered or presented in the previous proceeding. Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Even if the evidence submitted on motion, and in response to the AAO's NOID, is considered, the petitioner fails to establish: (1) that the beneficiary possesses the minimum requirements of the offered position set forth on the labor certification as of the priority date; (2) that it has the continuing ability to pay the proffered wage; and (3) that a *bona fide* job offer exists.

Beneficiary Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 (1st Cir. 1981).

² The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984) (emphasis in original).

On the Form ETA 750, Question #14, the petitioner has an asterisk in the education box indicating that the position offered requires a minimum of high school completion and two years of experience in the job offered as evening manager prior to the priority date.

On Form ETA 750B, the beneficiary claims to have completed [REDACTED] India from May 1963 to May 1973. The record contains a copy of the beneficiary's Secondary School Certificate, stating that he has passed the Secondary School Certificate Examination in March 1973. The beneficiary also claims to have worked at [REDACTED] in India from April 1987 to May 1995 as a general manager. No other experience is listed on the labor certification.

In its December 26, 2012 decision, the AAO determined that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. The AAO stated that the record contained an employment letter from [REDACTED]. The experience letter, dated June 30, 1995, from the company's President, states that the beneficiary worked for the company from April 1987 to May 1995. The AAO noted that the letterhead contains only the company name and general address with no phone number or logo, and the company name in the letterhead contains a spelling error. Given this, the AAO found that the letter lacked credibility and was insufficient to establish the beneficiary's claimed experience. 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).

On motion, counsel reasserts statements made on prior appeal that the employment letter was prepared by an individual who was not very familiar with the English language, resulting in a typographical error. Counsel reasserts that this is a harmless error and does not affect the merits of the case. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the AAO noted additional discrepancies with two other [REDACTED] letters submitted on appeal. Counsel submitted two letters from [REDACTED] both dated September 20, 2010 and signed by [REDACTED] Proprietor.³ One letter states that the company was established in 1961 and describes the company. The other letter states that the beneficiary worked for the company from April 1987 to June 1995. The experience letter also states an employment end date of June 1995; whereas, the initial experience letter states May 1995. In addition, the letterhead varies between the letters. No explanation for the difference in letterhead or the inconsistent dates has been provided.

³ A search of the Westlaw database reveals that a company named [REDACTED] exists with principal addresses in Texas and Georgia in the United States. [REDACTED] lists its executives as [REDACTED]

The inconsistent employment dates cast doubt on the overall credibility of the beneficiary's work experience.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. at 591. On motion, the petitioner has failed to address or overcome these inconsistencies. No additional evidence was submitted on motion in support of the beneficiary's claimed experience. Therefore, the petitioner has failed to establish that the beneficiary possessed the minimum qualifications for the position offered as of the priority date.

Further, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴

According to EDGE, the beneficiary's secondary school certificate "represents attainment of a level of education comparable to less than completion of senior high school in the United States. May be placed in Grade 11." On the labor certification, the petitioner requires a minimum of high school completion prior to the priority date. Therefore, the record does not reflect that the beneficiary possesses the requisite education for the position offered, and the AAO withdraws its statement from the May 28, 2013 decision indicating that the secondary school certificate is sufficient to demonstrate high school equivalency.

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

Given the above, the AAO affirms its prior decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Ability to Pay

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 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 \$29.44 per hour (\$61,235.20 per year based on forty hours per week).

In its December 26, 2012 decision, the AAO determined that the petitioner did not establish its ability to pay the proffered wage in the years 2001 and 2003. On motion, counsel asserts that the petitioner has the ability to pay the proffered wage in 2001 and 2003, and submits a copy of an updated accountant letter, a copy of a shareholder's affidavit, and resubmits copies of the shareholder's tax returns for 2001 and 2003.

The updated letter, dated January 15, 2013, from the petitioner's accountant states that the petitioner has always had "sufficient income and/or net current assets to pay the proffered wage." [*sic*]. The accountant reasserts statements made in a previously submitted letter from him that the petitioner's 2001 and 2003 income/net current assets were substantially reduced due to a temporary loss. The accountant states that the petitioner experienced a loss in 2001 due to Tropical Storm Allison and September 11, 2001, and again in 2003 due to road construction. As previously stated in the AAO's December 26, 2012 decision, the petitioner does not provide any new facts with supporting documentation which would overcome the grounds for denial. No evidence was submitted in support of the accountant's claims, including evidence of how the petitioner was directly impacted by either Tropical Storm Allison, the tragic events of September 11, 2001 or by the 2003 road construction. Further, no explanation is provided as to why this information was previously unavailable. 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)). Here, the updated accountant's letter is insufficient to establish the petitioner's claim.

On motion, the petitioner submits a copy of a shareholder's affidavit, stating that he will be personally liable for the beneficiary's proffered wage. The petitioner submits copies of the shareholder's tax returns for 2001 and 2003. The petitioner's reliance on the assets of the petitioner's shareholder is misplaced. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." On motion, the petitioner did not provide evidence or case law that would permit piercing of the corporate veil in this instance. Therefore, the petitioner has failed to demonstrate a basis by which the AAO could consider the shareholder's tax returns to be evidence of the petitioner's ability to pay.

Further, although the petitioner's shareholder states that he is willing to be liable for the beneficiary's proffered wage, the petitioner's IRS Forms 1120S for 2003 reflect that the petitioner paid shareholder compensation equal to the petitioner's net income received for that year. The record fails to contain a complete copy of the petitioner's 2001 Form 1120S, including Schedule K-1. As the AAO determined in its prior decision, the petitioner's net income in every year failed to establish its ability to pay the proffered wage of \$61,235.20; similarly, the amount of shareholder compensation fails to establish the petitioner's ability to pay the proffered wage in 2003. Although officer compensation could be considered,⁵ the petitioner's tax returns do not reflect that any officer compensation was paid in 2001 or 2003. Given the above, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage in 2001 and 2003.

In addition, USCIS records indicate that the petitioner has filed multiple petitions since the petitioner's establishment in 1999, including I-129 petitions, and I-140 petitions. 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. From the record, whether the petitioner can pay all of its sponsored workers in all of the applicable years, as well as the priority dates and wages of those

⁵ The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

workers, is unclear. Here, the petitioner has failed to demonstrate that it has the ability to pay the proffered wages of the instant beneficiary in 2001 and 2003, as well as to each of the beneficiaries of its pending petitions from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.⁶

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 the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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). As discussed in its December 26, 2012 decision, assessing the totality of the circumstances in this individual case, the AAO concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. In 2001 and 2003 the petitioner's tax returns reflect that it paid total salaries and wages of only \$12,000 and \$30,200, respectively. The petitioner's tax returns do not reflect any officer compensation paid in these years. To pay the beneficiary, the petitioner would have had to more than double its salaries paid in 2003, and pay more than five times of all salaries in 2001. The petitioner failed to provide any regulatory-prescribed evidence of its ability to pay the proffered wage in 2009. The petitioner has failed to demonstrate its ability to pay the proffered wages of the instant beneficiary and all other sponsored beneficiaries from the priority date onwards. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. On motion, the petitioner has not submitted any evidence, reflecting the company's reputation. Nor has it included any evidence or detailed explanation of the corporations' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments. Thus, assessing the totality of the circumstances in this individual case, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Bona Fide Job Offer

Beyond the AAO's previous decision, it is not clear that the petition continues to represent a *bona fide* job offer.⁷ Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. On August 30, 2013, the AAO issued a Notice of Intent to Dismiss and Derogatory Information (NOID) to the petitioner and counsel of record. The AAO stated that, according to the

⁶ In any further filings the petitioner would need to address the priority dates, respective proffered wages and prevailing wages, and any wages paid to its other sponsored workers.

⁷ 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 (9th 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).

Texas Alcoholic Beverage Commission, the petitioner did not possess a valid liquor license in [REDACTED] Texas, the worksite listed on the labor certification, or at the petitioner's current address in [REDACTED] Texas. As the petitioner's current address is not the same address listed on the labor certification, it is unclear that the job opportunity is the same as the position offered on the labor certification. See 20 C.F.R. § 656.30(c)(2). The AAO also stated the worksite address listed on the labor certification and the instant Form I-140 appears to be a residential location in [REDACTED] Texas, which is an unknown number of miles from the petitioner's current address in Newton. Further, the AAO indicated that the record of proceeding fails to contain any evidence that the petitioner ever amended its name and operated as "d/b/a [REDACTED]" The AAO provided the petitioner with 30 days to respond and rebut any derogatory information pursuant to 8 C.F.R. § 103.2(b)(16)(i).

In response to the AAO's NOID, the counsel asserts that [REDACTED] based in [REDACTED] Texas, owns and operates multiple liquor and wine retail locations. Counsel also asserts that "[REDACTED] Texas) closed on October 2008." Counsel states that the beneficiary's employment was moved to [REDACTED] (formerly known as [REDACTED] located at [REDACTED] Texas, which is also part of [REDACTED] Counsel submits copies of the following documents:

- Texas Cigarette and/or Cigars and Tobacco Products Taxes Permits for [REDACTED] Texas, from June 1, 2006 through June 1, 2008;
- Texas Alcoholic Beverage Commission permit for [REDACTED] Texas, from April 9, 2007 through April 9, 2008;
- Texas Sales and Use Tax Permit for [REDACTED] Texas, issued on February 1, 2003;
- Numerous invoices under the name [REDACTED] dated in 2008 and 2009;
- [REDACTED] lease agreement for [REDACTED] Texas, dated on February 1, 2003 and ending on January 31, 2013;
- [REDACTED] Sales and Use Tax Return Summary for the periods ending September 30, 2009 through December 31, 2009;
- [REDACTED] confirmation of tax payments, dated from June 2008 through May 2009;
- [REDACTED] Form 1120S tax return for 2012; and
- Metropolitan and Micropolitan Statistical Areas in Texas with Component Counties.

The documentation submitted establishes that the petitioner and [REDACTED] have the same taxpayer identification number and, thus, would appear to be the same entity. However, the record fails to contain evidence in support of the petitioner's claim that [REDACTED] was formerly known as [REDACTED] and continues to operate under the same tax identification number as the

⁸ There does not appear to be a [REDACTED] Texas. However, there does appear to be a [REDACTED] Texas. The petitioner was asked to submit independent, objective evidence of the petitioner's worksite address in its response.

identified petitioner, or that it would be the valid successor-in-interest to the petitioner on the labor certification, to continue processing based on the same labor certification.⁹ 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).

Further, the evidence submitted fails to establish that the petitioner's current location is in the same area as the worksite address listed on the labor certification. Counsel asserts that [REDACTED] and [REDACTED] are in the same metropolitan statistical area and submits a copy of the Metropolitan and Micropolitan Statistical Areas in Texas with Component Counties. While the document lists a [REDACTED] under the [REDACTED] TX, Metropolitan Statistical Area, it fails to list a [REDACTED]. Counsel does not indicate which county [REDACTED] is a part of, or otherwise provide any information by which the AAO could conclude that [REDACTED] and [REDACTED] are similar worksites. Therefore, the document provides minimal probative value in support of the petitioner's claim. The petitioner's response does not indicate whether the worksite address listed on the labor certification and the Form I-140 was the actual worksite address. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the petitioner failed to submit evidence that the beneficiary's current position in [REDACTED] is the same as the position offered on the labor certification. The petitioner's response indicates that the [REDACTED] store location ceased operation in October 2008, prior to the director's initial decision. The petitioner indicates that its other store locations existed prior to the closure of its [REDACTED] store. Further, counsel suggests that the petitioner was employing the beneficiary at the time his "employment was moved to [REDACTED] (formerly known as [REDACTED] located at [REDACTED] Texas]." However, the record of proceeding contains no

⁹ USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act. Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482.

evidence of the beneficiary's employment at either location. The petitioner's response has not overcome the doubt cast on whether a *bona fide* job opportunity continued to exist after the closure of the purported worksite in [REDACTED] Texas. The petitioner has not provided evidence of opening, or expanding, its existing stores, or of the existent need for this position. The closure of the worksite suggests that prior to the director's decision, the position offered on the labor certification changed or ceased to exist. A labor certification is valid only for the position offered as described on the labor certification. 20 C.F.R. § 656.30(c)(2). The petitioner has failed to provide independent, objective evidence that the position offered continued to exist after the closure of the worksite. 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)). The petitioner has failed to overcome the derogatory information in the AAO's NOID. Therefore, the petitioner has failed to establish that the instant petition is based on a continuing *bona fide* job opportunity that was available to U.S. workers. Accordingly, the petition must also be denied for this reason.

In summary, the AAO finds that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date, or that the petitioner has the continuing ability to pay the proffered wage, or that a continuing *bona fide* job offer exists.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the motion is denied, the AAO's December 26, 2012 and May 28, 2013 decisions will be affirmed, and the approval of the petition will remain revoked.

ORDER: The motion is denied. The previous decisions of the AAO, dated December 26, 2012 and May 28, 2013, are affirmed. The petition's approval remains revoked.