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



U.S. Citizenship
and Immigration
Services

DATE: FEB 26 2015

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition, which the petitioner appealed to the Administrative Appeals Office (AAO). The director's decision will be withdrawn, and the matter will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with the following decision.

I. PROCEDURAL HISTORY

The petitioner describes itself as a restaurant franchise. It seeks to employ the beneficiary permanently in the United States as its Quality Control Manager. To that end, it filed a Form I-140, Immigrant Petition for Alien Worker, indicating that this position qualifies as a skilled worker.¹ An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition. The director denied the petition, finding that petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The petitioner appealed the director's decision to our office on September 22, 2011. We conduct appellate review on a *de novo* basis.² Our review considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³ The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact.

We issued a Notice of Derogatory Information and Request for Evidence (RFE) to the petitioner and counsel. The petitioner responded, and we then notified the petitioner we would hold its appeal in abeyance, pending investigation and consultation with DOL regarding the beneficiary's undisclosed familial relationship to the petitioner's owner.⁴ On September 9, 2014, DOL notified our office of its determination that it will not pursue revocation of the petitioner's labor certification.

II. LAW AND ANALYSIS

A. Ability to Pay the Proffered Wage

The director denied the petition with a finding that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward. In her decision, the director relied upon the

¹ 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, 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.

² See 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ The instructions to Form I-290B, which are incorporated into the regulations, permit the submission of additional evidence on appeal. 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of the documents submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ See 8 C.F.R. § 103.2(b)(18).

petitioner's net income and net current assets as listed in the petitioner's 2008 and 2009 federal income tax returns. If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As the director failed to consider the totality of the circumstances in the instant case, we will remand the petition to allow the petitioner to perfect the record and demonstrate its ability to pay the proffered wage, as well as to provide it an opportunity to respond to derogatory information identified on appeal.⁵

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is the date DOL accepted the labor certification for processing.⁶ DOL accepted this labor certification on April 11, 2008. The labor certification indicates the following information: the position's annual proffered wage, \$56,000; and, the petitioner employed the beneficiary as of October 5, 2005, as its "Industrial Engineer." The petitioner's tax returns indicate it incorporated in [REDACTED] and structured itself as a C corporation with a fiscal year beginning October 1 and ending the following September 30. The petitioner stated it employed eight people on Form I-140; the labor certification indicated seven employees.

The petitioner must establish that a realistic job opportunity exists. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that a realistic job offer existed as of the priority date, and that the offer remained realistic for each year until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.⁸ USCIS requires a petitioner to demonstrate sufficient financial resources to pay a beneficiary's proffered wages,⁹ however, we will also consider the totality of the circumstances affecting a petitioner's business.

In determining the petitioner's ability to pay the proffered wage, we first examine whether the petitioner paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The petitioner provided Internal Revenue Service (IRS), Form W-2, Wage and Tax Statements documenting that it paid the beneficiary wages as follows: \$41,597.34 in 2008; \$43,742.40 in 2009; \$43,742.40 in 2010; \$52,460.00 in 2011; \$50,425.17 in 2012; and \$51,251.20 in 2013. These records fail to establish that the petitioner paid the beneficiary the full proffered wage, \$56,000, from the priority date onward.

⁵ 8 C.F.R. § 103.2(b)(16)(i) (requirement to advise the petitioner of derogatory information of which it may be unaware, and to provide an opportunity to present information on its own behalf).

⁶ 8 C.F.R. § 204.5(g)(2) (evidence of the ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements); 8 C.F.R. § 204.5(d) (defining priority date).

⁷ Fla. Dept. of St., Div. of Corp., <http://images.sunbiz.org/COR/2002/0815/80011208.tif> (accessed December 31, 2014).

⁸ *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2).

⁹ *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

Therefore, the petitioner must demonstrate its ability to pay the difference between the wages paid to the beneficiary, and the proffered wage, in each year from the priority date onward. The difference for each calendar year amounts to: \$14,402.66 in 2008; \$12,257.60 in 2009; \$12,257.60 in 2010; \$3,540.00 in 2011; \$5,574.83 in 2012; and \$4,748.80 in 2013.

As the petitioner failed to establish that it paid the beneficiary the proffered wage from 2008 onward, we will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.¹⁰ 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.¹¹ Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage, or that the petitioner paid total wages in excess of the proffered wage, is insufficient.

We rely on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.¹² Our analysis is without consideration of depreciation or other expenses.¹³

For a C corporation, we consider net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record includes the petitioner's response to our RFE, received on January 7, 2013. As of that date, counsel states the petitioner had not filed its fiscal year 2011 federal income tax return.¹⁴ The petitioner's tax returns list zero to negative net income for each year except fiscal year 2011.¹⁵ In fiscal year 2011, the petitioner reported \$227,751

¹⁰ *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).

¹¹ *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).

¹² *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084 (specifically rejecting the argument that we should consider income before expenses were paid rather than net income); *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

¹³ *River Street Donuts*, 558 F.3d at 118 (finding our policy of not adding depreciation back to net income is rational, because that the amount spent on a long term tangible asset is a "real" expense); *Chi-Feng Chang*, 719 F. Supp. at 537.

¹⁴ The petitioner's fiscal year encompasses October 1 to September 30 of the following year. As the petitioner is a C corporation, its federal income tax return is due the fifteenth day of the third month after the end of its tax year. See IRS, *Publication 509, General Tax Calendar*, <http://www.irs.gov/publications/p509/ar02.html> (accessed December 31, 2014). The petitioner's 2011 tax return filing deadline was December 15, 2012. While counsel, in his January 4, 2013 letter in response to our RFE, misstates the unavailable return as covering "Oct. 1, 2010 to September 30, 2011," the record fails to contain evidence indicating that the petitioner requested an extension to file its 2011 return. Going on record without supporting evidence is not sufficient to meet 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)).

¹⁵ The petitioner reported net income of (\$45,886) in 2007; (\$64,010) in 2008; (\$32,135) in 2009; \$0 in 2010; and (\$1,487) in 2012. It provided an incomplete copy of the 2008 return, omitting pages including the schedule for "other deductions." The petitioner included its 2011 and 2012 tax returns in filings for the beneficiary's nonimmigrant petitions.

in net income, in part due to \$306,475 in gains from the sale of business property as reported on IRS Form 4797, Sale of Business Property.¹⁶

Therefore, the petitioner lacked sufficient net income to pay the difference between the wages paid and the proffered wage for each year from the priority date, April 11, 2008, onward except for its fiscal year 2011.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, does not equal the amount of the proffered wage or more, we will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁷ Schedule L, lines 1 through 6, show a corporation's year-end current assets, including cash-on-hand. Lines 16 through 18 show its year-end current liabilities. 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 reported net current assets of \$13,325 in 2007, \$11,092 in 2008, \$25,550 in 2009,¹⁸ \$38,270 in 2010, \$16,187 in 2011, and (\$675) in 2012.

The chart below provides a comparison between the petitioner's fiscal year net current assets (NCA) and the remainder of the proffered wage (PW) for the overlapping calendar year.

Fiscal Year	NCA	Calendar Year	PW	NCA – PW Difference
2007: 10/07-9/08	\$13,325	2008	\$14,402.66	\$1,077.66
2008: 10/08-9/09	\$11,092	2009	\$12,257.60	\$1,165.60
2009: 10/09-9/10	\$25,550	2010	\$12,257.60	In excess
2010: 10/10-9/11	\$38,270	2011	\$3,540.00	In excess
2011: 10/11-9/12	\$16,187	2012	\$5,574.83	In excess
2012: 10/12-9/13	(\$675)	2013	\$4,748.80	\$4,748.80

The petitioner's tax returns demonstrate its ability to pay the difference between wages paid and the proffered wage based on net current assets in fiscal years 2009, 2010 and 2011. The returns reflect insufficient net current assets to pay that difference for fiscal years 2007 and 2008, and negative net current assets in 2012.

Therefore, from the date DOL accepted the labor certification for processing the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary and its net income or net current assets.

¹⁶ On remand, the petitioner should explain and document the impact of these substantial sales of its business property to its business operations and the position offered.

¹⁷ "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. *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000). "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹⁸ The petitioner submitted an amended tax return for fiscal year 2009. It is unclear if or when the petitioner amended the return, including Schedule L, as it is unsigned, undated, and shows no indication of filing with the IRS.

Counsel asserted in his brief on appeal that we should prorate the proffered wage for the portion of the year that occurred after the priority date. We informed the petitioner in our RFE that we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While we may prorate the proffered wage if the record contains evidence of net income and payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements and pay stubs, the petitioner had not submitted such evidence. In response to our RFE, the petitioner provides a payroll report which details the beneficiary's pay periods during 2008. Counsel asserts that this information reflects: (a) that the petitioner paid the beneficiary \$30,703.80 after the priority date; (b) that the prorated proffered wage for this period was \$40,658.95; and (c) that the petitioner's net current assets for fiscal year 2008,¹⁹ \$11,092, were sufficient to cover the difference between the wages paid and the prorated wage, or \$9,955.15, for that period. However, counsel's reliance on the petitioner's net current assets are misplaced. We stated in our RFE that we may consider the petitioner's net income earned over the same period of time, not the petitioner's net current assets. The petitioner's net current assets reflect a year-end prospective "snapshot" of the net total of its assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. They do not necessarily reflect income available earlier in the tax year. The petitioner failed to provide evidence of its net income earned after the priority date and through the end of calendar year 2008, preventing us from assessing whether it possessed sufficient net income to cover the remaining proffered wage during the same time period.

We may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In *Sonegawa*, the petitioner conducted business for more than 11 years, employed up to eight people, and routinely earned an annual income of about \$100,000. However, its federal income tax return for the year of the petition's filing reflected insufficient net income to pay the beneficiary's proffered wage. During that year, the petitioner moved its business, causing it to pay rent at two locations for a five-month period and to incur substantial relocation costs. The move also forced it to stop doing business briefly. Despite these difficulties, the Regional Commissioner found that the petitioner would likely resume successful business operations and had established its ability to pay the proffered wage. National magazines had featured the petitioner's work as a fashion designer. Her clients included beauty pageant winners, movie actresses, society matrons, and individuals included on lists of the best-dressed women in California. The petitioner also lectured on fashion design throughout the United States.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay a proffered wage beyond its tax returns. Relevant factors include: the number of years a business has existed; the established, historical growth of its business; its number of employees; the occurrence of uncharacteristic business expenditures or losses; its reputation within its industry; whether a beneficiary is replacing a current employee or an outsourced service; and other evidence of its ability to pay.

¹⁹ The petitioner's fiscal year 2008 net current assets relate to the period from October 1, 2008, through September 30, 2009; the priority date, April 11, 2008, falls during the petitioner's 2007 fiscal year.

The petitioner, like the employer in *Sonegawa*, is a small business whose low net income contrasts with its employment of eight workers. Unlike in *Sonegawa*, where the employer was in operations for over 11 years, the petitioner here was in operation for three years when it hired the beneficiary, and it filed the labor certification in its sixth year of operation. However, its ongoing operation from 2002 to present reflects a continuing expectation of viability. The petitioner's length of operations, over 10 years, its employment of the beneficiary since 2005, its claimed employment of seven other workers, and the relatively low deficits between the wages it paid the beneficiary and its net current assets, represent positive factors reflecting that the petitioner, in the totality of the circumstances, may be able to establish its ability to pay the proffered wage from the priority date onward.

The petitioner's gross sales, income, substantial sales of business property, diminishing officer compensation and wages are negative factors. The petitioner's gross sales remained steady during its fiscal years 2007 to 2009, increased substantially in 2010 before dropping approximately 65% in 2011. Its sales recovered in 2012, approximately doubling that year, although they remained its second lowest year on record. During the period of fiscal years 2009 to 2012, the petitioner paid substantially less in officer compensation year-over-year: in 2009, it paid \$45,000, which decreased to \$29,427 (35%) in 2010 and then another 15% in 2011, before the petitioner paid no officer compensation in 2012.

The petitioner's payroll remained stable, within the range of \$102,502 to \$105,436, during its fiscal years 2007 to 2009. However, the petitioner claims to employ eight workers; given the wages paid to the beneficiary, in excess of \$40,000 each year, the remaining amount available to the petitioner's other seven to eight employees is not substantial. See *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1345-46 (N.D. Ga. 2013) (low salaries combined with inconsistencies in the record undermine the petitioner's ability to pay). The petitioner did not report paying any wages, salaries, or costs of labor in fiscal year 2010, which conflicts with the W-2s for the beneficiary in the record that document wages paid.²⁰ The petitioner has not substantiated any reason for these declines.

The record contains little evidence of the petitioner's operations and no evidence of its reputation. The filing before the director contained a single-page letter from the petitioner, stating that a position is available to the beneficiary, and listing the position's wage and duties as described on the labor certification; it failed to describe the petitioner, its business environment, operations, or reputation.

In response to our RFE, the petitioner submitted a second single-page letter from its president, with a [REDACTED] logo in the letterhead. This letter also fails to discuss any factors similar to those in *Sonegawa*, or describe its business, reputation, or operations. Also, the use of the [REDACTED] logo on the petitioner's letterhead conflicts with other evidence in the record. The petitioner listed its business as a "franchise restaurant" on Form I-140. The petitioner operated a restaurant known as [REDACTED] according to its taxes and a November 14, 2002, Certificate of Registration from the Florida Department of Revenue. The record fails to indicate whether the

²⁰ The petitioner's 2010 tax return lists a \$122,386 deduction for "payroll services." The record fails to document what portion of this amount, if any, represents wages. Its previous tax returns list expenses for payroll services separately and in addition to wages paid.

petitioner continues to operate a [REDACTED] restaurant at the worksite specified on the labor certification in addition to the [REDACTED] restaurant.

In addition, the record indicates that the petitioner employs the beneficiary as its Industrial Engineer, and not in the position offered or a substantially comparable position.²¹ The petitioner stated on Form I-140 that the position offered is a new position, therefore, the beneficiary will not replace a current worker or an outsourced service. The petitioner has not indicated whether it intends to hire a new worker to replace the beneficiary, its Industrial Engineer, and whether that position will continue to exist after the beneficiary commences employment in the position offered, which would increase its operational costs.

While positive factors, similar to those in *Sonegawa*, exist in the record, substantial negative factors and doubt exist in the record. For example, the petitioner's operations are not described, nor is its reputation; the petitioner's 2010 tax return does not document wages paid, and it provided an incomplete copy of its 2008 return. On remand, the petitioner must provide its fiscal year 2013 tax return to document that the petitioner is an ongoing concern with continued expectation of increasing business and profits, and the beneficiary's 2014 W-2 statement. In addition, the petitioner should provide complete copies of its 2014 quarterly tax returns, IRS Forms 941, or other independent, objective evidence documenting the number of workers it employs. The petitioner may provide additional evidence documenting its reputation, any uncharacteristic expenses, and other relevant evidence.

The remaining issues on appeal are: (1) whether the beneficiary possesses the experience required for the position offered; and (2) whether the evidence of record establishes that the job opportunity is *bona fide* and clearly open to all U.S. workers.²²

B. Beneficiary's Qualifications

The record on appeal fails to establish the beneficiary's qualifications 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.²³ In evaluating the beneficiary's qualifications, we look to the job offer portion of the labor certification to determine the required qualifications for the position. We may not ignore a term of the labor certification, or impose additional requirements.²⁴

²¹ The petitioner asserted in part J.21 of the labor certification that the beneficiary did not gain any experience with the petitioner in a substantially comparable position. See 20 C.F.R. § 656.17(i)(5)(ii) (defining a "substantially comparable" job or position to be one requiring performance of the same job duties more than 50 percent of the time).

²² Our *de novo* review of a petition includes grounds for denial not identified in the initial decision. *Supra* n. 2; see *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

²³ 8 C.F.R. §§ 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

²⁴ 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).

The labor certification states that the offered position requires 48 months of experience in the position offered, Quality Control Manager. The petitioner required no training, education, or specific skills, and indicated that it will not accept an alternate combination of education and experience, or permit experience in an alternate occupation.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Shift Manager of Quality Control with [REDACTED] in [REDACTED] Israel, from February 1, 1995 to September 30, 2005. No other qualifying experience is listed.²⁵

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. 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from the human resources manager at [REDACTED] dated March 10, 2005. It indicates that the beneficiary commenced employment with [REDACTED] in "February 1995" and that he held "progressively responsible positions culminating in the position of Shift-Manger [*sic*] of Quality Control at the production line of Polypropylene products." The letter indicates the beneficiary first held the position of "Shift-Manager Coordinator," and provides a description of this position. The letter further states that "[in] 2002, [the beneficiary] was promoted to Shift-Manager – Quality Control," and provides a description of this position. The letter does not indicate the date of the end of the beneficiary's employment; therefore, the letter would only establish the beneficiary's employment through March 10, 2005, the date of the letter's signing.

While this letter purports to be from the beneficiary's previous employer, and appears to provide the name, address, and title of the employer, and a description of the beneficiary's experience as required by regulation, the letter cannot be accepted as credible evidence of the beneficiary's purported experience. The letter contains several factors suggesting it may not be authentic. We note that while the text of the letter is clear and legible, the letterhead is faded and illegible. There are several misspellings and grammatical errors throughout the letter. In addition, the author's typed name appears to be in a different font from the body of the letter, is faded, and contains evidence that suggests it was photocopied from another document. Similarly, the author's signature is also faded and appears to be photocopied from another document. We note that while the beneficiary stated on the labor certification that he was employed for approximately seven years by this company, he listed the company's name as [REDACTED] whereas the letter provided states the company's name to be [REDACTED]. Further, while the beneficiary attested under penalty of perjury on the labor certification that he held a single position, Shift Manager of Quality Control, from February 1995 to September 2005, the letter asserts that the beneficiary held multiple positions with differing duties during that time period. These issues cast doubt on the beneficiary's claimed experience, and the authenticity and credibility of the provided experience letter. *Matter of Ho*, 19 I&N Dec. 582, 591

²⁵ The labor certification also documents the beneficiary's current position with the petitioner, as a full-time Industrial Engineer beginning on October 5, 2005. However, the petitioner indicates that this position does not qualify the beneficiary for the position offered, because it indicated in Part J.20 and 21 that the beneficiary did not gain any qualifying experience with the petitioner in a substantially comparable position, and that the petitioner did not pay for any of the beneficiary's education or training for the position offered.

(BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592. The record contains no other evidence of the beneficiary's purported qualifying experience.

Even if we were to accept this letter, it fails to document that the beneficiary possessed the experience required for the position offered. On the labor certification, the beneficiary stated that he qualified for the job opportunity based on his experience as a "Shift Manager of Quality Control" which began February 1, 1995. The letter provided, however, states that he held this position only from an undisclosed month in 2002 until the date the letter was written, March 10, 2005. Even if the beneficiary were promoted on January 1, 2002, and remained in that position through September 30, 2005, the last day of employment stated on the labor certification, this would only equate to 1,368 days of employment experience (44 months and 29 days) which is short of the required 48 months of experience required.

In addition, the record fails to establish that the beneficiary's employment with [REDACTED] in any position, would meet the requirements of the labor certification. We must examine the beneficiary's experience in light of the requirements of the labor certification. *Madany*, 696 F.2d at 1114. The job opportunity requires 48 months of experience in the position offered, Quality Control Manager, which includes the following job duties:

Will be responsible for setting up and directing the development, execution, and maintenance of quality control standards. Assess and test equipment for quality standards. Will establish and enforce quality control procedures. Will scrutinize, test and evaluate personnel and work sites to ensure quality control standards are being met. Will direct activities that ensure quality control standards of company are met.

While the beneficiary provided a description of his experience with [REDACTED] that appears similar to the job duties for the position offered,²⁶ the letter from [REDACTED] provides a detailed description of his experience as a Shift-Manager – Quality Control. It states that he oversaw [REDACTED] polypropylene line of production, establishing procedures to maintain quality and reliability, and safety requirements. In addition, the beneficiary's duties included:

[The beneficiary] establishes a program to evaluate precision and accuracy of production equipment. He directs activities with regard to the development, implementation and maintenance of quality standards such as those concern by the

²⁶ The beneficiary attested that his experience with [REDACTED] consisted of the following job duties: "Established procedures for maintaining high standard of quality and reliability. Determined and enforced quality and safety requirements. Developed and initiated standards and methods for inspection, testing and evaluating. Established a program to evaluate precision and accuracy of production equipment. Directed activities with regard to the development, implementation and maintenance of quality standards."

international expecification [*sic*] of ISO 9001 (production quality controls), ISO 9002 (production quality controls), ISO 14001 (environment quality controls) and ISO 9001 (2004 new edition of production quality controls).

While the position offered is entitled “Quality Control Manager,” the record establishes that the petitioner operates a franchise fast-food restaurant in a mall food court; the petitioner states on Form I-140 that its business is a “franchise restaurant,” and the worksite address is that of the [REDACTED] Mall in [REDACTED] Florida. However, all of the beneficiary’s claimed qualifying experience involves quality control at a chemical plant that develops polypropylene products for consumer, construction and agricultural uses.²⁷ The experience letter provided states that [REDACTED] “is involved in [the] production of Polypropylene products like equipment for [REDACTED] office equipment and packing products, also products based by polycarbonate plastic for the construction and agriculture uses.” The petitioner has not explained how the beneficiary’s experience with quality control in an industrial factory establishes that he has experience in the position offered, as a Quality Control Manager in a fast-food restaurant. The labor certification requires 48 months of experience in the position offered, and does not permit an applicant to qualify based on experience in an alternate occupation.

The Board of Alien Labor Certification Appeals (BALCA) interprets that “experience in the job offered” is experience performing the key duties of the job opportunity, specifically the amount of experience required in H.6 on the form with the duties listed in H.11. *See Matter of Symbioun Technologies, Inc.* 2010-PER-01422, 2011 WL 5126284 *2 (BALCA 2011). Simply stating similar job titles or listing the same duties on a labor certification for the position offered and a beneficiary’s prior employment is insufficient to establish the beneficiary’s qualifications for the position offered. *See Z-Noorani, Inc. v. Richardson*, 950 F.Supp.2d 1330, 1340 (N.D. Ga. 2013) (finding that a cursory list of a beneficiary’s duties failed to clarify whether the employment was full- or part-time and failed to specifically describe the nature of the employment as required by 8 C.F.R. § 204.5(g)(1)); *Matter of Maple Derby, Inc.*, 89-INA-185, *4 (BALCA 1991) (*en banc*) (citing *Integrated Software Systems, Inc.*, 88-INA-200 (BALCA 1988)). When considering a beneficiary’s experience, BALCA looks to whether the duties performed by the beneficiary were substantially similar to the duties of the position offered. *Maple Derby, Inc.* at *3 (citing *Advanced Business Communications*, 88-INA-36 (June 30, 1989); *Showboat Restaurant*, 89-INA-27 (January 31, 1990)). The beneficiary is not qualified for the position offered when the experience is in a general field, and the experience fails to correlate to the offered position’s duties. *Maple Derby, Inc.* at *3; *see Pennsylvania Home Health Services*, 87-INA-696 (BALCA 1988) (a beneficiary’s decade of experience as a registered nurse failed to satisfy the experience requirement of one year of experience as a nurse manager). However, BALCA found a beneficiary to meet the stated qualifications for an accountant position based on his experience as an assistant accountant and auditor because his duties in those positions were “substantially similar” to the key duties of the

²⁷ [REDACTED] merged with another company, [REDACTED] in 2011; both companies were industrial manufacturers of “polycarbonate multi-wall sheets.” *See* [REDACTED] “About [REDACTED] Group,” [http://www.\[REDACTED\].com/about/the-group](http://www.[REDACTED].com/about/the-group) (accessed December 31, 2014) (describing the company as [REDACTED] and “one of the leading international specialist manufacturers of thermoplastic sheets”).

position offered. *Maple Derby, Inc.* at *5.

Here, the beneficiary's summary of experience with [REDACTED] as stated on the labor certification, appears to directly correlate to the job duties stated on the labor certification. However, the specific description of the beneficiary's experience, as documented by the letter from [REDACTED] fails to correlate to the offered position's duties. The beneficiary's experience in industrial or chemical quality control, if properly established, does not appear to relate to the duties of the offered position of Quality Control Manager for the petitioner's single fast-food franchise. We do not reach a conclusion on whether this experience would qualify as a related occupation because the petitioner stated on the labor certification that will not accept experience in an alternate occupation. The record does not include documentation regarding the petitioner's operations or explain how the beneficiary's experience correlates to the position offered. The experience letter from [REDACTED] fails to establish that the beneficiary possessed 48 months of experience in the key duties of the position offered.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. On remand, the petitioner may provide evidence of its operations and the work environment, and of the beneficiary's experience, describe the job duties in detail and establish how the beneficiary's experience correlates to the position offered.

C. *Bona Fide* Job Opportunity

The record also fails to establish that the labor certification and petition represent a *bona fide* job opportunity. Employers must attest on the labor certification 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) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)). 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 petition's denial where the labor certification was invalid for the area of intended employment). The requirements for the job opportunity, as specified on the labor certification, must represent the petitioner's actual minimum requirements. *See* 20 C.F.R. §§ 656.17(h), (i)(1).

The record raises issues suggesting that a *bona fide* job opportunity, as described on the labor certification, may not exist. These include the following questions: whether the description of the job opportunity, including the work location, is accurate, and; whether the labor certification states the actual minimum requirements for the job opportunity.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). As noted above, on Form I-140, the petitioner describes itself as a franchise restaurant. While the petitioner's taxes for 2008 through 2011 identify that it is doing business as

the petitioner's most recent letter and its 2012 taxes indicate that it is doing business now as a franchise restaurant. The petitioner lists the beneficiary's worksite as a food court in the Mall in Florida on the labor certification and the petition.²⁸ However, the record casts doubt on whether the worksite stated on the labor certification and petition is accurate. The petitioner's nonimmigrant visa application, requesting an extension of H-1B nonimmigrant status on behalf of the beneficiary, contains a September 17, 2014, letter that describes the petitioner as follows:

is one of a group of five companies which operate fast food restaurants. The group of companies is owned by an individual investor and operates four franchises, and manages the operations of the group pursuant to management agreements to operate [the five restaurants]. is located in Mall ... The restaurants are located in

The labor certification and the petition fail to state any work location beyond the "food court" location; the labor certification and the petition also fail to state any requirements for multiple work sites or travel. Likewise, the petitioner's H-1B petition and ETA Form 9035, Labor Condition Application for Nonimmigrant Workers, both state a single work location, Florida. The most recent Form I-129, Petition for a Nonimmigrant Worker, specifically states in Part 5.5 that the beneficiary will not "work off-site." We note that that three of the locations stated in the petitioner's letter, are located in Florida, a different metropolitan division (with different prevailing wages) than the worksite specified on the labor certification.²⁹ It is unclear whether the job opportunity is anticipated to include the management of those locations.

Also, it does not appear that the job duties for the proffered position as stated on the labor certification are accurate. As noted above, the position offered is for a Quality Control Manager, with the following job duties:

Will be responsible for *setting up and directing the development*, execution, and maintenance of quality control standards. Assess and test equipment for quality standards. Will *establish* and enforce quality control procedures. Will scrutinize, test and evaluate personnel and work sites to ensure quality control standards are being

²⁸ The petitioner listed Florida, as the worksite address on the labor certification. The petitioner's stationary now indicates its address is Florida. The designator "FC" appears to stand for "food court," indicating that the petitioner's location is a restaurant located within the Mall in Florida.

²⁹ These locations had a prevailing wage of \$65,229 per year in 2008 (a Level 3 wage for an Industrial Engineer), which exceeds the proffered wage of \$56,000 certified by DOL based on the single worksite location disclosed by the petitioner. See Foreign Labor Certification Data Center, Online Wage Library, "FLC Wage Results" available at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2112&&year=8&source=1> (accessed February 5, 2015); cf. <http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2112&&year=8&source=1> (accessed February 5, 2015).

met. Will direct activities that ensure quality control standards of company are met.

(Emphasis added.)

A review of [REDACTED] website demonstrates that quality control procedures are already established under the terms of its franchise agreement. See [REDACTED] “What is a Franchise Agreement,” [http://www.\[REDACTED\].com/#franchise-agreement](http://www.[REDACTED].com/#franchise-agreement) (accessed January 5, 2015) (stating that the “franchisee agrees to operate the business in accordance with [REDACTED] *pre-established standards of quality, service, cleanliness and value*”) (emphasis added). While the petitioner has not provided a copy of its franchise agreement, many of the responsibilities described appear to be under the control and discretion of the franchisor, and not the petitioner. *Id.* (stating that the franchisee must use [REDACTED] proprietary recipes, equipment layout, the formula and specifications for menu items, method of operation, inventory control, bookkeeping, accounting and marketing). The petitioner appears to operate a single location of a franchise fast-food restaurant, which is subject to the controls and conditions of its franchise agreement. In addition to being contractually bound by the quality standards of its franchise agreement, the petitioner’s operations and food service employees are also subject to government health and food regulations.³⁰ As it appears that quality control standards and procedures are already *set up, directed and developed*, doubt is cast as to whether the description of the job duties for a Quality Control Manager, as listed on the labor certification, are accurate.

The petitioner states that the beneficiary is not currently employed in the position offered, and that the position offered is for a new position. As the petitioner claims to be a going concern from 2002 onward, and has not employed a Quality Control Manager previously,³¹ the record does not support the conclusion that the job opportunity described on the labor certification exists as a full-time position carrying out the duties stated. These factors also call into question whether the position described on the labor certification accurately defines the job opportunity.

Based on the description of duties provided by the petitioner, DOL classified the position under the Standard Occupational Classification, 17-2112.00, for “Industrial Engineers.” See <http://www.onetonline.org/link/summary/17-2112.00> (accessed January 5, 2015) (describing an industrial engineer’s duties to include “[d]esign, develop, test, and evaluate integrated systems for managing industrial production processes, including human work factors, quality control, inventory control, logistics and material flow, cost analysis, and production coordination.”). It is unclear if DOL was aware of the petitioner’s business or the environment in which the job opportunity existed.³² DOL must “evaluate the employer’s actual minimum requirements,” and the petitioner’s

³⁰ See, e.g. Fla. Stat. § 381.0072 (“Food Service Protection”). The Florida Department of Health adopts and enforces rules that provide the standards and requirements for the storage, preparation, serving, and display of food in food service establishments. *Id.*; see also Fla. Stat. §§ 500, 509.

³¹ On Form I-140, Part 6, Item 8, the petitioner stated the position offered is a new position.

³² We requested copies of the petitioner’s correspondence with DOL, which would include the petitioner’s response to DOL’s audit request, its recruitment report, and copies of the advertisements placed and resumes received. The petitioner did not provide any of this evidence in response to our RFE. The failure to submit requested evidence that precludes a material line of inquiry is sufficient grounds to deny a petition. See 8 C.F.R. § 103.2(b)(14).

“job requirements, as described, must represent the employer’s actual minimum requirements for the job opportunity.” 20 C.F.R. §§ 656.17(i), (i)(1). This is necessary in order for DOL to ascertain whether U.S. applicants exist. The face of the labor certification does not appear to convey to DOL that the petitioner operated a franchise restaurant, or that the job duties stated would occur within a single franchise restaurant location. *See International School of Dog Grooming*, 93-INA-300 (BALCA 1995) (the job opportunity, duties, requirements, and minimum qualifications must be clearly and accurately described in the labor certification, otherwise, qualified U.S. workers will not be made aware of appropriate job opportunities); *see also* 20 C.F.R. § 656.17(f)(3) (requiring that advertisements contain a description of the vacancy specific enough to apprise U.S. workers of the job opportunity).

These issues cast doubt on whether the petitioner will employ the beneficiary full-time in the position offered at the location stated. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

The record on appeal fails to demonstrate that the job opportunity described on the labor certification represents a *bona fide* job opportunity open to any qualified U.S. worker. On remand, the petitioner must establish that the proposed employment will be in accordance with the terms of the labor certification. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

III. CONCLUSION

The director denied the petition, finding that the petitioner failed to establish its ability to pay the beneficiary’s proffered wage from the priority date onward. The petitioner failed to overcome this ground for denial on appeal. In addition, the record on appeal fails to establish that the beneficiary possessed the minimum experience required by the terms of the labor certification, and that a *bona fide* job opportunity exists. However, as these issues were not identified by the director’s initial decision, and in order to preserve the petitioner’s right of appeal, we will remand the matter to the director for consideration of these issues, as well as any other issue the director deems appropriate, and to provide the petitioner an opportunity to address this derogatory information. 8 C.F.R. § 103.2(b)(16)(i). The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

In visa petition proceedings, the petitioner bears the burden of establishing 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, and the petition is remanded to the director for issuance of a new decision.