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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 2 6 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (the director) denied the employment-based immigrant visa petition and the petitioner has appealed the director's decision to the Administrative Appeals Office (AAO). The decision will be withdrawn and the matter remanded to the director for action consistent with the following discussion and the issuance of a new decision.

The petitioner is a convenience store/gas station. It seeks to employ the beneficiary[1] permanently in the United States as a store manager pursuant to section 203(b)(3)(A(i)) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by DOL. The priority date of the petition is April 26, 2001, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d).

The record reflects that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Appellate review is conducted on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.[3] An application or petition that fails to comply with the technical requirements of the law may be denied even if the director 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 D.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ, supra.*

The director denied the Form I-140, Immigrant Petition for Alien Worker, on September 24, 2013, after determining that the record did not demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage from the petition's April 26, 2001 priority date forward. Specifically, the director found the record to establish the petitioner's ability to pay only during the years 2001 through 2008. He indicated that the petitioner had submitted no financial evidence to demonstrate its ability to pay during the period 2009 through 2012.

On appeal, counsel states that the beneficiary has ported to new employment under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and asserts that the visa petition is, therefore, approvable pursuant to the guidance provided in the May 12, 2005 memorandum

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[1] The instant petition is for a substituted beneficiary. The substitution of beneficiaries was formerly permitted by the U.S. Department of Labor (DOL). On May 17, 2007, DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the instant petition was filed with U.S. Citizenship and Immigration Services (USCIS) on July 16, 2007 and another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[2] 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.

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

issued by William R. Yates, Associate Director for Operations, USICS, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313),* HQPRD 70/6.2.8-P (May 12, 2005).[4] She contends that in cases where the beneficiary of an unadjudicated Form I-140 petition has ported to new employment under the provisions of AC21, the May 12, 2005 memorandum instructs USCIS adjudicators to approve the petition if it would have been approvable if adjudicated within 180 days of receipt and remains approvable but for an ability to pay or other issue relating to a time subsequent to the filing of the petition. Counsel maintains that the Form I-140 petition in the present case would have been approvable had it been adjudicated within 180 days of its July 16, 2007 filing since the record clearly demonstrates that the petitioner had the ability to pay the proffered wage at that time.

**Ability to Pay**

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be 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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that a job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Where a petitioner has filed petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each sponsored worker. *See Matter of Great Wall,* at 144-145; *see also* 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at

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[4] An amended version of this memorandum was issued by Michael Aytes, Acting Director of Domestic Operations, USCIS on December 27, 2005 and is referenced by counsel in the petitioner's April 26, 2013 response to the Request for Evidence (RFE) issued by the director on January 29, 2013.

an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[5] If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In the present case, the labor certification establishes that the proffered wage is $36,600.00 per year, based on a 40-hour week. Accordingly, the petitioner must demonstrate a continuing ability to pay the proffered annual wage of $36,600.00 to the beneficiary from the April 26, 2001 priority date onward.

As discussed in the director's September 24, 2013 decision, the record establishes the petitioner's ability to pay the beneficiary the proffered wage of $36,600.00 a year from 2001 through 2008, based on the net current assets reflected in its tax returns for these years. Moreover, in response to the Request for Evidence (RFE) we issued on June 17, 2014, the petitioner has submitted sufficient evidence to establish that, during these same years, it was also able to pay the proffered wage of a second beneficiary for whom it had filed a Form I-140 petition that had already been approved at the time of the instant petition's filing. *See Matter of Great Wall,* at 144-145; *see also* 8 C.F.R. § 204.5(g)(2). Therefore, the record demonstrates the petitioner's ability to pay the proffered wage from 2001 to 2008.

The director, however, also determined that the petitioner was required to establish its ability to pay the proffered wage during the years 2009 through 2012, as the beneficiary claimed to have ported to new employment in 2009 under AC21 could not be considered except in adjustment of status proceedings. Finding the petitioner had submitted no evidence to demonstrate its ability to pay beyond 2008, the director denied the visa petition.

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[5] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

However, in reaching his decision, the director appears to have overlooked existing USCIS guidance regarding the adjudication of unapproved Form I-140 visa petitions where a beneficiary's concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, has been pending more than 180 days, and he or she may have ported to new employment under the provisions of AC21.

The record establishes that the beneficiary in this case claims to have accepted new employment with [redacted] in 2009, more than 180 days after the filing of the Form I-485, but prior to USCIS adjudication of the instant Form I-140 petition. Therefore, as counsel states on appeal, USCIS adjudication of the petition is governed by the policy guidance set forth in USCIS' memoranda of May 12 and December 27, 2005. These memoranda state in pertinent part:

> **Question 1. How should service centers or district offices process <u>unapproved</u> I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?**
>
> **Answer:** If it is discovered that a beneficiary has ported off an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied.
>
> A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits . . . .

The director's decision in this case does not reflect the above guidance. It does not indicate that the director considered whether the petition would have been approvable had it been adjudicated within 180 days of its filing on October 5, 2007, a period during which the record demonstrates the petitioner's ability to page the proffered wage. Instead, the director's denial of the visa petition is focused solely on the petitioner's failure to establish its ability to pay the proffered wage from 2009 through 2012, which, per the above guidance, may not serve as the sole basis for denial if the petition was initially approvable.[6] Accordingly, the director erred in denying the visa petition based only on the petitioner's failure to establish its ability to pay in 2009 through 2012[7] and his September 24, 2013 decision will be withdrawn.

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[6] The beneficiary purportedly commenced employment with [redacted] in 2009. However, online records maintained by the Tennessee Secretary of State reflect that [redacted] did not begin operations until November 2009. *See* http://tnbear.tn.gov/ECommerce/Filing Detail.aspx (accessed August 28, 2014). Therefore, on remand, the petitioner should provide evidence of its ability to pay the beneficiary the proffered wage in 2009.

[7] While not required, the petitioner has submitted tax returns for [redacted] for the years 2009 through 2012, as well as

The petition may not be approved, however, as the record fails to demonstrate that the beneficiary was qualified to perform the duties of the offered position as of the April 26, 2001 priority date and the petition was, therefore, not approvable within the 180-day window indicated in the May 12 and December 27, 2005 memoranda. As noted above, the record of proceeding does not contain evidence of the petitioner's ability to pay the proffered wage during 2009. Pursuant to 8 C.F.R. § 204.5(g)(2), the director, on remand, should request evidence of the petitioner's ability to pay in 2009.

**Beneficiary Qualifications**

To establish that a beneficiary is qualified to perform the duties of the offered position, a petitioner must demonstrate that the beneficiary met all of the requirements set forth in the labor certification by the priority date of the visa petition, which in this case is June 13, 2002. 8 C.F.R. §§ 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the 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 present case, the labor certification at Part A.14. requires the beneficiary to have two years of experience in the job offered, i.e., as a store manager. In Part B.15. of the labor certification, which was signed by the beneficiary on July 14, 2007 as being true and correct under penalty of perjury, he states the following employment experience:

- Manager at [redacted] from January 1994 until January 2000;
- Manager at [redacted] from April 2003 until April 2004;[8]
- Manager at [redacted] from April 2004 until October 2004;[9]
- Cashier at [redacted] from October 2004 until June 2005;
- Cashier (part-time) at [redacted] from June 2002 until present (July 14, 2007); and
- Manager at [redacted] from June 2005 until present (July 14, 2007).

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Internal Revenue Service Forms W-2, Wage and Tax Statements, establishing the wages [redacted] paid the beneficiary from 2008 through 2012. However, pursuant to the guidance provided by the May 12 and December 27, 2005 memoranda, [redacted] is not required to establish its ability to pay in this matter.

[8] Based on the Forms W-2 submitted in response to the June 17, 2014 RFE, the name of this business is actually [redacted]

[9] Based on the Forms W-2 submitted in response to the June 17, 2014 RFE, the name of this business is [redacted] *dba* [redacted]

However, on September 7, 2007, counsel submitted an amended Part B. of the labor certification, signed by the beneficiary on August 6, 2007, and requested that it be substituted for the previously submitted Part B. "to reflect the correct qualifications of the Beneficiary." The amended Part B. provides different dates for the beneficiary's employment with as follows:

- Manager at from January 1994 until January 2000;
- Manager at from 2001 to 2001;
- Manager at from August 2002 until February 2003;
- Cashier at from October 2003 until October 2004;
- Cashier (part-time) at from June 2003 until present (August 6, 2007); and
- Manager at from June 2005 until present (August 6, 2007).

A Form G-325A, Biographic Information, submitted in support of the beneficiary's Form I-485, also signed by the beneficiary on August 6, 2007, reflects a third U.S. employment history, as follows:

- Manager at from January 1994 until January 2000;
- Manager at from August 2002 until February 2003;
- Manager at from February 2003 until September 2003;
- Manager at from October 2003 until October 2004;
- Cashier at from June 2003 until present; and
- Manager at from June 2005 until present.

On June 17, 2014, we issued a Request for Evidence (RFE) informing the petitioner that the inconsistencies in the above accounts of the beneficiary's prior U.S. employment cast doubt on the entirety of the employment history he had claimed on the labor certification, including his employment with the Pakistan, on which he based his eligibility for the offered position. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

To overcome the doubts raised with regard to the beneficiary's qualifying employment with the RFE requested independent, objective evidence of the beneficiary's U.S. employment history in the form of Internal Revenue Service Forms W-2, Wage and Tax Statements, Forms 1090 MISC, or earnings statements for the relevant periods. It also asked for the beneficiary's earnings statements or tax documents covering the period of his employment with or business records identifying the beneficiary as a employee during this same period. In the event that independent, objective evidence of the beneficiary's employment with could not be obtained, the RFE asked for evidence of the petitioner's unsuccessful attempts to acquire such documentation and reliable secondary evidence of the beneficiary's employment, as defined by the regulation at 8 C.F.R. § 103.2(b)(2). The RFE also noted that the July 11, 2007

experience letter from [redacted] President of [redacted], which had been submitted in compliance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), did not indicate that the beneficiary had been employed by the company on a full-time basis. Accordingly, the RFE instructed the petitioner to provide a new experience letter from [redacted] indicating the number of hours worked by the beneficiary on a weekly basis during the period of his employment.

In response to the RFE, counsel states that documentary evidence of the beneficiary's employment with [redacted] is not available. She asserts that [redacted] did not provide the beneficiary with earnings statements or tax documents during his employment, and did not keep business records identifying him as its employee. Accordingly, she indicates that the petitioner has provided secondary evidence of the beneficiary's employment in the form of two affidavits from individuals who are not parties to this proceeding and who have direct personal knowledge of the beneficiary's employment.

To resolve the inconsistencies in the U.S. employment histories provided by the beneficiary, counsel submits copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the beneficiary in the years 2001 through 2013. She contends that the inaccuracies in the employment dates provided by the beneficiary in the Part B. of the labor certification he signed on July 14, 2007 are the result of the haste in which the beneficiary initially provided this information and are the reason that the petitioner submitted an amended Part B. of the labor certification to USCIS on September 7, 2007. She also notes that there are inconsistencies between the employment listed on the amended Part B. of the labor certification, the beneficiary's Form G-325A and the newly-submitted Forms W-2. Counsel asserts that these additional inconsistencies may be explained by the fact that the beneficiary was not granted employment authorization until October 17, 2007 and that, as a result, he frequently changed jobs and has a difficult time remembering his employment history. Counsel further points out that [redacted] the most recent employer listed in the beneficiary's employment histories, is the successor-in-interest to [redacted], one of the employers identified in the submitted Forms W-2. Finally, counsel submits copies of two new statements from [redacted] to establish the beneficiary's hours of work at [redacted] as well as the July 11, 2014 translation of a statement submitted in connection with an "Application for Registration of Criminal Case."

Evidence of U.S. Employment

The Forms W-2 submitted by the petitioner indicate that the beneficiary was employed by the following businesses during the period 2001 through 2013:

- 2001: [redacted]
- 2002: [redacted]
- 2003: [redacted]
- 2004: [redacted]
- 2005: [redacted]

- 2006:
- 2007:
- 2008:
- 2009:
- 2010:
- 2011:
- 2012:
- 2013:

Although we note the petitioner's submission of the beneficiary's Forms W-2 in response to the RFE, we do not find this evidence to resolve the inconsistencies in the U.S. employment histories previously provided by the beneficiary. The overview of the beneficiary's employment history in the United States provided by his Forms W-2 contradicts not just the employment history he claimed in Part B. of the labor certification submitted on July 16, 2007, but also, as counsel acknowledges, that reflected in the amended version of Part B. submitted by counsel on September 7, 2007. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* at 591-92. Although counsel maintains that such inconsistencies are explained by the beneficiary's inability to remember the many jobs he has had in the United States, the assertions of counsel, without supporting documentation, are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We also note that counsel has submitted no evidence in support of her assertion that is the successor business to *Id.* Accordingly, the Forms W-2 do not resolve the inconsistencies in the several employment histories provided by the beneficiary. Instead, this evidence reveals new inconsistencies in the beneficiary's previous U.S. employment claims and, therefore, serves to cast further doubt on his claimed experience with *Matter of Ho*, at 591-92.

Affidavits Re Employment

In response to the RFE, the petitioner, through counsel, has asserted that no documentary evidence of the beneficiary's employment with exists. Instead, it has submitted two affidavits to establish this employment, the first from and the second from owners of businesses located near . However, the affidavits from Mr. and Mr. will not be accepted in lieu of the documentary evidence requested by the RFE as the petitioner has failed to comply with the requirements at 8 C.F.R. § 103.2(b), which states the following:

> (2) *Submitting secondary evidence and affidavits* – (i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary

> evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Counsel's assertion regarding the unavailability of independent, objective evidence to document the beneficiary's employment with appears to be based on statements made by the beneficiary. The beneficiary's statements are self-serving and do not provide the independent, objective evidence requested by the RFE. Inconsistencies must be resolved by the submission of "independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, at 591-92. The statements from Mr. and the affidavits from Mr. and Mr. do not discuss the unavailability of primary or secondary evidence. The RFE issued on June 17, 2014 specifically informed the petitioner that if it was unable to obtain the requested objective, independent evidence of the beneficiary's employment, it must provide proof that it had attempted to obtain this information and submit reliable secondary evidence of the beneficiary's employment, as defined by the regulation at 8 C.F.R. § 103.2(b)(2). The record, however, does not indicate that the petitioner attempted to obtain documentary evidence relating to the beneficiary's employment from either government offices. Further, the record also fails to reflect that, having failed to acquire direct proof of the beneficiary's employment with the petitioner sought secondary evidence pertinent to the beneficiary's employment.

As the petitioner has failed to demonstrate either that the documentary evidence requested by the June 17, 2014 RFE does not exist or cannot be obtained, or that relevant secondary evidence of the beneficiary's employment with does not exist or cannot be obtained, it has not satisfied the evidentiary requirements at 8 C.F.R. § 103.2(b)(2). In the absence of such evidence, the petitioner may not rely on the affidavits provided by Mr. and Mr. to meet the evidentiary requirements at 8 C.F.R. § 103.2(b)(2)(i). Therefore, the petitioner failed to provide independent, objective evidence sufficient to overcome the doubt case on the evidence.

However, even with the submission of the documentary evidence requested by the RFE, the submitted affidavits would not establish the beneficiary's employment with or that such employment provides him with the two years of management experience required by the labor certification.

In his June 27, 2014 sworn statement, attests that his business is located next to and that he knows the business' owner. He also states that he knows that the beneficiary worked at and that he was a good employee, "operating and monitoring the store." The second affidavit from also dated June 27, 2014, reflects that Mr. is the owner of a shop that is "very close" to In his affidavit,

Mr. attests to the beneficiary's employment as a manager with Neither affiant, however, indicates the specific time period during which the beneficiary worked for Further, they do not describe the specific managerial duties performed by the beneficiary or demonstrate the direct personal knowledge of the beneficiary's employment required by 8 C.F.R. § 103.2(b)(2). Accordingly, the submitted affidavits do not establish the beneficiary's employment at or that this employment provided him with the two years of experience required by the labor certification.

The translated statement that relates to an Application for Registration of Criminal Case filed by with the for the also fails to demonstrate the beneficiary's qualifications for the offered position. The statement, written by Mr. describes a robbery at that occurred around noon on July and appears to identify the beneficiary as the store's manager as of that date. However, the translated statement does not meet the evidentiary requirements set forth at 8 C.F.R. § 103.2(b)(3) as it is not certified by the translator as being complete and accurate, and does not contain the translator's certification that he is competent to translate the statement into English. Accordingly, it will not be accepted as evidence in this proceeding.

The translated statement also contains no information regarding the duties that the beneficiary performed as a manager at or the dates and hours of his employment. Further, it misspells the beneficiary's last name. We also find the date on which the statement was written to be illegible, both on the original document and on the translation. Moreover, the statement seems to suggest that the beneficiary was the only employee in the store during the mid-day robbery, and, therefore, raises questions regarding the reliability of the supervisory duties he claimed on the labor certification, where he stated that he was required to supervise and train employees, assign job duties and work schedules, and evaluate employee performance. For these reasons as well, the translated statement does not establish the beneficiary's experience with Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* at 591-92.

Experience Statements

The regulation at 8 C.F.R. § 204.5 states:

> (g) *Initial evidence* –
> (1) *General.* [E]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

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.

In response to the June 17, 2014 RFE, the petitioner has submitted copies of the two statements from the President of to establish the beneficiary's full-time employment. One of the copies is dated June 27, 2014 and notarized; the other copy is neither dated, nor notarized. Both statements are identically worded and report that the beneficiary worked for as its manager five days a week from 9 a.m. until 5 p.m. from 1994 to 2000, and that his duties included the monitoring of inventory, the ordering of supplies, the training of employees, the daily accounting of funds, the preparation of banking transactions and the maintenance of "text accounts."

While we note the information provided in the statements regarding the beneficiary's hours, we also observe that the copies of Mr. statements are marked by stippling, particularly the copy of the undated statement. Such mottling is often an indication that a statement has been manipulated and, therefore, raises questions as to whether the newly-submitted statements were provided by Mr. [10] Accordingly, the statements will be given reduced evidentiary weight in this proceeding and do not, therefore, establish that the beneficiary was employed by on a full-time basis as a manager during the period January 1994 until January 2000. Accordingly, the petitioner has not satisfied the employment verification requirements at 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A). As noted above, neither statement addresses the lack of secondary evidence to provide independent, objective evidence of the beneficiary's experience. While the statements do indicate that the beneficiary recently called Mr. neither states that the beneficiary requested secondary evidence of his purported employment. Therefore, the petitioner has failed to overcome the doubt cast on the evidence in the record.

The record also reflects that the beneficiary would have been only 16 years-of-age in January 1994, when he claims to have begun working for as a manager. The beneficiary, however, did not list any prior experience on the labor certification that would have qualified him for the managerial duties he claims to have begun performing for at the age of 16 years, including the supervision and training of employees, and the maintenance of payroll and tax accounts. Further, no other information in the record demonstrates that the beneficiary had such experience. In the absence of such evidence, the beneficiary's young age at the time he claims to have worked for as a manager raises further questions regarding his qualifications for the offered position. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* at 591-92.

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[10] No similar stippling is found in the copy of the July 11, 2007 experience statement signed by Mr. that was filed with the visa petition

We also note the petitioner's claim that did not provide the beneficiary with earnings statements or tax documents during his employment, and did not keep business records identifying him as its employee. However, the beneficiary has claimed to qualify for the offered position based on the managerial duties he performed for which involved the maintenance of payroll and tax records, the type of documentation that the petitioner claims was not provided to the beneficiary. Accordingly, as these documents would have been the responsibility of the beneficiary during the course of his purported employment, the petitioner's assertion that documentary evidence of the beneficiary's employment with cannot be provided serves to cast further doubt on the experience claimed by the beneficiary on the labor certification. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* at 591-92.

For the reasons just discussed, the record on appeal does not demonstrate that, on the April 26, 2001 priority date, the beneficiary had the two years of experience as a store manager required by the labor certification. Therefore, on appeal, the petitioner has failed to demonstrate that the beneficiary is eligible for classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act.

**Summary**

The director denied the visa petition on September 24, 2013, based on his determination that the petitioner had not established a continuing ability to pay the proffered wage. We have found the director to have erred in denying the petition solely on the basis of ability to pay and will withdraw his decision. Nevertheless, we will not approve the petition as we do not find the record to demonstrate that the beneficiary had the experience required by the labor certification as of the petition's April 26, 2001 priority date.

The director has not previously considered the beneficiary's qualifications for the offered position of store manager. Accordingly, this matter will be remanded to the director for his consideration and the issuance of a new decision. Prior to issuing his decision, the director shall provide the petitioner with the opportunity to supplement the record with additional evidence that responds to the preceding discussion.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER**: The director's decision is withdrawn. The matter is remanded to the director for action consistent with this decision and the issuance of a new decision.