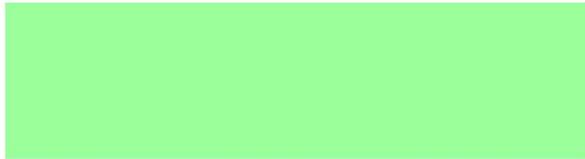




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: FEB 09 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:  
[REDACTED]

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. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. On January 22, 2010, the director served the petitioner with a notice of intent to revoke the approval of the petition. On March 15, 2010, the director revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director in accordance with the following.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a machine shop and seeks to permanently employ the beneficiary in the United States as a machinist. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3).<sup>1</sup>

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 priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 23, 2006. *See* 8 C.F.R. § 204.5(d).

On January 22, 2010, the director issued the petitioner a notice of intent to revoke (NOIR) the approval of the petition on the basis that Part C.9 of labor certification indicated that the beneficiary did not have a familial relationship with the owners, stockholders, partners, corporate officers, or the incorporators of the employer; and yet, the beneficiary indicated in an interview at the Embassy on 2009 that he was related to the owner and president of the petitioner. The director concluded that this false answer to Part C.9 of the labor certification constituted a willful misrepresentation of a material fact and that the approval of the petition should be revoked. Accordingly, the director provided the petitioner an opportunity to rebut the intent to revoke the approval of the instant petition.

On March 15, 2010, the director revoked the approval of the petition, concluding that evidence in the record indicated that the petitioner’s president and the beneficiary are related and that the failure to disclose this family relationship in Part C.9 of the labor certification constituted a willful misrepresentation of a material fact. The director found that the petitioner had not overcome these grounds for revocation as noted in the NOIR.

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, the petitioner asserts that: (1) the director's notice of intent to revoke did not properly include a specific statement of the facts or proper evidence underlying the intent to revoke the approval of the petition; and (2) the terms "related" and "familial relationship" do not necessarily mean the same thing and therefore the U.S. Citizenship and Immigration Services (USCIS) did not establish that the petitioner willfully misrepresented a material fact.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by him or her under section 204 for "good and sufficient cause." *See* section 205 of the Act; 8 U.S.C. § 1155. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of [the USCIS].

This means that notice must be provided to the petitioner before a previously approved petition can be revoked. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation,

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

As noted above, the director issued a notice of intent to revoke the approval of the instant petition (NOIR) on January 22, 2010. Specifically, the director noted that the beneficiary had attended a visa interview for consular processing on [REDACTED] 2009 at the U.S. Embassy in [REDACTED] in which he indicated that he was related to the petitioner's owner and president. The director noted that this statement conflicted with Part C.9 of the labor certification that asks whether there is a familial relationship between the petitioner's owner and the beneficiary, and which was checked "no." Accordingly, the director issued the NOIR and provided the petitioner an opportunity to respond.

On March 15, 2010, after considering the petitioner's response to the NOIR, the director revoked the approval of the petition. On appeal, the petitioner asserts that USCIS has not provided any evidence of the exact statement given by the beneficiary in his visa interview and whether the beneficiary was speaking his native [REDACTED] or whether his statements were accurately translated. In the director's NOIR, the petitioner was informed that the beneficiary stated that he was related to the petitioner's president; however, the petitioner has not indicated that the beneficiary's alleged statement in his visa interview was not correct and that he is not related to the petitioner's president. This demonstrates that the validity of the beneficiary's statement regarding his relationship to the petitioner's president is not in question. This statement that the beneficiary was related to the petitioner's president would be "good and sufficient cause" to question the original basis of the petition's approval.

We note that information available to USCIS regarding the beneficiary's visa interview further indicates that he was evasive in his answers and that he initially denied that he had family members living in the United States or who were working for the petitioner. Subsequently, the beneficiary admitted that he had family members in the United States, that the petitioner's president and owner is his cousin's husband, that his uncle has been working for the petitioner for over ten years, and that the majority of the petitioner's employees are related to him in some way.<sup>3</sup>

The petitioner further asserts that because the term "familial relationship" is not defined in the regulations, USCIS has not demonstrated that the terms "related" and "familial relationship" have the same meaning. Part C.9 of the labor certification asks the following:

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 term "familial relationship" is not a term of art that is defined in the regulations; rather the plain language and meaning of this language to an objective person is that Part C.9 asks whether the beneficiary bears a familial relationship, or is related, to any of the owners, stockholders, partners,

<sup>3</sup> The Form I-140 in the instant case states that the petitioner has four employees.

corporate officers, and incorporators. The Frequently Asked Questions (FAQs)<sup>4</sup> on “Familial Relationships” listed on the DOL’s Office of Foreign Labor Certification website corroborates this view on familial relationships and states the following, in pertinent part:

In order to provide the Certifying Officer (CO) the 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. *See also Matter of Modular Container, 1989-INA-228 (Jul. 16, 1991) (en banc).*

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. It also includes relationships established through marriage, such as in-laws and step-families. The term “marriage” will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated.

The purpose of Part C.9 of the labor certification is to ensure that the position offered is open to potential U.S. workers. Therefore, Part C.9 of the labor certification inquires as to whether the beneficiary is related to a person of influence in the petitioning entity to ensure that U.S. workers are not disadvantaged by hiring the beneficiary. The DOL adjudicator of an ETA Form 9089 will determine whether the job is subject to the alien’s influence and control by looking at the totality of the circumstances. *See Modular Container Systems, Inc., 1989-INA-228 (BALCA Jul. 16, 1991) (en banc).* The factors the DOL considers as part of the totality of the circumstances are whether the beneficiary: (1) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (2) is related to corporate directors, officers, or employees; (3) was an incorporator or founder of the company; (4) has an ownership interest in the company; (5) is involved in the management of the company; (6) is on the board of directors; (7) is one of a small number of employees; (8) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (9) is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. *Id.*

The same standard in *Modular Container, Inc.* has been incorporated into the PERM regulations<sup>5</sup> at 20 C.F.R. § 656.17(l), which states the following, in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or

<sup>4</sup> See U.S. Dep’t of Labor, Office of Foreign Labor Certification, “OFLC Frequently Asked Questions & Answers,” <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed December 17, 2014).

<sup>5</sup> See 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

In response to the director's NOIR, the petitioner references *Modular Container, Inc.* The petitioner states the following:

1. The position of machinist does not control or influence hiring decisions regarding the job for which labor certification is sought.
2. [The beneficiary] was not an incorporator or founder of the company.
3. [The beneficiary] does not have an ownership interest in the company.
4. [The beneficiary] is not involved in the management of the company.
5. [The beneficiary] is not one of a small number of employees. He doesn't even live in the US, never mind work for the company.
6. There are no unusual or specialized job duties or requirements.
7. [The beneficiary] is not so inseparable from the sponsoring employer because of his pervasive presence and personal attributes that the employer would be unlikely to continue in operations without the alien.

Here, the petitioner's statements alone do not satisfy the requirements of 20 C.F.R. § 656.17(1) as listed above. 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)). Further, the petitioner misinterprets Item 5, which requires that certain documentation be provided if the beneficiary is one of a small number of employees. This factor refers to the likelihood of family relationships in companies with fewer than 10 employees as stated in 20 C.F.R. § 656.17(1)(5) and whether the beneficiary is, or will be, part of such a company, not specifically whether the beneficiary is already working for the petitioner. Regarding the other factors stated above in 20 C.F.R. § 656.17(1), the record does not contain any evidence that the job opportunity

was available to all U.S. workers, such as evidence of the pre-filing recruitment for the position offered; any evidence of the establishment of the business entity; a list of all officers and shareholders;<sup>6</sup> the petitioner's financial history; or the name of the individual who is responsible for hiring.

On December 6, 2012, we referred the instant case to the DOL to seek advice regarding the validity of the labor certification application based upon the one identified familial relationship between the beneficiary and the petitioner's owner. We informed the DOL that the beneficiary appeared to be the nephew of the owner's spouse. Upon further review of the evidence in the record, we note that this was an inadvertent error and that the beneficiary is the cousin of the owner's spouse. On September 9, 2014, the DOL informed us that it did not intend to take any action on the instant labor certification, based on the limited information that it had regarding the relationship between the petitioner's owner and the beneficiary.

A subsequent closer review of the record, however, reveals further information not before the DOL indicating that the beneficiary is potentially related to all three of the petitioner's officers in a company of four individuals. The petitioner has not had an opportunity to address these facts but is required to do so in order to fully assess the regulatory requirements and *bona fide* nature of the job opportunity, as well as the factors of *Modular Container, supra*.

Section 204(b) of the Act requires USCIS to investigate the facts of each case (which often includes additional evidence than what is submitted to the DOL) to ascertain whether: (1) the facts stated in the petition are true, and (2) the beneficiary is eligible for preference under the category requested. An inherent part of this inquiry is in verifying that a *bona fide* job offer exists. An underlying rationale for the authority of USCIS to address whether a *bona fide* job offer exists is that, with every Form I-140 that is filed, USCIS receives substantive evidence that is not before the DOL pertaining to the *bona fide* nature of the job offer. The DOL regulation at 20 C.F.R. § 656.17(a)(3) states that "documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination." In other cases, even those in which the DOL has conducted an audit and requested additional information, USCIS may receive evidence or other information that the DOL is not entitled to receive, such as the evidence in this case regarding the beneficiary's visa interview at the U.S. Embassy in [REDACTED]. Therefore, although the DOL has the primary purpose of reviewing and certifying the labor certification, this does not foreclose USCIS from examining the labor certification based on the evidence in the record of proceeding as it forms the basis of the job offer.

We find BALCA's analysis set forth above in *Modular Container, supra*, and the regulations at 20 C.F.R. § 656.17(l), an appropriate method of analyzing the beneficiary's influence and control over the job opportunity and whether a *bona fide* job offer exists. Therefore, after further review of the instant case, we will withdraw the director's decision revoking the approval of the petition. We will

---

<sup>6</sup> The petitioner's 2006 tax return states that there are three shareholders, but the record does not contain the relevant schedules with the names of these shareholders.

remand the matter to the director to allow the petitioner an opportunity to address additional factors discussed in this decision so that the director may determine whether a *bona fide* job offer exists. Specifically, the petitioner must address the beneficiary's relationship to all of the petitioner's shareholders as set forth below. The petitioner should also be allowed to address the following issues.

We note that the 2006 tax return in the record states that the petitioner has three shareholders, who were collectively paid \$164,021.00 in officer compensation.<sup>7</sup> This tax return also states cost of labor of \$56,096 and no amount of salaries and wages paid. A review of Massachusetts business records states the following officers: [REDACTED], President and Director; [REDACTED] Treasurer and Director; [REDACTED] Secretary and Director. The record contains a Form DS-230, Application for Immigrant Visa and Alien Registration, signed by the beneficiary on April 1, 2009, which states that the beneficiary will live with [REDACTED] in [REDACTED]. This is the same address as [REDACTED] the petitioner's Secretary and Director. The beneficiary stated in the interview that he was related to the petitioner's owner, that his uncle has been working for the petitioner for over ten years, and that the majority of the petitioner's employees are related to him in some way. We note that the petitioner's treasurer and secretary share the same last name. Therefore, it appears that the beneficiary shares more than an attenuated relationship to only one relative of the petitioner's owner, but instead to possibly all three shareholders. As the petitioner has not had an opportunity to address these issues, we will remand the petition to the director to assess whether a *bona fide* job offer exists under 20 C.F.R. § 656.17(l).

Beyond the decision of the director,<sup>8</sup> the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The proffered wage in this case is \$15.21 per hour (\$31,636.80 per year).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>9</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12

<sup>7</sup> As noted above, the 2006 tax return does not contain the relevant schedules stating the shareholders and the amounts of compensation that each shareholder received. The petitioner must provide this documentation on remand.

<sup>8</sup> 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 (9<sup>th</sup> 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).

<sup>9</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011).

I&N Dec. 612 (Reg'l Comm'r 1967).

The record contains the petitioner's Form 1120S for 2006 which stated net income of \$15,761.00 on Schedule K.<sup>10</sup> Therefore, the petitioner did not have sufficient net income to pay the proffered wage of \$31,636.80 in 2006.

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.<sup>11</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's Form 1120S for 2006 stated net current assets of (\$20,355.00). Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2006.

The petitioner has not demonstrated that its tax return presents an inaccurate financial picture or that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its low amount of net income or its negative amount of net current assets for 2006.<sup>12</sup> The record contains only the petitioner's tax return for 2006 so that the petitioner's historical growth cannot be considered, or so that 2006 can be examined against any other tax year to examine whether it was an unusual year.

As the record fails to establish that the petitioner had the ability to pay the beneficiary's proffered wage, the petitioner should be allowed to address this issue on remand.

Also beyond the decision of the director, the petitioner has not established that the beneficiary meets the experience requirements 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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec.

<sup>10</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2012) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 28, 2014) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return for that year. The director considered the amount stated on line 21 of page one.

<sup>11</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>12</sup> The petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2).

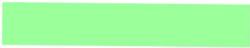
158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the position offered as a machinist. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a machinist for [REDACTED] from July 10, 2000 until January 26, 2006.

The beneficiary's claimed qualifying experience must be supported by 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 letter from the owner of [REDACTED] dated January 26, 2006, stating that the beneficiary has been employed there since July 10, 2000 and that he was hired as a machine tool specialist. This letter does not provide a description of the beneficiary's experience or his job duties to meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). It is unclear whether the job duties of a machine tool specialist and a machinist are the same. Further, in a prior non-immigrant visa application submitted in 2005, the beneficiary listed his position with this employer as an "operator." This casts doubt on the beneficiary's actual job duties and the amount of experience the beneficiary gained, if any, in the offered position of machinist. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* As the record fails to establish that the beneficiary is qualified for the offered position, the petitioner should be allowed to address this on remand.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of whether a *bona fide* job offer exists based on the beneficiary's potential relationship to three shareholders, whether the petitioner can establish its ability to pay the beneficiary's proffered wage, and whether the beneficiary has the experience required for the position offered. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

(b)(6)



*NON-PRECEDENT DECISION*

Page 11

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

**ORDER:** The director's decision of March 15, 2010 is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore we may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.