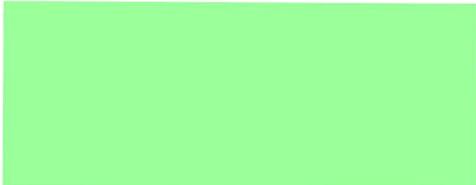


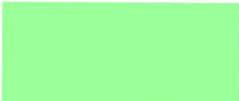
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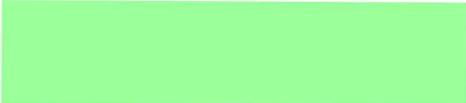
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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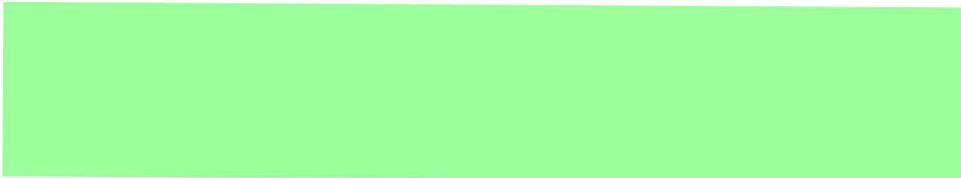


DATE: **MAY 27 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an architectural design company. It seeks to employ the beneficiary permanently in the United States as an architect and classify him as a professional under section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). This statutory provision allows for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

In the denial decision, issued on November 5, 2012, the director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage from the priority date up to the present. The director denied the petition accordingly.

The record shows that the instant appeal is properly filed, timely, and makes a specific allegation of error in law or fact.¹ The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Ability to Pay the Proffered Wage

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

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.

¹ The petitioner also filed an untimely appeal (Receipt No. [REDACTED]) on December 11, 2012. In a separate adjudication, the untimely appeal was rejected as improperly filed.

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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

In this case, the ETA Form 9089 was accepted on November 30, 2005. The proffered wage as stated on the ETA Form 9089 is \$31.72 per hour (\$65,977.60 per year, based on a work year of 2,080 hours). The ETA Form 9089 states that the position requires a bachelor's degree in architecture and 120 months of experience in the job offered as a thematic design architect.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. In the petition, filed on April 2, 2007, the petitioner claimed to have been established in 2002 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, United States Citizenship and 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 submitted copies of a series of Forms 1099-MISC issued to the beneficiary over the years showing that it paid the beneficiary the following "nonemployee compensation" between 2005 and 2011:

<u>Year</u>	<u>Form 1099-MISC</u>
2005	\$2,000.00
2006	None submitted
2007	\$10,655.00

2008	\$8,000.00
2009	\$7,586.80
2010	None submitted
2011	\$19,500.00

The compensation paid to the beneficiary was less than the annualized proffered wage of \$65,977.60 in all seven years. Thus, the petitioner must demonstrate that it could have paid the difference between compensation actually paid to the beneficiary and the annualized proffered wage in each of the above years.³ The shortfall year-by-year was as follows:

<u>Year</u>	<u>Shortfall</u>
2005	\$63,977.60
2006	\$65,977.60 (no Form 1099-MISC)
2007	\$53,322.60
2008	\$57,977.60
2009	\$58,390.80
2010	\$65,977.60 (no Form 1099-MISC)
2011	\$46,477.60

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. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial*

³ The petitioner asserts it made indirect payments to the beneficiary through a third-party intermediary, [REDACTED] Inc. [REDACTED]. On the labor certification, the beneficiary states that he worked for [REDACTED] from April 15, 2003, through November 28, 2005 (the approximate date he signed the ETA Form 9089). While the record contains evidence that the beneficiary was assigned to work with the petitioner during his employment at [REDACTED] there is no evidence that the petitioner directly employed the beneficiary and paid him employee wages during the relevant period. The record contains Forms 1099-MISC issued to the beneficiary by [REDACTED] for 2005 through 2007, which are separate from the Forms 1099-MISC issued to the beneficiary by the petitioner. On appeal, counsel submits a letter dated January 2, 2013, from the petitioner's owner and Chief Executive Officer (CEO), stating that the petitioner has "no employees, but engages qualified architect and engineering consultants." In its appellate brief, also dated January 2, 2013, counsel asserts that the petitioner utilizes this strategy "to gain significant paper tax deductions." The petitioner cannot, on the one hand, acknowledge that for tax purposes it does not employ the beneficiary, while on the other hand assert that for immigration purposes it does employ the beneficiary, without persuasive evidence demonstrating the true nature of the beneficiary's purported employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because they ignore other necessary expenses).

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

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

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

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

The record before the director closed on May 2, 2012, with the receipt 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 had not yet been filed. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The petitioner's tax returns, Form 1120S for each of the years 2005 through 2011, recorded its net income in Schedule K as follows:⁴

- In 2005, the Form 1120S stated net income of \$22,966.
- In 2006, the Form 1120S stated net income of \$(17,329).
- In 2007, the Form 1120S stated net income of \$28,376.
- In 2008, the Form 1120S stated net income of \$35,100.
- In 2009, the Form 1120S stated net income of \$16,854.
- In 2010, the Form 1120S stated net income of \$(8,575).
- In 2011, the Form 1120S stated net income of \$45,955.

Thus, for the years 2005 through 2011 the petitioner did not have sufficient net income to pay the shortfall between the compensation actually paid to the beneficiary and the proffered wage.⁵

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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

⁴ In the director's decision the petitioner's net income figures were mistakenly taken from page 1, line 21, of the IRS Form 1120S. Where an S corporation's income is exclusively from a trade or business, USCIS does consider net income to be the figure for ordinary income, shown on line 21 of page 1 of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported in Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (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 June 25, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had deductions and/or adjustments recorded in Schedule K for each of the years 2005-2011, the petitioner's net income is found in Schedule K, line 17e, for 2005, and in Schedule K, line 18, for 2006 through 2011.

⁵ In the denial decision the director mistakenly found that that the petitioner narrowly established its ability to pay the proffered wage in 2011 based on a net income figure that was taken from page 1, line 21, of the IRS Form 1120 – which read \$46,879 – rather than Schedule K, line 18, of the tax return – which read \$45,955.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

able to pay the proffered wage using those net current assets. The petitioner's tax returns recorded its end-of-year net current assets for 2005 through 2011 as follows.

- In 2005, the Form 1120S stated net current assets of \$29,987.
- In 2006, the Form 1120S stated net current assets of \$(18,047).
- In 2007, the Form 1120S stated net current assets of \$(4,390).
- In 2008, the Form 1120S stated net current assets of \$(1,085).
- In 2009, the Form 1120S stated net current assets of \$0.
- In 2010, the Form 1120S stated net current assets of \$0.
- In 2011, the Form 1120S stated net current assets of \$37,727.

Thus, for the years 2005 through 2011, the petitioner did not have sufficient net current assets to pay the shortfall between the compensation actually paid to the beneficiary and the proffered wage.

Accordingly, from the date the ETA Form 9089 was accepted for processing by the DOL (the priority date) up to the present the petitioner has not established its continuing ability to pay the beneficiary the proffered wage by means of the compensation it actually paid to the beneficiary, or its net income, or its net current assets.

On appeal, counsel asserts that since "November 30, 2005 the petitioner has shown it is an ongoing concern with significant retained earnings and contracts to ensure its ability to pay." Form I-290B, Page 2, Part 3.5. Retained earnings are a company's accumulated earnings since its inception less dividends. See Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Furthermore, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

Counsel's assertions on appeal do not outweigh the evidence presented in the petitioner's tax returns which show that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL up to the present.

USCIS may also 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).⁷

In the instant case, the petitioner claims to have been doing business since 2002. The petitioner's tax returns from 2005 to 2011 do not reflect sufficient net income or net current assets to pay the proffered wage in any year since the priority date. On appeal, the petitioner submits copies of its 2002 through 2004 tax returns. The ten years of tax returns in the record, however, do not show a solid record of historical growth in the petitioner's business from 2002 through 2011. The petitioner's net income over that time was inconsistent, with decreases in 2003 and 2009 and net losses in 2006 and 2010. Likewise, the petitioner's net current assets reflect inconsistent growth. In fact, only two years (2005 and 2011) show positive figures, with the years in between showing either net current liabilities (2006-2008) or zero (2009-2010). Nor do the gross receipts recorded in the tax returns reflect a steady increase over the years. From a high of \$887,198 in 2007, gross receipts declined to \$446,816 in 2008, \$107,752 in 2009, and \$11,485 in 2010, before rebounding to \$315,450 in 2011. The petitioner's tax records indicate that it has never paid employee wages.

On appeal, counsel submits documents in support of the petitioner's business reputation and its sole shareholder's professional reputation, which include the petitioner's business portfolio, its website printout, industry articles, reference letters from clients, and a press release. While the record contains documents indicating the popularity and reputation of the company and/or its sole shareholder, the articles fail to outweigh the evidence presented in the tax returns. Counsel states that the "2007-2008

⁷ 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.

great recession/global and financial crisis” constituted “extraordinary and unique circumstances that are similar to those presented in *Matter of Sonogawa*.” (Form I-290B, Page 2, Part 3.6). The petitioner’s slump, however, was both extreme and lengthy. From 2007 to 2010 gross sales virtually dried up – declining 98.7% over that three-year period – before beginning to improve in 2011. Counsel claims that the petitioner “has a record of stable payments to [the] Beneficiary directly and through a third party intermediary,” and asserts that [REDACTED] Inc. [REDACTED] of Seattle, Washington, was that third party intermediary from 2005 onward. The Forms 1099-MISC and W-2 (Wage and Tax Statements) in the record fail to support counsel’s claim, however, because they do not confirm that the beneficiary received compensation equal to or above the proffered wage from [REDACTED] or any other company in the years 2009-2011. Moreover, the beneficiary’s own federal tax returns for the years 2009-2011 record business income of only \$20,010, \$18,000, and \$28,840, respectively, for those three years. Thus, even if the AAO credited the petitioner with the payments the beneficiary received from one or more third parties, the documentation of record shows that this compensation was far below the proffered wage in 2009, 2010, and 2011. Furthermore, the petitioner has not demonstrated its ability to pay the proffered wage from 2005 onward, and as the “great recession/financial crisis” referred to by counsel occurred some years later, it cannot account for the deficiency in prior years. Assessing the totality of the circumstances in this individual case, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

For all of the reasons discussed in this decision, the evidence of record does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date in 2005 up to the present.

Bona Fides of Job Offer

Beyond the decision of the director, the AAO determines that the petitioner has not demonstrated that a *bona fide* job offer exists.⁸ See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm’r 1986). Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See also C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A labor certification is valid only for the particular job opportunity stated on the ETA Form 9089. See 20 C.F.R. § 656.30(c)(2).

On appeal, counsel asserts that it provided ample proof of its agreement with a third party, [REDACTED] Inc., for the services of the beneficiary who was employed by [REDACTED] and directly assigned to work for the petitioner. The petitioner asserts that its tax strategy of employing the

⁸ 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).

beneficiary through [REDACTED] allowed the petitioner to gain significant paper tax deductions. While it appears that the petitioner has not employed the beneficiary for tax purposes, the petitioner now asserts that it paid wages to the beneficiary through this third party.

It is unclear from the record whether the petitioner will be the beneficiary's employer and was authorized to file the instant petition, or if the Department of Labor was cognizant of the petitioner's tax strategy at the time it considered the labor certification. 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." In addition, the DOL regulation at 20 C.F.R. § 656.3⁹ states as follows:

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.

In this case, the petitioner has not demonstrated that it intends to employ the beneficiary in the position described on the Form I-140 petition and the ETA Form 9089 labor certification. The record lacks evidence that a job opportunity exists to which U.S. workers may be referred for employment. The petitioner describes itself as architectural designer business and its tax returns reflect that it has never paid any employee salaries. Despite the statements on its ETA Form 9089 in 2005 that it had two employees and on its Form I-140 in 2007 that it currently had three employees, the petitioner does not appear to employ anyone directly. As confirmed by the petitioner's owner in his letter of January 2, 2013, "[REDACTED] Inc. has no employees." This casts doubt on whether the petitioner intends to employ the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). The petitioner, through the filing and signing the labor certification, has attested to certain conditions which are not supported by the evidence in the record. *See* 20 C.F.R. §§ 656.10(c)(4) (the employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States); § 656.10(c)(8) (the job opportunity has been and is clearly open to any U.S. worker); and § 656.10(c)(10) (the job opportunity is for full-time, permanent employment for an employer other than the alien). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at

⁹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

591-592. In any future filings, the petitioner should document that a job opportunity to which U.S. workers could be referred for employment by a person, association, firm, or corporation, exists.

Based on the foregoing analysis, and the petitioner's documented history of utilizing consultants rather than hiring employees, the AAO cannot determine that a *bona fide* job opportunity was available to U.S. workers without additional evidence.

Qualifications for the Offered Position

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

In the instant case, the labor certification states that the offered position requires a bachelor's degree in "architect" [*sic*] and 120 months of experience in the job offered as a "thematic design architect." The labor certification also requires "international experience" and "Italian, English and Spanish."¹⁰ On the labor certification the beneficiary claims to qualify for the offered position based on his university degree in architecture from the [REDACTED] in 1971, and experience as a designer for [REDACTED] in Maitland, Florida, from April 2003 through November 2005; as an architect for [REDACTED] in Trenton, New Jersey, from April 2001 through April 2003; and as an architect and constructor for [REDACTED] in Valencia, Venezuela, from March 1985 through November 2000 and from June 1973 through December 1979. The beneficiary's claimed qualifying experience must be supported by letters from employers providing the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a letter dated March 15, 2007 from [REDACTED], president of [REDACTED] Inc. in Maitland, Florida, stating that the beneficiary worked for the company as an

¹⁰ The AAO notes that the position offered appears to be that of an architect, which is a professional occupation requiring an architect's license. See Fla. Stat §§ 481.203, 481.213. The labor certification is silent as to whether a license is required for the position offered, suggesting the labor certification may be deficient on its face. See 20 C.F.R. § 656.10(c)(7) (the job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law). In any further filings, the petitioner must document the actual minimum requirements for the position offered, and the beneficiary's qualifications for the position offered, as of the priority date.

architect from April 2003 to the present (March 2007). The letter did not provide a detailed description of the job duties and did not indicate whether the position was full or part-time. Moreover, the employment dates and job title asserted in this letter are inconsistent with those in another letter from [REDACTED] five years later, dated March 20, 2012, in which he stated that the beneficiary worked for [REDACTED] (which had moved by 2012 to Winter Park, Florida) as a designer from 2005 to 2007. Once again, the letter neglected to provide a detailed description of the job duties and indicate whether the position was full or part-time.¹¹

The record contains a letter dated March 23, 2012 from [REDACTED] AIA, president of [REDACTED] in Dickinson, Texas, stating that the beneficiary worked for his company over a twenty-five year span in Venezuela and in Texas. The letter fails to provide a detailed description of the job duties, whether the position was full or part-time, and the dates of employment.

The record contains a letter dated May 1, 2012 from [REDACTED] principal at [REDACTED] in Longwood, Florida, stating that the beneficiary provided architectural design services from June 2003 to February 2004. The letter fails to indicate whether the beneficiary was an actual employee or hired as a consultant, and whether the job was full or part-time.

The record contains a letter dated September 11, 2006 from [REDACTED] AIA, vice-president/director of studio operations at [REDACTED] Inc. in Maitland, Florida, stating that the beneficiary worked full-time as a designer from May 2005 to December 2005. The letter fails to indicate whether the beneficiary was an actual employee or hired as a consultant.

Lastly, the record contains a letter dated March 1, 2012 from [REDACTED] director of [REDACTED] in Valencia, Venezuela, stating that the beneficiary had been in charge of the firm's Architecture department since the company's founding in 1983. The letter fails to provide a detailed description of the beneficiary's job, whether it was full or part-time, the dates of employment, and whether the beneficiary was an actual employee or hired as a consultant.

With the exception of the experience with [REDACTED] none of the experience referenced in the above letters was listed by the beneficiary on the labor certification. In *Matter of Leung*, 16 I&N Dec.

¹¹ As previously discussed, the petitioner claims the beneficiary's prior "employment" with [REDACTED] as evidence of its own ability to pay the proffered wage because it allegedly paid the beneficiary for the work with [REDACTED]. In the labor certification, however, the petitioner's president and the beneficiary both declared that none of the beneficiary's qualifying experience was gained with the employer (the petitioner) in a substantially comparable position to the instant job offer (ETA Form 9089, section J, line 21). It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In any future proceedings the petitioner would have to submit documentary evidence to resolve the foregoing inconsistencies.

2530 (BIA 1976), the Board's dicta indicates that if a beneficiary's claimed experience has not been listed and certified by the DOL on the labor certification application, it lessens the credibility of the evidence and facts asserted. The AAO also notes that the dates of claimed employment in the letters do not correlate with the dates of employment listed by the beneficiary on the labor certification, and do not account for many of the years covered by the labor certification. With regard to the beneficiary's employment in Valencia, Venezuela, the labor certification states that it was with [REDACTED] from 1973 to 1979 and its successor company, [REDACTED] from 1985 to 2000, whereas one of the employment letters in March 2012 states that the beneficiary's experience was with [REDACTED] starting in 1983 and another letter in March 2012 states that the beneficiary's Venezuela experience was with [REDACTED]. The [REDACTED] letter also states that much of the beneficiary's experience with the company was in Dickinson, Texas, a locale (like the company itself) that was unmentioned on the labor certification.

These inconsistencies cast serious doubt on the credibility of the employment letters. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591. In any future filings, the petitioner must address these inconsistencies with independent, objective evidence.

Finally, none of these letters, or any other documents in the record, address whether the beneficiary possesses the required language skill in Italian, in conformance with the labor certification.

For the reasons discussed above, the AAO determines that the evidence of record fails to establish that the beneficiary possessed all of the required experience and skills set forth on the labor certification as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Conclusion

The petition is deniable on the following grounds:

1. The petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present, in accordance with 8 C.F.R. § 204.5(g)(2).
2. Beyond the decision of the director, the petitioner has not established that there is a *bona fide* employment opportunity in which it intends to employ the beneficiary, in accordance with section 203(b)(3) of the Act.

3. Also beyond the decision of the director, the petitioner has not established that the beneficiary fulfills the requisite job experience requirements and Italian language skills set forth on the labor certification, in accordance with 8 C.F.R. § 103.2(b)(1), (12).

For the above stated reasons, considered both in sum and as independent grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The appeal is dismissed.