



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: SEP 11 2013

OFFICE: NEBRASKA SERVICE CENTER

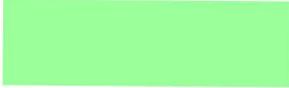
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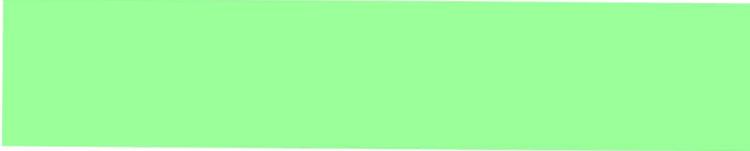
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center, on January 19, 2006. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke (NOIR) the approval of the petition on March 10, 2010. In a Notice of Revocation (NOR) issued on July 9, 2010, the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The petitioner appealed the revocation to the Administrative Appeals Office (AAO) on August 30, 2010. The AAO dismissed the appeal, and affirmed the director's revocation of the previously approved petition and invalidation of the alien employment certification on February 1, 2013. The AAO also determined the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Immigration and Nationality Act (Act) and the implementing regulations. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as an IS/IT professional consulting service. It seeks to employ the beneficiary permanently in the United States as a human resource manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).¹

The director's July 9, 2010 decision revoking the approval of the petition concludes that a *bona fide* job opportunity did not exist and that the petitioner willfully misrepresented material facts, thereby invalidating the labor certification.

In its February 1, 2013 decision, the AAO affirmed the director's finding of material misrepresentation and the invalidation of the underlying labor certification. Specifically, the AAO found that the petitioner misrepresented material facts when the petitioner had not disclosed that it was wholly owned by the beneficiary and its representative signed the Form ETA 750A on October 29, 2003, declaring that a *bona fide* job offer existed. Accordingly, the AAO affirmed the director's decision denying the petition because it was not supported by a valid labor certification. Beyond the decision of the director, the AAO determined that the petitioner failed to establish that the beneficiary possessed the minimum education and experience required to perform the position offered by the priority date, and that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO also determined that the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) did not render the instant visa petition valid.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The record shows that the motions are properly filed 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.

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.²

Bona Fide Job Opportunity

An issue in this case is whether the petitioner has established that a *bona fide* job opportunity exists, and whether the petitioner willfully misrepresented material facts. The director found that as the beneficiary of the instant petition is also the sole owner of the petitioner, a *bona fide* job offer open to all qualified U.S. citizens did not exist. In its February 1, 2013 decision, the AAO found that the beneficiary was the sole owner of the petitioning entity at the time the labor certification was filed. The record of proceedings contains no evidence indicating that the petitioner disclosed the beneficiary's ownership of the petitioner to the DOL. The AAO found the petitioner misrepresented material facts when its representative signed the Form ETA 750A on October 29, 2003, declaring that a *bona fide* job offer existed. The AAO affirmed the director's finding of material misrepresentation and invalidation of the underlying labor certification.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may 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*, 00-INA-93 (BALCA May 15, 2000).

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the 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 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

² The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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 motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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*). Where the petitioner is owned by the person applying for a position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

On motion, counsel asserts that the petitioner has demonstrated that the job opportunity is a *bona fide* job opportunity. Counsel asserts that the petitioner was required to pre-recruit for the position and file the application with the proof of the recruiting effort and the results of the recruiting effort. However, counsel does not provide documentation in support of his assertion. 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)). 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 Obaighena*, 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). Counsel contends that the certifying officer had the opportunity to require additional documents regarding the petitioner's ownership and did not; therefore, counsel contends that the subsequent certification makes the job offer a *bona fide* job opportunity, despite the petitioner's failure to disclose the beneficiary's ownership interest and attesting to the DOL that it was a *bona fide* job offer open to all U.S. workers. The AAO is not persuaded. The certifications made by DOL are limited in that the DOL only certifies the job offer portion of the labor certification to ensure that no United States workers were qualified for the position. Whether the job offer is "open" is an attestation made by the petitioner. As such, the petitioner's attestation that it was a *bona fide* job offer, coupled with the petitioner's failure to disclose the beneficiary's ownership, prevented the DOL from properly analyzing whether a *bona fide* job opportunity existed.

The DOL's certification of the Form ETA 750 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the job opportunity is a *bona fide* job offer. In the instant case, the petitioner's affirmative attestation that there is a *bona fide* job offer, and its failure to disclose the beneficiary's ownership in the petitioning entity to the DOL, prevents the AAO from finding a *bona fide* job opportunity exists.

On motion, counsel also asserts that the beneficiary "is merely an investor and an HR manager," and the petitioner has complied with the multipart test articulated in *Modular Container Systems, Inc.* See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*) ("where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the

question arises whether the employer has a bona fide job opportunity.”). In determining whether the job is subject to the alien’s influence and control, the adjudicator will look to the totality of the circumstances. *Id.*

As stated in the AAO’s prior decision, the beneficiary is the sole owner of the petitioning entity and was the sole owner of the petitioning entity at the time of the filing of the labor certification. As indicated on the Form I-140, the petitioner only employs nine individuals. On motion, counsel states that the beneficiary is a founder of the company and a “director,” which contradict the petitioner’s claim that the beneficiary has limited management involvement, and is merely an investor and HR manager. Further, the record contains several of the petitioner’s lease agreements which are signed by the beneficiary on behalf of the petitioner, suggesting that the beneficiary’s duties are greater than that of a HR manager. The record contains lease agreements signed by the beneficiary on behalf of the petitioner, dated on May 15, 2005, May 24, 2007, and May 5, 2009. The 2005 and 2009 lease agreements reflect the beneficiary’s title as vice-president of the petitioner. The record also contains the petitioner’s Department of Treasury Short Form Standing for the State of New Jersey, dated August 26, 2009, indicating that the beneficiary is the registered agent for the petitioner.

Moreover, the record contains a [REDACTED] dated December 4, 2000, stating that the beneficiary is “authorized to oversee all the legal operations of the corporation in the United States, make withdrawals from the Corporation’s bank accounts, execute corporate checks and carry out all such transactions on behalf of the Corporation.” The record contains another [REDACTED], dated June 15, 2002, stating that the beneficiary was COO of the company and he would have “complete ownership of the [REDACTED] after June 15, 2002.”

The above evidence in the record is inconsistent with the petitioner’s claim that the beneficiary is merely an investor in and the human resource manager of the petitioner. 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). 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. *Id.* Here, the evidence in the record significantly detracts from the credibility of the petitioner’s claim, and demonstrates that the beneficiary is not an investor and human resource manager, but rather an owner who has control over the petitioner’s day to day operations.

Based on the above evidence, the beneficiary does appear to have a greater influence over more than the duties articulated in the position offered, and therefore the job opportunity does not appear to be a *bona fide* job opportunity that was open to any qualified United States worker. The omission of the beneficiary’s ownership interest in the petitioner cuts off a material line of inquiry and is a willful misrepresentation that adversely impacted the DOL’s adjudication of the labor certification. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C); *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.”) (discussed further below).

Further, the Board of Alien Labor Certification Appeals (BALCA) differentiated between a *per se* bar to labor certification, such as self-employment pursuant to then 20 C.F.R. § 656.50 (now codified at 20 C.F.R. § 656.3, definition of “employment”), and the in fact determination that a certifying officer must make as to whether a *bona fide* job opportunity exists. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*) (“where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer’s business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.”). BALCA held that a close personal relationship between the petitioner and beneficiary would raise the question of whether a *bona fide* job opportunity exists. *Id.*

In the instant case, the beneficiary’s ownership and control of the petitioner during the labor certification process casts substantial doubt on the *bona fides* of the job offer. As stated above, the regulations in place at the time of the labor certification filing prohibited self-employment. 20 C.F.R. § 656.50 (2003). The AAO concludes that the beneficiary’s 100% ownership, which was undisclosed to the DOL or USCIS, appears to be self-employment, and therefore, not a *bona fide* job offer, and was prohibited *per se*.

Moreover, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

Here, the validity of the labor certification requires a specific position as HR Manager. As 100% owner of the petitioning entity, it is unclear that the petitioner would have the intent to employ the beneficiary as an HR manager only or that the beneficiary will remain in the position offered. However, even if the petition was approved, the underlying labor certification is not valid and cannot be reinstated because of the *per se* bar on self-employment.

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. Here, the petitioner has not met that burden.

Misrepresentation

A material issue in this case is whether the petitioning entity disclosed the relationship between the petitioning entity and the beneficiary. Failure to notify the DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *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.”) In its February 1, 2013 decision, the AAO affirmed the director’s finding of material misrepresentation and the invalidation of the underlying labor certification. Specifically, the AAO found that the petitioner misrepresented material facts when the petitioner had not disclosed that it was wholly owned by the beneficiary and when its representative signed the Form ETA 750A on October 29, 2003, declaring that a *bona fide* job offer existed, as the job opportunity “has been and clearly is open to any qualified U.S. worker.” The omission of the beneficiary’s status as 100% owner of the petitioning entity is a willful misrepresentation that adversely impacted the DOL’s adjudication of the labor certification. On motion, counsel does not explain or provide a reason for the omission of the beneficiary’s ownership in the petitioning entity to the DOL.

The failure to disclose the beneficiary’s ownership of the petitioning entity would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See Section 212(a)(6)(C) of the Act, 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.”

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.

By failing to identify any potential close or financial relationship, the beneficiary would seek to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue.

The record reflects that the petitioner filed the underlying labor certification on November 13, 2003 on behalf of the beneficiary. At that time, the beneficiary held 100% of the stock and was sole owner of the petitioner. The Form ETA 750 was certified by the DOL on November 9, 2005. On December 16, 2005, the petitioner filed the instant petition. The beneficiary’s ownership of the company was not disclosed to the DOL when the Form ETA 750 was filed or to USCIS when the Form I-140 was filed. As previously mentioned, the record contains two Resolutions of the Board of Directors of the petitioning entity, dated in 2000 and 2002, giving the beneficiary substantial management control and complete ownership over the petitioning entity. The record also contains the petitioner’s 2004 Form 1120 tax return, indicating that the beneficiary owned 100% of the

corporation's voting stock. The beneficiary's position in the petitioning entity was misrepresented in the labor certification as an HR manager when, in fact, the beneficiary held substantial oversight of the company. The AAO finds that the petitioner misrepresented material facts in order to procure an immigration benefit.

Therefore, the AAO's previous decision, which affirms the director's finding of material misrepresentation and affirms the invalidation of the underlying labor certification, will remain undisturbed. Therefore, the instant petition must also be denied because it is not supported by a valid labor certification.

Beneficiary's Qualifications

Even if the job offer had been *bona fide*, the petition could not be approved. In its prior decision, the AAO also determined that the petitioner failed to establish that the beneficiary possessed the minimum education and experience required to perform the position offered by the priority date. On motion, the petitioner resubmits copies of the following evidence: an evaluation of the beneficiary's credentials; the beneficiary's diploma, certificates and school records; two experience letters; and the petitioner's tax returns for 2006.

On motion, the petitioner also submits copies of three experience letters not previously submitted. In the instant case, the labor certification states that the offered position requires two years in the job offered or in the related occupation of "HR Management/administration." On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a vice president with [REDACTED] in New Jersey from July 1999 to January 2002 and as vice president with [REDACTED] in New Jersey from August 1997 to June 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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).

In support of the instant petition, the petitioner submitted two experience letters with its Form I-140 petition. The petitioner submitted a copy of an experience letter from the executive director on [REDACTED] letterhead, dated March 18, 1997, stating that the beneficiary was employed as a human resource manager from January 6, 1996 to March 18, 1997. The letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. The AAO also notes that this experience was not listed on the beneficiary's Form ETA 750B. 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. Therefore, the letter is insufficient to document the beneficiary's claimed experience.

The petitioner also submitted a copy of an experience letter from the claimed president of [REDACTED], dated December 9, 1998, stating that the beneficiary has been employed as a personnel manager for the last ten years. As the letter does not list any duties performed by the beneficiary, the letter does not meet the regulatory requirements. 8 C.F.R. § 204.5(l)(3)(ii)(A). Further, no specific dates of employment were provided. Also, the name of the company on the letterhead was cut off the photocopy of this letter. Given this, the letter is insufficient to document the beneficiary's claimed experience.

On motion, counsel submits a copy of the same experience letter with a portion of the company name visible on the letterhead. From the portion of the company name that is visible, the letter does not appear to be on [REDACTED] letterhead. This inconsistency casts doubt on the credibility of the beneficiary's claimed experience. Further, the experience letter conflicts with the beneficiary's Form ETA 750B where he states he was employed with [REDACTED] from August 1997 to June 1999. 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). Given the above, the letter is insufficient to document the beneficiary's claimed experience.

On motion, the petitioner also submits copies of three additional experience letters not previously submitted. The petitioner submits a copy of an experience letter from the COO & Head-HR on [REDACTED] letterhead, dated February 8, 2013, stating that the beneficiary was employed as the "Personnel Administration Manager" from January 19, 1988 to January 5, 1996. As the letter does not list any duties performed by the beneficiary, the letter does not meet the regulatory requirements. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. The AAO notes that this letter is recently dated, however, states that the beneficiary's resignation "has been accepted and he is being relieved." The AAO also notes that this conflicts with the length of employment stated in the previous letter purportedly from [REDACTED], which indicated ten years of employment. This inconsistency casts doubt on the credibility of 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). Further, the experience was not listed on the beneficiary's Form ETA 750B. 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. Therefore, the letter is insufficient to document the beneficiary's claimed experience.

The record contains a copy of an experience letter from the president of [REDACTED], dated January 31, 2002, stating that the beneficiary worked as "Vice-President Operation" from July 1999 to January

2002. As the letter does not list specific duties performed by the beneficiary, the letter does not meet the regulatory requirements and cannot be considered to demonstrate the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO notes that the letter states the beneficiary "played a vital role in building the organization from funding, business, Technical & management resources area. He was mainly Involved into business development worldwide, technical resources for the Company." [sic] This description is vague, and suggests that the beneficiary may have been employed in a position other than the position offered, "HR Manager," or the alternate occupation, "HR Management/administration." The job duties provided on the labor certification for the position offered focus on personnel matters, and not the building, funding, or technical and management resources noted in this letter. These duties are not consistent with the duties the beneficiary indicated he performed at [REDACTED] on the labor certification, which the AAO notes appear to be a nearly verbatim listing of the duties of the position offered. Further, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. The letter is insufficient to document the beneficiary's claimed experience.

The record contains a copy of an experience letter the [REDACTED] dated February 1, 1999, stating that the beneficiary worked as "Vice President - Operations" from March 3, 1997 to January 29, 1999. The letter states that "at the time of leaving" the beneficiary was "Vice President - Operations," suggesting that the beneficiary was not hired as a Vice President. It is unclear what the beneficiary's previous job(s) were and when he became Vice President. Therefore, it is unclear what amount of experience was gained in the position as claimed on the labor certification. 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 letter is insufficient to document the beneficiary's claimed experience.

Further, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. Further, the letter is inconsistent with the beneficiary's dates of employment at [REDACTED] listed on beneficiary's Form ETA 750B. On the labor certification, the beneficiary stated that he was employed by [REDACTED] located in Piscataway, NJ, from August 1997 to June 1999. The experience letter is from Network Programs with an address in India and the dates of employment overlap. The record contains no explanation regarding the discrepancy in the dates of employment or in the country of employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Accordingly, the letter is insufficient to document the beneficiary's claimed experience.

Given the above, the submitted experience letters are insufficient to demonstrate that the beneficiary possesses the minimum experience for the position offered, as they conflict with the labor

certification and with previously submitted letters. These issues cast doubt on the beneficiary's purported experience. The record contains no competent, objective evidence to establish whether the beneficiary possessed any of the claimed experience. In any future filings, 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).

Therefore, the petitioner has failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

Further, the petitioner fails to reconcile the discrepancies noted by the AAO's February 1, 2013 decision which indicated that the beneficiary did not possess the minimum educational requirements as stated in the labor certification. The AAO stated that, according to the Electronic Database for Global Education (EDGE), the beneficiary's three-year Bachelor of Arts degree from India is comparable to "three years of university study in the United States," and not a bachelor's degree as required in the labor certification. Moreover, AAO also found that the record failed to contain any evidence that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE), or that a two or three-year bachelor's degree was required for admission into the program of study. Finally, the AAO found no evidence in the record to substantiate the beneficiary's claimed Bachelor of Law degree from [REDACTED]

On motion, counsel asserts that EDGE's analysis on Indian education may not be relied upon. Counsel contends that the use of EDGE is inappropriate as it uses a generic statement of Indian degrees and post-graduate diplomas and not a specific evaluation of the beneficiary's credentials. Counsel asserts various arguments as to why EDGE's analysis on Indian education may not be relied upon; however, counsel fails to provide case law or evidence in support of his assertions. 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).

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, 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." <http://www.aacrao.org/About-AACRAO.aspx> (accessed July 17, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed July 17, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National

Council on the Evaluation of Foreign Educational Credentials.³ If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

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.* 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.

As stated in the AAO's prior decision, the record fails to contain any evidence that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE), or that a two or three-year bachelor's degree was required for admission into the program of study. On motion, the petitioner has not addressed this issue or provided any evidence responsive to the AAO's finding; therefore, the petitioner has failed to overcome the AAO's prior decision.

Further, in its prior decision, the AAO stated that the evidence in the record fails to substantiate the beneficiary's claimed Bachelor of Law degree from [REDACTED]. On motion, the petitioner submits the beneficiary's provisional certificate from [REDACTED] indicating that the beneficiary passed the "LL.B. (Prof.);" examination; however, the document is only a provisional certificate, not a diploma. Also, no transcripts were submitted. Even if transcripts had been provided, as noted in the previous AAO decision, a law degree is not the appropriate field of study as required on the labor certification. Therefore, the petitioner has failed to overcome this ground for denial.

On motion, the petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Furthermore, the evidence in the record does not establish that the beneficiary possessed the required education or experience set forth on the labor certification by the priority date.

³ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

Therefore, the AAO affirms its prior decision, dated February 1, 2013, finding that the petitioner failed to establish that the beneficiary met the minimum requirements of the position offered as set forth on the labor certification as of the priority date.

Ability to Pay

In its February 1, 2013 decision, the AAO also found that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Specifically, the AAO determined that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage in 2003, 2004, 2005 and 2007.

On motion, the petitioner submits the beneficiary’s Forms W-2 for 2005, 2007, and 2008 issued by the petitioner. On the Form ETA 750B, signed by the beneficiary on October 29, 2003, the beneficiary claimed to have worked for the petitioner since February 2002. The petitioner also submits copies of its Form 1120 tax returns for 2009, 2010, and 2011.

The proffered wage as stated on the Form ETA 750 is \$71,000 per year. In its prior decision, the AAO determined that the petitioner failed to pay the beneficiary sufficient wages to meet the full proffered wage in 2003 to 2008. The evidence in the record and submitted on motion contains IRS Forms W-2 showing the following wages paid to the beneficiary:

<u>Year</u>	<u>Wages Paid</u>	<u>Difference between the proffered wage and wages paid</u>
2003	\$8,250	\$62,750
2004	\$52,500	\$18,500
2005	\$37,500	\$33,500
2006	\$54,000	\$17,000
2007	\$38,212	\$32,788
2008	\$60,636	\$10,364
2009	No Form W-2 submitted	\$71,000
2010	No Form W-2 submitted	\$71,000
2011	No Form W-2 submitted	\$71,000

Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage for any year in question.

The petitioner’s Form 1120 tax returns demonstrate its net income⁴ for 2003 through 2011, as shown in the table below.

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<u>Year</u>	<u>Net Income</u>	<u>Difference between the proffered wage and wages paid</u>
2003	\$10,292	\$62,750
2004	\$10,555	\$18,500
2005 ⁵	\$25,028	\$33,500
2006	\$23,090	\$17,000
2007	\$30,635	\$32,788
2008	\$4,044	\$10,364
2009	\$6,366	\$71,000
2010	\$15,382	\$71,000
2011	\$20,772	\$71,000

Therefore, for the years 2003 through 2005 and 2007 through 2011, the petitioner did not have sufficient net income to pay the difference between the wages paid, if any, and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 2003 through 2011, as shown in the table below.

<u>Year</u>	<u>Net Current Assets</u>	<u>Difference between the proffered wage and wages paid</u>
2003	\$(64,307)	\$62,750
2004	\$(50,668)	\$18,500
2005	\$(31,006)	\$33,500
2007	\$(9,695)	\$32,788
2008	\$85,038	\$10,364
2009	\$(64,068)	\$71,000
2010	\$7,186	\$71,000
2011	\$(36,480)	\$71,000

Therefore, for the years 2003 through 2005, 2007, and 2009 through 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

⁵ The record contains an incomplete copy of the petitioner's Form 1120 tax returns for 2005.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 the AAO's February 1, 2013 decision, the AAO stated that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage in years 2003, 2004, 2005, and 2007. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). On motion, the petitioner has not overcome these findings.

Further, as noted in the AAO's prior decision, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, or net current assets. The AAO acknowledges that the petitioner has conducted business since 2003; however, according to its tax returns, the petitioner's gross receipts and wages and salaries paid have fluctuated. The petitioner appears to pay some officer compensation; however, the record does not indicate that the officers would be willing or able to forgo this compensation in order to pay the beneficiary the proffered wage. Further, there are no other factors present in the record such as reputation, uncharacteristic expenditures or losses, or replacement of employees, which would indicate that the financial condition of the petitioner should be given less weight. Therefore, considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the offered wage since the priority date.

Therefore, from the date the ETA Form 9089 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.

Accordingly, the AAO concludes that the evidence in the record and submitted on motion does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date onwards. In any future filings, the petitioner must provide evidence of its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

Conclusion

Therefore, the AAO affirms its prior decision, finding that the petitioner misrepresented material facts, that a *bona fide* job offer did not exist, that the beneficiary's self-employment is prohibited *per se*, and the invalidation of the labor certification is proper. Beyond the decision of the director, the AAO also determines that the petitioner failed to establish that the beneficiary possessed the minimum education and experience required to perform the position offered by the priority date, and that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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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 motions will be granted, and the previous decision of the AAO will not be disturbed.

ORDER: The motions are granted. The AAO's prior decision, dated February 1, 2013, remains undisturbed. The petition remains denied.