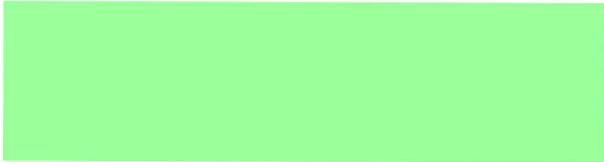




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 21 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(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 (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn in part, and affirmed in part. The appeal will be dismissed.

The petitioner makes custom, wooden picture frames. It seeks to permanently employ the beneficiary in the United States as a wood carver.¹ The petitioner requests classification of the beneficiary as a professional or skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).²

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The petition's priority date, which is the date the DOL accepted the labor certification application for processing, is September 2, 2005. *See* 8 C.F.R. § 204.5(d).

The Director concluded that the petitioner did not establish the *bona fides* of the job opportunity. The Director found that, during the labor certification process, the petitioner failed to disclose the beneficiary's familial relationship to the petitioner's chairman, who also owns half of the corporation's stock. Accordingly, the Director invalidated the accompanying labor certification and denied the petition on February 24, 2010.

The record shows that the appeal is properly filed and alleges specific errors of law and fact. The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

The Bona Fides of the Job Opportunity

An employer requesting labor certification must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991)

¹ On the Form I-140, Immigrant Petition for Alien Worker, the petitioner identifies the offered position as cabinet maker and bench carpenter. However, we will refer to the position's title as wood carver pursuant to the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification).

² Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

³ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), permit the submission of additional evidence on appeal. 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, 766 (BIA 1988).

(*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)). When asked, the petitioner has the burden when asked to show that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. 20 C.F.R. §§ 656.3, 656.10(c)(8); see *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). USCIS may deny a petition accompanied by a labor certification that does not comply with DOL regulations. See *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the geographical area of intended employment).

To provide an "opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking 'yes' to Question C.9 on the ETA Form 9089." U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," "Familial Relationships," <http://www.foreignlaborcert.doleeta.gov/faqsanswers.cfm> (accessed Sept. 15, 2014). "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included." *Id.*

A familial relationship between the alien and the employer does not establish the lack of a *bona fide* job opportunity *per se*. Ultimately, the question of whether a *bona fide* job opportunity exists in situations where the alien has a familial relationship with the employer depends on 'whether a genuine determination of need for alien labor can be made by the employer corporation and whether a genuine opportunity exists for American workers to compete for the opening.' [citing *Matter of Modular Container Sys.*, *supra*, at *7]. Therefore, the employer must disclose such relationships, and the [adjudicator] must be able to determine that there has been no undue influence and control and that these job opportunities are available to U.S. workers. When the employer discloses a family relationship, and the application raises no additional denial issues, the employer will be given an opportunity to establish, to the [adjudicator's] satisfaction, that the job opportunity is legitimate and, in the context of the application, does not pose a bar to certification. The [adjudicator] will consider the employer's information and the totality of the circumstances supporting the application in making this determination.

Id.

As the DOL's website "Frequently Asked Questions & Answers" (FAQ) discusses, while a family relationship does not establish a bar to labor certification, it does present the question of whether the job opportunity is *bona fide*. The FAQ also properly notes that this is a question which must be determined by the DOL's Certifying Officer after the petitioner discloses such a relationship. See 20 C.F.R. §§ 656.10(c)(8), 656.17(l); *Matter of Modular Container Sys.*, *supra* at *7. In determining whether a *bona fide* job opportunity exists, adjudicators must consider multiple factors, including but not limited to, whether an alien: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the

company; has an ownership interest in it; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; or has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Matter of Modular Container Sys., supra*, at *8. Adjudicators must also consider whether an alien's pervasive presence and personal attributes would likely cause the petitioner to cease operations in the alien's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

In the instant case, the petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." ETA Form 9089, Question N.8.; 20 C.F.R. § 656.10(c)(8). In response to Question C.9 on the ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" the petitioner indicated: "No."

Despite its negative response to Question C.9 on the ETA Form 9089, however, the petitioner's chairman/shareholder admitted in a March 13, 2009 letter that the beneficiary is his "second cousin," specifically, the son of his first cousin.⁴ The petitioner included the letter with its initial evidence in support of the petition. The chairman/shareholder stated that his father is the uncle of the beneficiary's father.⁵

Counsel argues that the relationship between the beneficiary and the petitioner's chairman/shareholder is not a "familial relationship." Counsel notes that DOL regulations do not define the term "familial relationship." Counsel also asserts that the Board of Alien Labor Certification Appeals (BALCA) has not addressed the issue.

Although DOL regulations do not define the term "familial relationship," as previously discussed, an agency website states that a "familial relationship" includes "any relationship established by blood, marriage, or adoption, even if distant. For example, *cousins of all degrees*, aunts, uncles, grandparents and grandchildren are included." U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," *supra* (emphasis added). Thus,

⁴ The petitioner submitted the March 13, 2009 letter in support of its prior petition on behalf of the beneficiary. U.S. Citizenship and Immigration Services (USCIS) records indicate that the prior petition, which was filed on June 9, 2008 for the same offered position, was denied on May 22, 2009. Similar to the decision in the instant proceedings, the Director concluded that the prior petition did not establish the *bona fides* of the offered position. The prior immigrant petition is not under appeal.

⁵ We held these proceedings in abeyance, as of June 26, 2013, while we attempted to consult with the DOL regarding the effect on the labor certification of the beneficiary's relationship to the petitioner's chairman/shareholder. See section 204(b) of the Act, 8 U.S.C. § 1154(b) (permitting USCIS to consult with DOL when adjudicating immigrant petitions for alien workers); see also 8 C.F.R. § 103.2(b)(18) (authorizing USCIS to withhold adjudication of a petition pending an investigation regarding eligibility for the requested benefit). On September 9, 2014, the DOL notified us that it will not initiate its own proceedings to revoke the accompanying labor certification at this time. The DOL's response does not preclude USCIS from considering issues or taking action involving the labor certification our authority pursuant to 20 C.F.R. § 656.30(d).

DOL guidance clearly states that the term “familial relationship” encompasses the “second cousin” relationship between the beneficiary and the petitioner’s chairman/shareholder.

The DOL website indicates that the agency did not publish the FAQ answer on familial relationships until July 28, 2014, after the filing of this appeal. However, we must apply the law as it exists at the time of adjudication. *See, e.g., Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (citing *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943)) (holding that a federal agency must follow a change in law during its proceedings because it cannot issue decisions contrary to existing legislation). Although the FAQ answer is not a statute or regulation, the FAQ answer interprets a regulation. The regulation at 20 C.F.R. § 656.17(l) indicates that the DOL must ascertain whether there is a “familial relationship” between an employer and an alien. The employer must also provide “[a] list of all corporate/company officers and shareholders . . . and a description of the relationships to each other and to the alien beneficiary.” 20 C.F.R. § 656.17(l)(2). Thus, the recent FAQ answer indicates that the DOL does not limit the broad language of the regulation, but rather implements its plain language without limitation.

Further, the FAQ answer is persuasive because it is consistent with earlier BALCA decisions. *See Matter of HealthAmerica*, 2006-PER-000001, 2006 WL 5040202 **8-9 (BALCA July 18, 2006) (*en banc*), *superseded by regulation on other grounds* at 20 C.F.R. § 656.11(b) (stating that the persuasive authority of an FAQ answer depends in part on its consistency with earlier or later pronouncements). Contrary to counsel’s argument, BALCA has found previously that cousin relationships between aliens and principals of their prospective employers constitute familial relationships that trigger concerns about the *bona fides* of job opportunities. *See, e.g., Matter of Bombay Jewelry Co.*, 2011-PER-02917, 2013 WL 4714549 *3 (BALCA Aug. 28, 2013) (upholding a certification denial in part because the alien was a cousin of two majority owners of the employer and a “second cousin” of a director who owned 15 percent of the company); *Matter of Nextlabs, Inc.*, 2011-PER-00673, 2012 WL 1448230 **2-3 (BALCA Apr. 19, 2012) (affirming a certification denial where the alien was a cousin of the employer’s owner and chief executive officer); *Matter of Jewelry Connections*, 2005-INA-129, 2006 WL 4579825 *4 (Aug. 8, 2006) (ruling that a labor certification was properly denied where the employer did not establish the *bona fides* of the job offer to a cousin of the employer’s owner).

BALCA has also issued decisions on the issue that predate the September 2, 2005 priority date of the instant petition. *See Matter of Dr. Lalita Reddy*, 94-INA-172, 1995 WL 445686 **1-2 (BALCA July 25, 1995) (upholding a determination that the job opportunity was open only to the alien in part because of a “family relationship” between the employer and the alien, the employer’s cousin); *Matter of Phone Masters*, 91-INA-277, 1992 WL 302690 ** 2-3 (BALCA Oct. 15, 1992) (affirming a certification denial for failure to establish the *bona fides* of a job opportunity in part because the alien was a cousin of the employer’s other four partners); *Matter of Foodmix, Inc.*, 90-INA-521, 1992 WL 133073 *4 (BALCA June 4, 1992) (finding that an employer did not establish the *bona fides* of the job opportunity in part because the alien’s cousin controlled one-third of the close corporation’s stock). Therefore, existing BALCA decisions support the conclusion that familial relationships and other close relationships may be sufficient grounds to prevent a job opportunity

from being *bona fide*. See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000) (holding that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.”).

Counsel also asserts that USCIS mistakenly found that the petitioner concealed the relationship between the beneficiary and the petitioner’s chairman/shareholder. Counsel argues that the chairman/shareholder and the beneficiary stated their names, including their common family names, on all papers submitted to the DOL and USCIS.

However, disclosure of common family names does not necessarily reveal familial relationships. Millions of people in many parts of the world who are not closely related share common family names. As noted above, the petitioner has the burden to demonstrate that a job opportunity is *bona fide* when asked. 20 C.F.R. §§ 656.3, 656.10(c)(8), 656.17(l); see *Matter of Amger, supra*. When specifically asked whether any familial relationship exists between the beneficiary and the petitioner’s principals on Question C.9 of the ETA Form 9089, the petitioner indicated: “No.”

Electronic labor certification is an attestation-based program. 20 C.F.R. § 656.10(c). Among other attestations, an employer must attest that the job opportunity has been and is clearly open to U.S. workers. 20 C.F.R. § 656.10(c)(8). Labor certification is an exacting process, designed to eliminate back-and-forth communications between applicants and the government, and to favor administrative efficiency over dialogue to better serve the public interest given the resources available to administer the program. *Matter of HealthAmerica, supra*, at **10-12. Thus, where the petitioner’s failure to disclose a relationship on ETA Form 9089, preventing the DOL from ascertaining whether a *bona fide* job opportunity exists pursuant to regulation, the Director properly found that the petitioner did not disclose the familial relationship between the beneficiary and the petitioner’s chairman/shareholder by stating “No” to Question C.9 on the ETA Form 9089.

Counsel also asserts that, while first cousins are legally barred from marrying each other in 31 U.S. states, all states permit second cousins to wed. However, counsel does not sufficiently explain the relevance of this argument, nor does the petitioner submit evidence or citations to support the asserted facts. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We find the DOL’s website and BALCA case law to be more persuasive because they address the issue with greater specificity and legal authority.

Based on the statement of the petitioner’s chairman/shareholder, the guidance on the DOL’s website, and BALCA case law, the record indicates that the beneficiary has a familial relationship with the petitioner’s chairman/shareholder.

The other enumerated factors stated in *Matter of Modular Container Sys., supra*, indicating that the job opportunity is not *bona fide*, do not appear to be present in the record. However, despite receiving opportunities in both the instant and prior petition proceedings, the petitioner has not established the *bona fides* of its job opportunity. See 20 C.F.R. § 656.17(l); *Matter of Amger Corp.*,

87-INA-545, 1987 WL 341738 *2 (BALCA Oct. 15, 1987) (*en banc*) (providing that, when questioned, an employer bears the burden of establishing the *bona fides* of its job opportunity).

USCIS first questioned the *bona fides* of the petitioner's job opportunity in its February 17, 2009 Notice of Intent to Deny (NOID) the petitioner's prior petition. In its response to the NOID and its submissions in the instant proceedings, the petitioner has argued that the relationship between the beneficiary and the petitioner's chairman/shareholder is not a "familial relationship." A petitioner bears the burden of proof to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). However, the record does not contain any affirmative evidence, such as documentation of the petitioner's recruitment efforts for the offered position, to demonstrate that the beneficiary exerts no influence or control over the job opportunity. See *Matter of Topco USA, Inc.*, 93-INA-00516, 1996 WL 86214 *4 (BALCA Feb. 23, 1996) (upholding certification denial based solely on the "family relationship" between the alien and his sister-in-law, an officer and director of the employer, where the record did not contain any evidence of the job opportunity's *bona fides*). The record does not contain documentation that a petitioner with a familial relationship to a beneficiary is required to submit pursuant to 20 C.F.R. § 656.17(l), including a list of all of its corporate officers and shareholders describing their relationships to each other and the beneficiary, or information on who conducts and controls the petitioner's recruitment and hiring. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

After consideration of the factors stated in *Matter of Modular Container Sys.*, *supra*, and the totality of the circumstances in the instant case, the petitioner failed to establish the existence of a *bona fide* job opportunity for United States workers. Therefore, the petitioner failed to overcome the Director's grounds for denying the petition.

Invalidation of the Labor Certification

The Director also invalidated the labor certification accompanying the instant petition. USCIS may invalidate a labor certification after its issuance upon a determination of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Willful misrepresentation of a material fact consists of a false representation of a material fact made with knowledge of its falsity. *Matter of Hui*, 15 I&N Dec. 288, 290 (BIA 1975). Fraud includes the same elements as willful misrepresentation of a material fact. *Matter of G-G*, 7 I&N Dec. 161, 164 (BIA 1956). However, a fraud finding also requires an intention to deceive the other party, and "the misrepresentation must be believed and acted upon by the party deceived to his [or her] disadvantage." *Id.*

A willful misrepresentation is established where the misrepresentation was deliberate and voluntary. *Matter of S- and B-C-*, 9 I&N Dec. 436, 445 (BIA 1960; A.G. 1961), *abrogated on another ground by Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Proof of intent to deceive is not required. *Id.*

Concealments or misrepresentations are material if they have “a natural tendency to influence the decisions of the [adjudicator].” *Monter v. Gonzales*, 430 F.3d 546, 553 (2d Cir. 2005) (citing *Kungys v. United States*, 485 U.S. 759, 770 (1988)). A concealment or misrepresentation has such a tendency if an honest representation “would predictably have disclosed other facts relevant to [the applicant’s] qualifications.” *Kungys v. United States*, *supra*, at 783.

In the instant case, the record does not indicate that the petitioner’s misrepresentation in response to Question C.9 on the ETA Form 9089 was material. As previously indicated, after learning of the relationship between the beneficiary and the petitioner’s chairman/shareholder, the DOL stated in a September 9, 2014 letter that it will not initiate labor certification revocation procedures in the instant matter. The record thus does not indicate that a timely disclosure of the relationship between the beneficiary and the petitioner’s chairman/shareholder would have predictably influenced DOL’s decision on the accompanying labor certification.

Therefore, the record does not support invalidation of the labor certification. Accordingly, we will withdraw that portion of the Director’s decision, and the validity of the labor certification will be reinstated. However, as the petitioner did not demonstrate the *bona fides* of the job opportunity, the petition will remain denied. In addition, other grounds preventing the approval of the petition exist.

The Beneficiary’s Qualifying Experience

Beyond the Director’s decision, the record does not establish the beneficiary’s qualifying experience for the offered position of wood carver.⁶

A petitioner must establish a beneficiary’s possession of all the education, training, and experience specified on the accompanying labor certification by the petition’s priority date. 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 a beneficiary’s qualifications for an offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

⁶ We may deny a petition that fails to comply with technical requirements of the law, even if the Director did not identify all of the denial grounds in the initial decision. *See Spencer Enters., 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. Dep’t of Justice*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that this office conducts appellate review on a *de novo* basis).

In the instant case, the accompanying labor certification states that the offered position requires at least 24 months of experience in the job offered. On the ETA Form 9089, the beneficiary claims under penalty of perjury to qualify for the offered position based on more than 60 months of full-time experience as a “carpenter/wood carver” at [REDACTED] from January 1, 1995 to September 1, 2000. No other experience is described on the labor certification.

A petitioner must support a beneficiary’s claimed qualifying experience with letters from employers giving the name, address, and title of the employer, and a description of the beneficiary’s experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a March 31, 2005 letter on [REDACTED] stationery. The letter describes the beneficiary’s job duties and states that the beneficiary worked full-time for the employer as a carpenter and wood carver from January 1995 to September 2000.

However, the beneficiary’s qualifying experience, as stated on the labor certification and in the March 31, 2005 letter, conflicts with claims made in a prior labor certification on behalf of the beneficiary. On March 12, 2001, the beneficiary stated on a labor certification filed by another employer that from January 1995 to September 2000 he worked full-time as a cabinet maker for [REDACTED]. In addition to indicating the beneficiary’s employment by a different employer, the 2001 labor certification states job duties different than those indicated on the instant labor certification and in the March 31, 2005 experience letter. The beneficiary repeated the employment information on the 2001 labor certification on his December 1, 2003 Form G-325A, Biographic Information, which he submitted with an application for adjustment of status.

An April 10, 2001 letter on [REDACTED] stationery also states that the beneficiary worked there full-time as a cabinet maker from January 1995 to September 2000. The letter contains the same job duties stated on the 2001 labor certification. The letter is signed by the same person who signed the 2005 letter and contains the same address as the 2005 letter.

The discrepancies in the names of the beneficiary’s claimed prior employers, his job titles, and his job duties from January 1995 to September 2000 cast doubt on the authenticity of the experience letters on his behalf and whether he possesses the qualifying experience for the offered position. See *Matter of Ho*, 19 I&N Dec. 582, 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence of record). The discrepancies also cast doubt on the veracity of the beneficiary’s statements on the labor certifications, suggesting that he misrepresented his employment history on at least one of the applications.⁷ *Id.* In any future filings, the petitioner must provide independent, objective evidence

⁷ In addition, the beneficiary’s December 1, 2003 Form G-325A states that the beneficiary was at that time employed by [REDACTED] as a cabinet maker. A letter from that employer, dated November 1, 2003, confirms that employment. However, this purported employment was not listed on the instant labor certification, which was filed September 2, 2005, despite the DOL’s instructions to “[l]ist all jobs the alien has held during the past 3 years.” This discrepancy in the beneficiary’s claimed employment history casts additional doubt on the credibility of the experience letters in the record and the experience claimed. See *Matter of Ho*, *supra*. at 591.

of the beneficiary's qualifying experience. *Id.* at 591-592 (stating that 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).

The record also indicates that the beneficiary would have been 14 years old when he purportedly began employment in January 2005. The beneficiary's age also casts doubt on his claimed qualifying experience for the offered position. *Id.* at 591.

The petitioner failed to provide credible evidence of the beneficiary's claimed experience. Therefore, the record does not establish the beneficiary's qualifying experience for the offered position by the petition's priority date. For this reason, the petition must also be denied.

Ability to Pay the Proffered Wage

Also beyond the Director's decision, the record does not establish the petitioner's continuing ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

In the instant case, the petitioner filed the petition on July 14, 2009. However, the petitioner's 2007 federal income tax return is the most recent evidence in support its ability to pay the proffered wage. The record does not contain copies of any annual reports, federal tax returns, or audited financial statements on behalf of the petitioner for 2008.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the petition's priority date merits dismissal of this appeal. While a petitioner may submit additional evidence to support its ability to pay, a petitioner may not substitute additional materials for evidence required by regulation.

In addition, USCIS records indicate that the petitioner has filed at least three other I-140 petitions for different beneficiaries since the instant petition's priority date. Accordingly, the petitioner must establish its continuing ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries of the other petitions from the priority date of the instant petition onward. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The record does not document the priority dates or proffered wages of the other petitions, or whether the petitioner paid any wages to the other beneficiaries. The record also does not indicate whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has not established its continuing ability



to pay the combined proffered wages of the instant beneficiary and the beneficiaries of its other petitions. For this reason, the petition must also be denied.

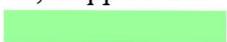
Conclusion

In summary, we withdraw the portion of the Director’s decision invalidating the labor certification. We will therefore reinstate the validity of the accompanying labor certification. However, we affirm the portion of Director’s decision finding that the petitioner did not establish the *bona fides* of the job opportunity. The petitioner failed to overcome this ground for denial, therefore, the petition will remain denied.

Beyond the Director’s decision, the record does not establish the beneficiary’s qualifying experience for the offered position or the petitioner’s continuing ability to pay the proffered wage. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act, and the petitioner failed to demonstrate its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

The appeal will be dismissed for the reasons stated above, with each considered an independent and alternative basis for denial. In visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act; *Matter of Otiende, supra*, at 128. Here, that burden was not met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The validity of the accompanying ETA Form 9089, Application for Permanent Employment Certification, Case No.  is reinstated.