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U.S. Citizenship
and Immigration
Services

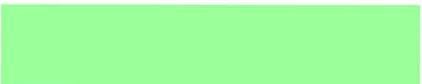


DATE: **AUG 05 2014**

OFFICE: TEXAS SERVICE CENTER

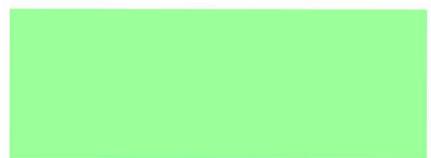
FILE: 

IN RE: Petitioner:
Beneficiary:



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

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 Director, Texas Service Center (the director), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a real estate development firm. It seeks to employ the beneficiary permanently in the United States as an executive secretary. As required by statute, the petition is accompanied by 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 seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ The director determined that the petitioner failed to demonstrate that there was a *bona fide* job offer, as the beneficiary's father is the President of the petitioning business. The director also determined that the petitioner had failed to establish its ability to pay the proffered wages. 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel for the petitioner submits only the Form I-290B, Notice of Appeal or Motion; counsel did not submit a separate brief or additional evidence.

Bona Fide Job Offer

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, 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). 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).

¹ The petitioner originally checked box "e" on the Form I-140, requesting classification as a professional pursuant to Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). On August 27, 2012, the director sent a request for evidence (RFE) noting that the record did not support the requested classification. The petitioner responded requesting that the classification be changed. The director noted in his decision that this request was accepted, the change was made and it was not a basis for denial.

² 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).

On appeal, counsel does not specifically address whether there was a *bona fide* job offer due to the relationship between the petitioning business and the beneficiary. Counsel states that an underlying issue with the instant case is that the petitioner was previously represented by Mr. [REDACTED] a now disbarred attorney, who failed to keep any records regarding the labor certification and Form I-140 immigrant petition. Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). While Mr. [REDACTED] is indeed disbarred, the petitioner has failed to meet the requirements of *Matter of Lozada* regarding the instant case because the petitioner does not set forth the details of the agreement, provided no evidence that it informed prior counsel, and gives no indication of whether a grievance was filed.

Even if counsel were able to meet the requirements of *Matter of Lozada*, counsel's contention that she cannot adequately respond to the inquiry regarding the disclosure of the familial relationship to the DOL and request for evidence that a *bona fide* job offer exists is unpersuasive. The petitioning business, not counsel, is required to conduct the recruitment for the labor certification. 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). Counsel provides no explanation on appeal as to why these records were not kept by the petitioner. Counsel asserts USCIS or DOL should have these records, stating that, "presumably, this information would have been submitted at the time of filing of the ETA 750 or the original I-140." Counsel does not explain why the petitioner does not have records of the recruitment that it purportedly conducted; only that petitioner's prior counsel did not "give a copy of the records to Petitioner." The unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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).

The petitioner failed to submit any evidence on appeal to support its claim that a *bona fide* job offer exists. 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 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). 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, 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).

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).

There is additional evidence regarding a lack of a *bona fide* job offer in the instant case. Corporate records for the petitioner, [REDACTED] reflect that [REDACTED] the beneficiary’s father, is the president of the petitioning company. Corporate records also indicate that [REDACTED] and the beneficiary are the only other officers for the petitioning business and that the beneficiary’s mother, [REDACTED] was also a former officer of the company.⁴ Therefore, the record of proceeding establishes that the beneficiary is related to the petitioner’s president and only other officer, in addition to being an officer. These relationships indicate that the job opportunity was not open to any U.S. workers. See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

The tax returns reflect that the petitioning business has not paid any salaries or wages to any employees since the priority date. Further, the tax returns reflect payment to contractors/outside services in the amounts of \$25,635 in 2004; \$26,455.00 in 2005; \$29,475.00 in 2006; \$23,775.00 in 2007; \$24,550.00 in 2008; \$23,415.00 in 2009; \$24,760.00 in 2010; and \$24,250.00. As discussed below in further detail, the petitioner claims to have paid the beneficiary as a contractor the amount of \$23,015.00 in 2004; \$23,140.00 in 2005; \$23,450.00 in 2006; \$23,775.00 in 2007; \$23,940.00 in 2008; \$24,125.00 in 2009; \$23,750.00 in 2010; and \$24,175.00 in 2011. As such, in all relevant years, the petitioning business did not expend sufficient amounts to other contractors to indicate that the petitioning business employs anyone other than the beneficiary. It appears that the petitioning business may exist solely to sponsor the beneficiary, indicating a *bona fide* job opportunity does not exist. *Hall v.*

³ Florida Department of State Division of Corporations records reflect that [REDACTED] was reincorporated as [REDACTED] which has the same Federal Employer Identification Number (FEIN) as the original company. See <http://search.sunbiz.org/Inquiry/> [REDACTED]

⁴ The instant Form I-140 lists “[REDACTED]” as the Executive Secretary of the petitioner. A previously filed Form I-140 is purportedly signed by [REDACTED] and letters accompanying that petition lists Mr. [REDACTED] title as Accountant and Tax Accountant. Neither Mr. [REDACTED] nor Mr. [REDACTED] is listed as an officer of the petitioner in the Florida Department of State Division of Corporations records. It is unclear whether Mr. [REDACTED] (or Mr. [REDACTED] is an actual employee of the petitioner authorized to sign any petition. In any future filings, the petitioner must establish that Mr. [REDACTED] or Mr. [REDACTED] is its Executive Secretary as claimed on the Form I-140.

McLaughlin, 864 F. 2d 868, 875 (D.C. Cir. 1989) (business cannot be established for sole purpose of sponsoring beneficiary).

We further note that the petitioner claims to be in the business of real estate development. The petitioner's tax returns list its business activity as "real estate rents" or "rentals." However, none of the petitioner's tax returns in the record include any entry for deductions based on depreciation.⁵ It is unclear why the petitioner does not list its expenses for maintaining its rental property as a deduction on its tax returns, as would be expected for a real estate rental/development business. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In *Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991) (*en banc*), the Board of Alien Labor Certification Appeals (BALCA) listed certain criteria for a certifying officer to consider when determining whether a *bona fide* job offer exists. Those include whether the beneficiary: is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; is related to the corporate directors, officers, or employees; is an incorporator or founder of the company; has an ownership interest in the company; is involved in the management of the company; is on the board of directors; is one of a small number of employees; has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. *Id.* at 8. We find that there was no *bona fide* job offer because the beneficiary is one of a small number of employees and she is so inseparable from the sponsoring employer as a result of her and her family's pervasive presence and personal attributes. Employment of a U.S. worker in her position was therefore, never viable. Further, evidence indicates that the petitioner exists solely to sponsor the beneficiary, indicating that the petitioner is not pursuing the labor certification in good faith. Therefore, we affirm the director's decision that there was no *bona fide* job offer. *Modular Container Systems, Inc.* (quoting *Hall v. McLaughlin*, 864 F. 2d 868, 875 (D.C. Cir. 1989)).

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

⁵ The Internal Revenue Service defines depreciation as "an income tax deduction that allows a taxpayer to recover the cost or other basis of certain property. It is an annual allowance for the wear and tear, deterioration, or obsolescence of the property. Most types of tangible property (except, land), such as buildings, machinery, vehicles, furniture, and equipment are depreciable. Likewise, certain intangible property, such as patents, copyrights, and computer software is depreciable." See <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/A-Brief-Overview-of-Depreciation> (accessed June 2, 2014).

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 28, 2004. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour (\$23,660.00 per year based on a 35-hour work week).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ "1+ contractors." According to the tax returns in the record, the petitioner's fiscal year is from September 1 to August 31. On the Form ETA 750B, signed by the beneficiary on April 15, 2004, the beneficiary did not claim to have worked for the petitioner.

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, U.S. Citizenship & Immigration Services (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 claimed that it employed the beneficiary as a contractor from 2004 through at least 2011. The petitioner submitted Internal Revenue Service (IRS) Forms 1099, Miscellaneous Income, for the beneficiary indicating that it paid the beneficiary "nonemployee compensation" in the amount of \$23,015.00 in 2004; \$23,140.00 in 2005; \$23,450.00 in 2006; \$23,775.00 in 2007; \$23,940.00 in 2008; \$24,125.00 in 2009; \$23,750.00 in 2010; and \$24,175.00 in 2011. However, the petitioner's 2009 IRS Form 1120, U.S. Corporation

Income Tax Return, indicates that the company only paid \$23,415.00 to contractors/outside services, which directly contradicts the Form 1099 submitted as proof of payment of wages to the beneficiary. 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). This inconsistency calls into question whether any of the Forms 1099 issued to the beneficiary are legitimate. On appeal, counsel contends that the petitioner has shown that it paid the beneficiary at least the proffered wage in all relevant years. The petitioner fails to provide any independent objective evidence to explain the inconsistencies between the tax returns and the Form 1099.⁶ Additionally, the Social Security Number (SSN) to which the wages were paid is linked to multiple individuals and, therefore, it is unclear whether the wages were actually paid to the beneficiary. As such, the AAO cannot accept the Forms 1099 as evidence of payment of the proffered wage to the beneficiary.⁷

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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

⁶ In any future filings, the petitioner should submit independent, objective evidence to overcome these inconsistencies, such as certified copies of the Forms 1099 and the petitioner's tax returns.

⁷ In any future filings, the petitioner should submit evidence that the SSN was issued to the beneficiary by the Social Security Administration (SSA). Neither the Form I-140 filed on the beneficiary's behalf, or the Form I-485, Application to Register Permanent Residence or Adjust Status, list that the beneficiary has a SSN despite the number listed on the Forms 1099. 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. 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).

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 the Service 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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

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. The record before the director closed on December 10, 2012 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available.

In the instant case, the petitioner submitted its Forms 1120 for 2004 through 2011. The record reflects that the petitioner filed an earlier Form I-140 petition for the same beneficiary and based on the same labor certification on November 2, 2007. With [REDACTED] the petitioner submitted its Form 1120 for 2004 and Form 1120-A for 2005. The tax returns submitted with [REDACTED] do not match the 2004 and 2005 Forms 1120 submitted with the instant petition, although both sets of tax returns bear the same Federal Employer Identification Number. The 2004 Form 1120 submitted with [REDACTED] is handwritten and the figures on both the 2004 and 2005 tax returns differ from the figures on the later submitted Forms 1120. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the tax returns in the record cannot be accepted as credible. Nothing in the record explains this inconsistency.⁸ Without an explanation for this inconsistency and certified copies of the tax returns, we cannot determine which figures are the correct and accurate amounts.⁹

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.¹⁰ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

Even if the petitioner were able to demonstrate that its tax returns were credible, the tax returns in the record reflect the petitioner's net income and net current assets are insufficient, as follows in the table below.

- In 2004, the Form 1120 stated net income of -\$2,028.00¹¹ and net current assets of \$0.00.¹²
- In 2005, the Form 1120 stated net income of -\$801.00¹³ and net current assets of \$0.00.

⁸ 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. 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).

⁹ Without an adequate explanation for the different tax returns, we may enter a finding of fraud and/or willful misrepresentation against the petitioner. A willful misrepresentation of a material fact is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). This issue must be resolved with any further filings, including the submission of certified tax transcripts or other documentation evidencing the filing and amendment of the two sets of tax returns.

¹⁰ 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.

¹¹ The previously submitted 2004 Form 1120 lists the petitioner's net income as -\$7,457.

¹² For 2004 through 2011, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. See <http://www.irs.gov/instructions/i1120/> (accessed June 2, 2014).

¹³ The previously submitted 2005 Form 1120-A lists the petitioner's net income as -\$949.

- In 2006, the Form 1120 stated net income of -\$885.00 and net current assets of \$0.00.
- In 2007, the Form 1120 stated net income of -\$1,939.00 and net current assets of \$0.00.
- In 2008, the Form 1120 stated net income of -\$6,853.00 and net current assets of \$0.00.
- In 2009, the Form 1120 stated net income of -\$9,103.00 and net current assets of \$0.00.
- In 2010, the Form 1120 stated net income of -\$5,812.00 and net current assets of \$0.00.
- In 2011, the Form 1120 stated net income of -\$3,271.00 and net current assets of \$0.00.

Therefore, for all relevant years, even considering the previously submitted inconsistent tax returns, the petitioner did not have sufficient net income or net current assets to pay the proffered wage.

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.

Counsel's assertions on appeal 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. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. In the years 2005, 2006, 2007,

2008 and 2010, the petitioner lists \$0 in gross receipts. The tax returns for 2004 and 2011 reflect only a minimal increase in gross receipts from \$37,564 to \$40,768. The petitioner, a rental service business, lists no gross rents on its tax returns in 2004, 2009, or 2011. Based upon the amount of income the rental business generates as reported on the tax returns, it is unclear that the petitioner requires the full-time services of an executive secretary, the proffered position. The petitioner lists no salaries or wages paid on any of its tax returns from 2004 through 2011. On appeal, counsel presents no additional evidence to address the petitioner's ability to pay the proffered wage. 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.

Beneficiary's Qualifications

Beyond the director's decision,¹⁴ 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, 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum

¹⁴ 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).

requirements:

EDUCATION

Grade School: None.

High School: None.

College: None.

College Degree Required: None.

Major Field of Study: None.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered (Executive Secretary).

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based on experience as an executive secretary with [REDACTED] Venezuela from June 1983 to April 1986. 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an April 14, 1986 experience letter from [REDACTED], Owner, on [REDACTED] letterhead stating that the company employed the beneficiary as an executive secretary from June 1983 to April 1986. However, the letter is inconsistent with a March 25, 2008 Form G-325A, Biographical Sheet, on which the beneficiary failed to list any employment outside the U.S. 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). As noted by the director, the experience letter is written by the president of the petitioning entity who is, as discussed above, the father of the beneficiary. The beneficiary's father's affidavit is self-serving and does not provide independent, objective evidence of the beneficiary's prior work experience. *See Matter of Ho*, 19 I&N Dec. at 591-592. 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)). Even if we were to accept the experience letter, it is unclear whether the beneficiary's employment was full-time, constituting two full years of experience.

Although the inconsistencies in the experience letter and the Form G-325A were noted by the director in his decision denying the petition, on appeal, counsel does not specifically address these inconsistencies in the record. Counsel only states that the underlying defect with the instant case is

that the petitioner was previously represented by Mr. [REDACTED]. However, as discussed above, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Further, the petitioner was provided an opportunity to resolve any inconsistencies concerning the beneficiary's experience with independent, objective evidence, as the director noted the inconsistencies in his August 27, 2012 request for evidence and allowed the petitioner 84 days to submit a response. *Matter of Ho*, 19 I&N Dec. at 591-92. Although counsel claims that neither she nor the beneficiary is sure that the Form G-325A was signed by the beneficiary, we note that the signatures on both the 2008 Form G-325A and the Form ETA 750B bear identical signatures with the beneficiary's name. Counsel has not claimed at any time that the beneficiary did not actually sign the Form ETA 750B.

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 skilled worker under section 203(b)(3)(A)(i) of the Act.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.