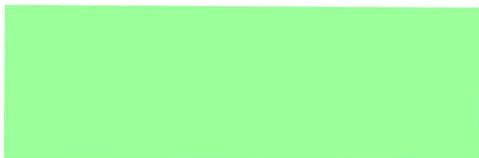




U.S. Citizenship
and Immigration
Services

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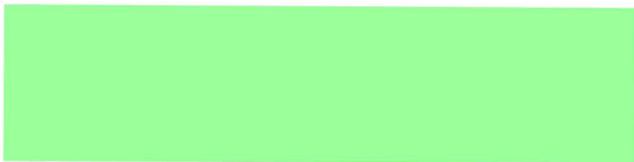
DATE: **JAN 02 2014** OFFICE: NEBRASKA SERVICE CENTER

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:

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, Nebraska Service Center, denied the immigrant visa petition on April 7, 2009. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 30, 2012. On August 2, 2013, the AAO reopened this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The petitioner submitted a response to the AAO's motion on September 17, 2013. The AAO will affirm the previous decisions of the director and the AAO. The reopened appeal will be dismissed. The petition will remain denied.

The Form I-140 was filed with a Form ETA 750, Application for Alien Employment Certification, filed by [REDACTED]. The petitioner describes itself as a restaurant and seeks to employ the beneficiary permanently in the United States as a chef. The Form ETA 750 was filed on November 9, 2004, and certified by the United States Department of Labor (DOL) on October 13, 2006. The petitioner subsequently submitted an ETA Form 9089, Application for Permanent Employment Certification, for the beneficiary which was filed on October 12, 2006, by [REDACTED]. It was certified by the DOL on April 13, 2007.

In his April 7, 2009 decision, the director determined that because the petitioner was not doing business at the time the Form I-140 petition was filed, the labor certification could not have been used by the petitioning company. In its July 30, 2012 decision dismissing the appeal, the AAO determined that the petitioner had not established its continuing ability to pay the proffered wage; that [REDACTED] is not a successor-in-interest to [REDACTED] that it is unclear if a bona fide job offer exists because [REDACTED] is dissolved; and that the beneficiary does not have the required experience for the proffered job. In its August 2, 2013 motion, the AAO reopened the matter for purposes of clarifying certain issues for the record, including the identity of the petitioner; the beneficiary's qualifications for the proffered position; the petitioner's continuing ability to pay the proffered wage; and a claim of ineffective assistance of counsel.¹

The AAO also requested a new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, from the petitioner's counsel. The AAO noted in its motion that the most recent Form G-28 was signed on June 16, 2011, by [REDACTED] and [REDACTED] and listed [REDACTED] as the petitioner. Ms. [REDACTED] signed her name as the petitioner. However, as the petitioner is not [REDACTED], the AAO requested the petitioner to provide an updated Form G-28 signed by the petitioner and by the petitioner's counsel. The petitioner provided the requested Form G-28 with its response to the AAO's motion.

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.

¹ 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).

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

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Soltane v. DOJ*, 381 F.3d at 145.

Identity of the Petitioner

The first issue discussed in the AAO's motion to reopen was the identity of the petitioner. The petitioner has not resolved the inconsistencies in the record regarding its identity with independent, objective evidence.

The Form I-140 was filed on August 13, 2007 by [REDACTED] located at [REDACTED]. According to the Illinois Secretary of State website, [REDACTED] changed its name to [REDACTED] on January [REDACTED] 2002. <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed January 1, 2014). The federal employer identification number (EIN) listed for the petitioner on the Form I-140 is [REDACTED]. According to the tax returns in the record, this EIN belongs to [REDACTED].

The Form I-140 was filed with a Form ETA 750, Application for Alien Employment Certification, filed by [REDACTED] located at [REDACTED]. The Form ETA 750 was filed on November 9, 2004 and certified by the DOL on October 13, 2006.

In response to the director's request for evidence dated February 6, 2009 (RFE), the petitioner submitted another labor certification for the beneficiary. The ETA Form 9089, Application for Permanent Employment Certification, was filed on October 12, 2006 by [REDACTED] located at [REDACTED]. It was certified by the DOL on April 13, 2007. The EIN listed for the employer on the ETA Form 9089 is [REDACTED] (which belongs to [REDACTED]).

The regulation at 20 C.F.R. § 656.17(d) provides:

(1) Employers that filed applications under the regulations in effect prior to March 28, 2005, may, if a job order has not been placed pursuant to those regulations, refile such applications under this part without loss of the original filing date by:

(i) Submitting an application for an identical job opportunity after complying with all of the filing and recruiting requirements of this part 656; and

(ii) Withdrawing the original application in accordance with ETA procedures. Filing an application under this part stating the employer's desire to use the original filing date will be deemed to be a withdrawal of the original application. The original application will be deemed withdrawn regardless of whether the employer's request to use the original filing date is approved.

(2) Refilings under this paragraph must be made within 210 days of the withdrawal of the prior application.

(3) A copy of the original application, including amendments, must be sent to the appropriate ETA application processing center when requested by the CO under § 656.20.(4) For purposes of paragraph (d)(1)(i) of this section, a job opportunity shall be considered identical if the employer, alien, job title, job location, job requirements, and job description are the same as those stated in the original application filed under the regulations in effect prior to March 28, 2005. For purposes of determining identical job opportunity, the original application includes all accepted amendments up to the time the application was withdrawn, including amendments in response to an assessment notice from a SWA pursuant to § 656.21(h) of the regulations in effect prior to March 28, 2005.

As of March 28, 2005, Form ETA 750 applications were no longer accepted under the regulation in effect prior to March 28, 2005, and instead new ETA Form 9089 applications had to be filed under the new permanent labor certification program (PERM) regulation at the appropriate National Processing Center (NPC). Where an employer chose to withdraw an application filed under the regulation in effect prior to March 28, 2005, and still in process, and to refile an application for the identical job opportunity under the refile provisions of the PERM regulation, the employer was permitted to use the previously filed ETA Form 750 application filing date (priority date) if the refiled application was certified by DOL accepting the earlier priority date and determined under 20 C.F.R. § 656.17(d) to be identical. See http://www.foreignlaborcert.doleta.gov/perm_detail.cfm (accessed January 1, 2014). The priority date for a petition supported by an ETA Form 9089 labor certification that was filed with DOL on or after March 28, 2005 as a refiled labor certification application after a withdrawal of a previously filed Form ETA 750 is the filing date that DOL specifies in Section O of the ETA Form 9089. In the instant case, although requested by the employer at Section A of the ETA Form 9089, the DOL determined that the refile provision of 20 C.F.R. 656.17(d) was not applicable. Thus, the priority date listed at Section O of the ETA Form 9089 is October 12, 2006. There is no indication in the record that the employer requested a BALCA review of this determination.

On appeal, the petitioner's former counsel stated that USCIS "may consider either labor certification" and that the ETA Form 9089 "was valid at the time of filing of the I-140." However, the ETA Form 9089 was not submitted in support of the instant Form I-140 until March 20, 2009 in response to the director's RFE. The regulation at 20 C.F.R. § 656.30(b)(2) states that an "approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007."

The ETA Form 9089 expired on January 12, 2008 and, therefore, it was expired at the time it was submitted in support of the Form I-140 on March 20, 2009 in response to the director's RFE. For purposes of this decision, the terms of both labor certifications will be addressed, even though it is not clear that the ETA Form 9089 is valid. The proffered wage listed on the ETA Form 9089 is less than the proffered wage listed on the Form ETA 750. Additionally, the education level required on the two labor certifications is different, the employers are different and the EIN for each employer is different. Therefore, even if the ETA Form 9089 was valid, the Form ETA 750 would not be interchangeable with the ETA Form 9089 as former counsel suggests.

On appeal, the petitioner's current counsel stated that the petitioner's former counsel completed the Form I-140 incorrectly. He stated that [REDACTED] and [REDACTED] were established concurrently and that the correct petitioner on the Form I-140 should have been [REDACTED]. He stated that [REDACTED] was the entity used in conducting the restaurant's day-to-day business, including the filing of tax returns. He further stated that there has been no change of business ownership and that "the facts, circumstances and events described clearly establish the relatedness of the two corporate entities and requirements for concluding that a successor in interest exists."

Counsel offered two separate and distinct arguments on appeal. First, he asserted that the correct petitioner on the Form I-140 should have been [REDACTED] and that the petitioner's former counsel committed errors in filing the Form I-140. This assertion will be discussed in the section relating to ineffective assistance of counsel. Alternatively, counsel stated that a successor-in-interest exists.

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.

Pursuant to *Matter of Dial Auto*, 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 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

(b)(6)

transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

The AAO stated in its motion:

If you claim that [REDACTED] (the petitioner) is the successor-in-interest to [REDACTED] (the labor certification employer), please highlight the evidence already submitted to the record establishing the transfer of all, or a relevant part of, [REDACTED] to [REDACTED]. We note that the transfer should have taken place sometime between October 12, 2006, when the ETA Form 9089 was filed by [REDACTED] and August 13, 2007, when the Form I-140 was filed by [REDACTED]. Please also submit any additional evidence illustrating the transfer of all, or a relevant part of, [REDACTED] to [REDACTED] including, but not limited to, purchase agreements, bills of sale, mortgage statements, sales invoices, inventory lists, licenses, corporate filings and bank records.² Please also provide evidence demonstrating that the job opportunity is the same as originally offered on the labor certification, and that [REDACTED] had the ability to pay the proffered wage from the date of the transfer of ownership forward.³

The record contains a letter dated August 24, 1999 signed by [REDACTED], President and Treasurer of [REDACTED] and [REDACTED], Vice President and Secretary of [REDACTED] stating that [REDACTED] changed its name to [REDACTED]. This is inconsistent with the Illinois Secretary of State's records which show that [REDACTED] was organized in Illinois on July 7, 1999 and changed its name to [REDACTED] on January 22, 2002. [REDACTED] was incorporated on March 2, 1999 in Illinois and remains an active corporation that is separate and distinct from [REDACTED]. *See*

² A Stock and Business Purchase Agreement dated July 26, 2001 (Agreement) in the record shows that [REDACTED] bought stock and assets of [REDACTED] from certain individual sellers. While not incorporated in the record, the Agreement references a Real Estate Contract of the same date pursuant to which [REDACTED] purchased real estate located at [REDACTED].

³ The record of proceeding contains federal tax returns for the purported predecessor, [REDACTED] for 2006 and 2007. In order to establish its ability to pay from the date of transfer of ownership forward, the petitioning successor, [REDACTED] must submit its annual reports, federal tax returns or audited financial statements.

(b)(6)

<http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed July 1, 2013). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. 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.* Please resolve the inconsistencies with independent objective evidence relating to the name change of [REDACTED]. Please also explain why the petition was filed in the name of [REDACTED] on August 13, 2007, when the limited liability company changed its name to [REDACTED] on January 22, 2002.

In its response to the AAO's motion, the petitioner did not assert that a successor-in-interest relationship exists between [REDACTED] and [REDACTED]. Instead, the petitioner stated that [REDACTED] are "an association which were all created in order to run the [REDACTED] restaurant."⁴ In support of this assertion, the petitioner cited the DOL regulation at 20 C.F.R. § 656.3 (2004), which stated:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN).

The PERM regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an

⁴ A separate corporation, [REDACTED] was incorporated on May 16, 2001 in Illinois. See <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed January 1, 2014) [REDACTED] was the President and Secretary of this corporation. In its motion, the AAO noted that [REDACTED] was not in good standing in the state of Illinois and requested the petitioner to explain why [REDACTED] has a separate corporate identity. However, [REDACTED] was dissolved in Illinois on October 11, 2013. See <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed January 1, 2014).

(b)(6)

Application for Permanent Employment Certification filed on behalf of an independent contractor.

The petitioner stated that the definition of association in the 6th edition of Black's Law Dictionary is the "act of a number of persons in uniting together for some special purpose or business." The petitioner stated that as an association, "these businesses were all created in order to work together with one another" and that although "[redacted]" was listed as the petitioning corporation on the I-140 visa petition, "[redacted]" could also have been used to the same effect as they all operate as an association to run "[redacted]". The petitioner's assertion is without merit.

Under Illinois law, associations are distinct business organizations. *See* 805 Ill. Comp. Stat. 305/ through 325/. The types of associations in Illinois include professional associations, co-operative associations, agricultural co-operative associations and cemetery associations. *Id.* The petitioner has not asserted that it fits within one of these categories of Illinois associations.

Further, the regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." The term "employer" is singular. The Form I-140 relates to a single employer with a single EIN, and the regulation at 20 C.F.R. § 656.3 clearly indicates that an employer must possess a valid EIN.⁵ The information relating to the petitioner on the Form I-140 does not indicate that the petitioner is an association of entities. Instead, it lists "[redacted]" as the sole petitioner.⁶ The petitioner's response to the AAO's motion did not explain why the petition was filed in the name of "[redacted]" on August 13, 2007, when the limited liability company changed its name to "[redacted]" on January 22, 2002. The petitioner did not address

⁵ As previously noted, "[redacted]" filed a labor certification application on ETA Form 9089 seeking to convert the previously submitted Form ETA 750 to an ETA Form 9089 under the special conversion guidelines set for in PERM. Comments and DOL responses to the proposed final rule as adopted in 20 C.F.R. Part 656 explain that if the refiled application is determined not to be identical to the original application in accordance with 656.17(d), the refiled application will be processed using the new filing date, and the original application will be treated as withdrawn. 69 Fed. Reg. 77326, 77342 (Dec. 27, 2004). DOL also stated that initially, the proposed rule regarding the definition of an "employer" would adopt the position taken by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Hayden, Inc.*, 88 I&N 245 (Aug. 30, 1998) whereby the definition of an employer would include predecessor organizations, successors-in-interest, a parent, branch, subsidiary, or affiliate, whether located in the U.S. or another country. After a review of the comments, however, DOL stated that this definition was too broad, stating that the final rule in 20 C.F.R. § 656.17(i)(5)(i) "has been simplified to provide an employer is an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at 656.3." 69 Fed. Reg. 77326, 77354 (Dec. 27, 2004).

⁶ A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the labor certification. 20 C.F.R. § 656.30(c)(2).

(b)(6)

the inconsistencies in the record relating to the name change of [REDACTED] *Matter of Ho*, 19 I&N Dec. at 591-92. 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 EIN listed on the Form I-140 is [REDACTED] which belongs to [REDACTED]. The Form I-140 states that the petitioner had gross annual income of \$2,273,032 and net annual income of \$255,097. These figures are the figures listed on the 2006 IRS Form 1120S for [REDACTED]. The Form I-140 also states that the petitioner is a restaurant established in 1999. [REDACTED] were established in 1999. It is not clear if the proper petitioner in this case is [REDACTED] however, these two separate entities cannot both be the petitioner.⁷ The petitioner has not resolved the inconsistencies regarding its identity with independent, objective evidence.

The AAO also stated in its motion:

In addition, [REDACTED] was dissolved in Illinois on January 8, 2010. Therefore, if you claim that it is the successor-in-interest to [REDACTED] and it is no longer in business, then no *bona fide* job offer exists.⁸ Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic

⁷ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

⁸ The petitioner's former counsel stated in response to the director's RFE:

[REDACTED] should have been terminated a while ago. For a long time the company did not operate. In its place, its owner opened a new restaurant: [REDACTED] was created to replace [REDACTED] therefore it operates under the same address, same dba name of [REDACTED] [REDACTED] has the same owner and clients.

He further stated that [REDACTED] "continues the business of [REDACTED]". Additionally, the record contains a letter dated March 19, 2009 from [REDACTED] the registered agent for [REDACTED] to [REDACTED] stating that [REDACTED] requested that he not file the annual report for [REDACTED] in 2008 because:

[REDACTED] was no longer in operation (e.g. no profits, no income, no tax returns, etc.), and that [REDACTED] became the successor-in-interest of [REDACTED] with all of the same clients, location, type of business and same ownership.

The inconsistencies in the record must be resolved by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

revocation due to the termination of your organization's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

Moreover, any concealment of the true status of your organization seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. at 586. You must resolve any inconsistencies in the record with independent, objective evidence. *Id.* If you intend to pursue the claim that [REDACTED] is the successor-in-interest to [REDACTED] please demonstrate the continued existence, operation, and good standing of [REDACTED]

[REDACTED] was dissolved in Illinois on January 8, 2010. Dissolution of a corporation terminates its corporate existence. A dissolved corporation cannot carry on any business except as necessary to wind up and liquidate its business and affairs. *See, e.g.*, 805 Ill. Comp. Stat. 5/12.30 and 12.40. The petitioner did not demonstrate the continued existence, operation, and good standing of [REDACTED] in its response to the AAO's motion. Therefore, even if the reopened appeal could be otherwise sustained, the dissolution of the petitioner's business would subject the approval of the petition to automatic revocation. *See* 8 C.F.R. § 205.1(a)(iii)(D).

The AAO's motion additionally stated:

On appeal, the petitioner's former counsel submitted a brief stating that [REDACTED] and [REDACTED] both conduct business under one name, [REDACTED]. He stated that [REDACTED] owns the liquor license for the business and that [REDACTED] holds the trademark, and that both entities are operated as one business.⁹ Please provide a copy of the liquor license for the business located at [REDACTED]

Additionally, the United States Patent and Trademark Office website indicates that the service mark [REDACTED] was registered by [REDACTED] on July 25, 2006. *See* [REDACTED] (accessed July 1, 2013). The record contains no evidence establishing that the service mark was transferred or licensed to [REDACTED] or any other evidence to establish that [REDACTED] had the authority to transact business as [REDACTED] such as an assumed business name certificate. Please provide such evidence.¹⁰ If you claim that the service mark could not be transferred to [REDACTED], please explain why.¹¹

⁹ Under Illinois state law, [REDACTED] is a separate and distinct legal entity from [REDACTED]

¹⁰ The petitioner's former counsel asserted in a brief in support of the appeal that the owner "was advised that if [REDACTED] was dissolved, the existing liquor license would be revoked. In the same way, [REDACTED] could not be closed because it continued to hold the company trademark."

¹¹ *See* <http://www.uspto.gov/trademarks/process/assign.jsp> (accessed July 1, 2013).

In its response to the AAO's motion, the petitioner submitted a copy of the retail and consumption liquor licenses for the business located at [REDACTED] which are held by [REDACTED]. The consumption license is marked "VOID." The petitioner also submitted a copy of the service mark for [REDACTED] which is owned by [REDACTED]. The petitioner did not submit any evidence establishing that the service mark was transferred or licensed to [REDACTED], or that [REDACTED] had the authority to transact business as [REDACTED] such as an assumed business name certificate.¹² 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 AAO's motion also stated:

Further, the 2002 IRS Form 1120S for [REDACTED] states that it is an initial return, although [REDACTED] was incorporated on March 2, 1999 and the tax return notes that it elected S corporation status on March 8, 1999. Please explain why it waited until 2002 to file its initial tax return, and explain why it showed no assets or liabilities on its balance sheet at the beginning of 2002.

The petitioner's response to the AAO's motion did not explain why [REDACTED] waited until 2002 to file its initial tax return, and did not explain why it showed no assets or liabilities on its balance sheet at the beginning of 2002. 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).

In sum, the petitioner did not resolve the inconsistencies in the record regarding its identity with independent, objective evidence. The petition will be denied for this reason.

Beneficiary's Qualifications

The second issue addressed by the AAO in its motion to reopen was the beneficiary's qualifications for the proffered position. The petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, as the petitioner has not demonstrated that the beneficiary has the required experience to meet the terms of the certified labor certification.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The minimum education, training, experience and other special requirements required to perform the duties of the offered position are set forth at Part A, Items 14 and 15 of the ETA Form 9089. In the

¹² The Cook County, Illinois Clerk's website indicates that [REDACTED] has not been registered as an assumed name in Cook County. See <https://assumednames.cookcountyclerk.com/public/search> (accessed January 1, 2014).

instant case, the ETA Form 9089 states that the offered position has the following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The Form ETA 750 submitted with the petition requires the completion of grade school and high school, and two years of experience in the job offered. It is not clear why the ETA Form 9089 and the Form ETA 750 required different education levels for the same position. 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, 591-592 (BIA 1988). The petitioner submitted no evidence to establish that the beneficiary completed grade school and high school.

The ETA Form 9089 states that the beneficiary has the following experience: [redacted] chef with [redacted] in Chicago, IL from September 1, 2002 to October 12, 2006; and [redacted] chef with [redacted] in [redacted] from January 31, 1996 to January 1, 1999. On the Form ETA 750, the beneficiary stated that he worked for [redacted] from September 2002 to the date he signed the Form ETA 750 on June 15, 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent, objective evidence. *Id.* The petitioner has not resolved the inconsistencies regarding the beneficiary's experience with independent, objective evidence.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this

classification are at least two years of training or experience.

The AAO stated in its motion:

As noted by the AAO in its decision, the record contains a handwritten letter, partially in English, attesting to the beneficiary's employment from January 31, 1996 to January 1, 1999 as a sushi chef. The letter does not provide the name, title and signature of the writer,¹³ does not list the duties performed by the beneficiary, and does not state whether the beneficiary was employed full or part time. Therefore, the letter does not meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the AAO stated that the letter contained untranslated foreign language. Because the petitioner failed to submit certified translations of the parts of the letter written in a foreign language, the AAO was unable to determine whether the letter supported the petitioner's claims. See 8 C.F.R. § 103.2(b)(3).

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed 24 months of experience in the offered position by the priority date as required by the terms of the labor certification. Therefore, please submit experience letters that satisfy the regulatory requirements set forth above to establish that the beneficiary possessed the required experience to perform the offered position.

In its response to the AAO's motion to reopen, the petitioner stated that the beneficiary was attempting to locate his former employer overseas and that an updated experience letter would be submitted as soon as it is received. As of the date of this decision, the AAO has received no additional correspondence from the petitioner relating to the beneficiary's qualifications.¹⁴ Although specifically and clearly requested by the AAO, the petitioner has not provided evidence to establish that beneficiary possessed the required experience to perform the offered position as of the priority date. The petitioner's failure to submit this evidence cannot be excused. 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 has not established that the beneficiary is qualified to perform the duties of the proffered position as the petitioner has failed to establish that the beneficiary has the experience required by the certified labor certification. The petition will be denied for this additional reason.

¹³ The letter appears to have been written and signed by the beneficiary.

¹⁴ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Ability to Pay the Proffered Wage

The third issue addressed by the AAO in its motion to reopen was the petitioner's ability to pay the proffered wage. The petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date as set forth below. This issue is complicated by the petitioner's failure to establish its identity, and therefore, failed to clearly establish the entity that must pay the proffered wage.

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 labor certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on November 9, 2004, and the ETA Form 9089 was accepted on October 12, 2006.

The AAO stated in its motion:

The petitioner must also demonstrate that it has been able to pay the proffered wage of \$11.62 per hour (\$24,169.60 per year) from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.* The beneficiary has not yet obtained lawful permanent residence. The record of proceeding contains federal tax returns for [REDACTED] for 2002, 2004, 2005, 2006 and 2007, and it contains IRS Forms W-2 issued to the beneficiary by [REDACTED] for 2007 and 2008. Accordingly, if you plan to pursue your claim that the correct petitioner on the Form I-140 should have been [REDACTED], please submit annual reports, federal tax returns or audited financial statements for [REDACTED] for 2008, 2009, 2010, 2011 and 2012. Please also submit any Forms W-2 or 1099 issued to the beneficiary by [REDACTED] for 2006, 2009, 2010, 2011 and 2012.

The Form ETA 750 states that the proffered wage is \$17.00 per hour (\$35,360.00 per year based on a 40 hour work week). It is not clear why the ETA Form 9089 provided a significantly lower wage for the same position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

The AAO also stated in its motion:

In addition, according to USCIS records, [REDACTED] and [REDACTED] have filed multiple I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, it must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

Accordingly, please provide the following information for each beneficiary for whom the petitioner has filed a Form I-140:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

In its response to the AAO's motion to reopen, the petitioner provided federal tax returns for [REDACTED] for 2008, 2009, 2010 and 2011; IRS Forms W-2 issued to the beneficiary by [REDACTED] in 2009, 2010 and 2011; and previously submitted IRS Forms W-2 issued to the beneficiary by [REDACTED] for 2007 and 2008. The petitioner stated that "income from any of the entities should be used in order to determine whether the [REDACTED] restaurant has the ability to pay the proffered wage."

The petitioner also provided information regarding one other Form I-140 petition filed by [REDACTED]. The petitioner stated that the beneficiary of the petition was [REDACTED] that the priority date of the petition was October 19, 2006; that the proffered wage was \$11.62 per hour (\$24,169.60 per year); that the petition was approved in 2009; that the beneficiary obtained lawful permanent residence; and that the beneficiary worked at [REDACTED] afterwards.¹⁵ The petitioner did not indicate the actual wages it paid to that beneficiary or when the beneficiary obtained lawful permanent residence.

United States Citizenship and Immigration Services (USCIS) records indicate that [REDACTED] Inc. (EIN [REDACTED]) filed another Form I-140 petition on July 23, 2007 with receipt number [REDACTED] for the position of restaurant manager. The priority date in that case was November 16, 2006; the proffered wage was \$24.03 per hour (\$49,982.40 per year); and the petition was approved on April 29, 2009. The record does not indicate that beneficiary has obtained lawful permanent residence. The petitioner did not acknowledge this filing in its response to the AAO's motion. 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. *Matter of Ho*, 19 I&N Dec. at 591-592.

In addition, [REDACTED] has filed three additional Form I-140 petitions. The first Form I-140 was filed by [REDACTED] on December 4, 2002 with receipt number [REDACTED] for the position of chef; the priority date was December 27, 2001; the Form I-140 listed the petitioner's EIN as [REDACTED] (which belongs to [REDACTED]); the proffered wage was \$22.00 per hour; and the petition was approved on March 11, 2003. It appears that the beneficiary of that petition obtained lawful permanent residence prior to the priority date of the instant petition. The second petition was filed on July 14, 2005 with receipt number [REDACTED] and the petition was voided. The third petition was filed on December 7, 2005 with receipt number [REDACTED] and the petition was withdrawn. The petitioner did not acknowledge these filings in its response to the AAO's motion, and it is not clear if the wages offered to the beneficiaries of these three additional petitions should be considered in the determination of the petitioner's ability to pay the proffered wage of the instant petition for any relevant period.

If [REDACTED] is the proper petitioner in this case, the petitioner submitted no regulatory-prescribed evidence of its continuing ability to pay the proffered wage.

Further, even if the petitioner had established that [REDACTED] was the proper petitioner in this matter, which it has not, the evidence does not establish that [REDACTED] had the continuing ability to pay the proffered wages of the beneficiaries of its multiple petitions. 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

¹⁵ USCIS records indicate that this petition was filed by [REDACTED]

petitioner's ability to pay the proffered wage. In the instant case, [REDACTED] paid the beneficiary \$5,244.98 in 2007 and \$16,735.10 in 2008, which is less than the proffered wage.¹⁶ Thus, the petitioner must demonstrate that [REDACTED] can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2007 and 2008. If [REDACTED] were the proper petitioner, then the petitioner must also establish that [REDACTED] can pay the full proffered wage in every other relevant year.

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. 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 Haw., 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. 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

¹⁶ The IRS Forms W-2 issued to the beneficiary by [REDACTED] do not establish the ability of the petitioner to pay the proffered wage in 2009, 2010 and 2011.

figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

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

The tax returns for [REDACTED] stated its net income as detailed in the table below.¹⁷

- In 2004, the IRS Form 1120S stated net income of \$59,976.
- In 2005, the IRS Form 1120S stated net income of \$203,546.
- In 2006, the IRS Form 1120S stated net income of \$180,708.
- In 2007, the IRS Form 1120S stated net income of \$21,835.
- In 2008, the IRS Form 1120S stated a net loss of (\$93,614).
- In 2009, the IRS Form 1120S stated net income of \$86,853.
- In 2010, the IRS Form 1120S stated net income of \$194,573.
- In 2011, the IRS Form 1120S stated net income of \$48,159.

Therefore, for the year 2008, the petitioner did not establish that [REDACTED] had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage. While the petitioner could establish that [REDACTED] had sufficient net income to pay the beneficiary of the instant petition the proffered wage in 2004, 2005, 2006, 2007, 2009, 2010, and 2011, if it were the proper petitioner, it did not establish that it had sufficient net income to pay the proffered wages of multiple beneficiaries in all relevant years.¹⁸

¹⁷ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 1, 2014) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because [REDACTED] had additional credits and deductions shown on its Schedule K for 2004, 2005, 2006, 2007, 2008, 2010 and 2011, the net income for [REDACTED] is found on Schedule K of its tax returns for those years. For 2009, net income is shown on line 21 of page one of the IRS Form 1120S.

¹⁸ The record also contains a copy of IRS Form 1120S for [REDACTED] for 2002. However, evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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.¹⁹ 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 tax returns for [REDACTED] stated net current assets as detailed in the table below.

- In 2004, the IRS Form 1120S stated net current assets of (\$308,437).
- In 2005, the IRS Form 1120S stated net current assets of (\$46,429).
- In 2006, the IRS Form 1120S stated net current assets of (\$53,663).
- In 2007, the IRS Form 1120S stated net current assets of (\$155,552).
- In 2008, the IRS Form 1120S stated net current assets of (\$144,846).
- In 2009, the IRS Form 1120S stated net current assets of (\$80,801).
- In 2010, the IRS Form 1120S stated net current assets of (\$65,713).
- In 2011, the IRS Form 1120S stated net current assets of (\$14,740).

Therefore, for the years 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011, the petitioner did not establish that [REDACTED] had sufficient net current assets to pay the proffered wage.

The petitioner asserts that income from other entities should be used in order to determine whether the petitioner has the ability to pay the proffered wage. This assertion is without merit. 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."

Thus, even if the petitioner had established that [REDACTED] was the proper petitioner in this matter, which it has not, from the date the labor certification was accepted for processing by the DOL, the petitioner had not established that [REDACTED] 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.

¹⁹ 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.

(b)(6)

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the identity of the petitioner has not been established with independent, objective evidence to establish which entity must properly demonstrate its ability to pay the proffered wage. The record shows a decrease in gross income earned by [REDACTED] from 2009 to 2011, and the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses. Nothing establishes that the petitioner can pay all the proffered wages of all of its sponsored workers. Further, the record contains no financial evidence for the petitioner listed on the Form I-140. 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. The petition will be denied for this additional reason.

Ineffective Assistance of Counsel

The fourth issue addressed by the AAO in its motion to reopen was ineffective assistance of counsel. The petitioner has not established a valid claim of ineffective assistance of counsel.

The AAO stated in its motion:

On appeal, current counsel for the petitioner asserted that the correct petitioner on the Form I-140 should have been [REDACTED] and that the petitioner's former counsel committed an error in filing the Form I-140 on behalf of [REDACTED]. If the

petitioner wishes to pursue a claim of ineffective assistance of counsel, the claim 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).

Please provide evidence meeting the three requirements listed above to support a claim of ineffective assistance of counsel.

In its response to the AAO's motion to reopen, the petitioner did not address the issue of ineffective assistance of counsel. Therefore, the petitioner has not established a valid claim of ineffective assistance of counsel.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-592. The petitioner was requested to resolve the questions raised in the record and to submit supporting documentation as set forth in the AAO's motion to reopen. Its response failed to resolve these inconsistencies and failed to establish that the petition was eligible for approval.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, 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.

ORDER: The AAO affirms the previous decisions of the director and the AAO. The reopened appeal is dismissed. The petition remains denied.