



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-G-M-&C- LLC

DATE: OCT. 26, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of contract placements to telecommunications network operators, seeks to permanently employ the Beneficiary as vice president of business development under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i).¹ The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Beneficiary's qualifications for the offered position as specified on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The Director also found that the record did not demonstrate the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on April 1, 2015.

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

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.²

I. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A beneficiary must meet all the requirements of an offered position specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of*

¹ Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing permanent, skilled labor (requiring at least two years training or experience), for which qualified workers are unavailable in the United States.

² The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

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Wing's Tea House, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of the offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1010-12 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

The instant petition's priority date is February 15, 2013, which is the date the DOL accepted the accompanying labor certification application for processing. See 8 C.F.R. § 204.5(d). The labor certification states the minimum requirements of the offered position of vice president of business development as a high school diploma or a foreign equivalent, plus at least 120 months of experience in the job offered.

The Beneficiary attested on the labor certification to about 147 months of full-time, qualifying experience before starting work for the Petitioner in the offered position on April 23, 2012. He stated that he gained the following experience:

- About eight months as director, sales solutions for [REDACTED] in the United States from August 28, 2011 to April 17, 2012;
- About 22 months as a systems design & performance engineer for [REDACTED] in the United States from October 21, 2009 to August 20, 2011;
- About 19 months as a Utran/OSS SME for [REDACTED] in the United States from March 10, 2008 to October 20, 2009;
- About 72 months as a senior data center engineer for [REDACTED] in the United Kingdom from March 2, 2002 to March 8, 2008; and
- About 26 months as an RMC enhancement engineer for [REDACTED] in the United Kingdom from January 2, 2000 to March 2, 2002.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(l)(3)(ii)(A); see also 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employers, and a description of a beneficiary's experience. *Id.*

If a required document is unavailable, a petitioner must demonstrate its unavailability and submit pertinent secondary evidence, such as government or business records. 8 C.F.R. § 103.2(b)(2)(i). If secondary evidence is also unavailable, a petitioner must demonstrate the unavailability of secondary evidence and submit two or more affidavits by non-parties who have direct personal knowledge of the events and circumstances. *Id.*

In the instant case, the Petitioner submitted letters in support of the Beneficiary's claimed experience on the stationeries of [REDACTED] and [REDACTED]. Together, these letters document about 41 months of qualifying experience. However, the record does not contain letters from the Beneficiary's three other claimed former employers: [REDACTED]

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Affidavits by the Beneficiary, dated October 16, 2014, accompanied the petition and attest to his claimed experience with [REDACTED]. In response to the Director's notice of intent to deny (NOID), dated February 18, 2015, the Petitioner also submitted copies of: the Beneficiary's purported [REDACTED] business card; a letter from his purported former supervisor at [REDACTED] and letters from two purported clients of his when he worked at [REDACTED].

However, the evidence is insufficient to establish the Beneficiary's claimed qualifying experience with [REDACTED]. Pursuant to 8 C.F.R. § 103.2(b)(2)(i), the Petitioner did not demonstrate the unavailability of required experience letters from those employers or of secondary evidence of his employment, such as payroll or tax records.

In the Petitioner's appellate brief, counsel asserts that "the Employment Verification letters are not available for [REDACTED] and [REDACTED]. However, counsel's assertion does not constitute evidence of the letters' unavailability. See *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel's unsupported assertions do not establish facts of record). The record does not contain documentation of unsuccessful attempts to obtain experience letters from the employers or other evidence of the unavailability of the required or secondary documentation.

Also, the Beneficiary's affidavits are self-serving and do not reflect independent, objective evidence of his qualifying experience at [REDACTED]. The Beneficiary previously attested to his qualifying experience on the accompanying labor certification. The regulations require corroborating, documentary evidence from the claimed employers.

In addition, the record does not establish the claimed relationships between the Beneficiary and his purported former clients and supervisor who signed letters on his behalf. Their letters are written on personal stationery. The record does not corroborate their claimed employers during the time the Beneficiary purportedly worked at [REDACTED] or their claimed relationships to the Beneficiary. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (stating that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings).

Further, the signatory of the undated experience letter from [REDACTED] appears to be the same person who signed the Form I-140, Petition for Alien Worker, and the accompanying labor certification for the Petitioner. The letter's signatory and the Petitioner's vice president of recruitment have the same name, and their signatures appear to be identical. The signatory's apparent involvement and interest in the instant petition casts doubt on the objectivity of the experience letter from [REDACTED].

The Petitioner argues that the affidavits of record are sufficient to establish the Beneficiary's qualifying experience for the offered position. Citing *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7 (D.D.C. 1988), the Petitioner asserts that U.S. Citizenship and Immigration Services (USCIS) must investigate the Beneficiary's claimed qualifying experience before it can legally reject the contents of the affidavits and deny the petition.

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Contrary to the Petitioner's argument, we need not follow *Lu-Ann*. U.S. District Court decisions lack precedential value, even in their own districts. *See Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993).³ Moreover, the facts in *Lu-Ann* distinguish it from the instant case.

In *Lu-Ann*, the Service revoked a petition's approval despite the petitioner's submission of affidavits from the beneficiary's former employer and from witnesses recanting their prior testimony of the beneficiary's lack of qualifying experience with the employer. *Lu-Ann*, 705 F. Supp. at 8-9. The district court remanded the matter, finding that the Service erred in requiring additional, contemporaneous evidence of the beneficiary's qualifying experience where it already possessed an employer affidavit stating the experience as required by regulation. *Id.* at 11.

Unlike the petitioner in *Lu-Ann*, the instant Petitioner did not meet regulatory requirements. *See* 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed qualifying experience with letters from employers). The Petitioner did not provide the regulatory required employer letters to support all of the Beneficiary's claimed qualifying experience. Also unlike in *Lu-Ann*, USCIS did not require the instant Petitioner to provide additional, contemporaneous evidence of the Beneficiary's qualifying experience. Thus, even if *Lu-Ann* had precedential value, we would find the decision inapplicable to this matter. We therefore reject the Petitioner's argument that the affidavits of record establish the Beneficiary's qualifying experience.

As indicated in the Director's NOID and decision, the record also does not establish the Beneficiary's qualifying experience in the job offered, as opposed to as an engineer.

The accompanying labor certification states that the offered position involves managing the Petitioner's "business development organization," participating in setting the company's "strategic direction," spearheading business development initiatives, supervising revenue generation, managing complex contract negotiations, and establishing "the style and approach" of the company's "dealings with the marketplace." The labor certification states that experience in an alternate occupation is unacceptable.

However, the labor certification and the letters from former employers, clients, and supervisors indicate that much of the Beneficiary's experience involved engineering, rather than business development. The Petitioner also submitted a September 9, 2009, evaluation by [REDACTED] a professor of mechanical and aerospace engineering at [REDACTED]. The evaluation concludes that the Beneficiary's employment experience equates to a U.S. Bachelor of Science degree in electrical engineering.

³ The Director's decision mistakenly indicates that *Lu-Ann*'s precedential value turns on whether the decision was published. Even if published like *Lu-Ann*, U.S. District Court decisions lack precedential value. *See K-S-*, 20 I&N Dec. at 718 (finding that "district court judges are not bound by the *published* decisions of their colleagues, even in the same district") (emphasis added).

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In response to the NOID, the Petitioner submitted another evaluation of the Beneficiary's employment experience. The March 18, 2015, evaluation by [REDACTED], a professor of management at [REDACTED], notes that the Beneficiary's resume and experience letters state his performance of some management duties with prior employers. [REDACTED] stated that he sees "clear similarities" among the duties of the offered position and the Beneficiary's prior positions. However, the evaluation does not specifically conclude that the Beneficiary possessed 120 months of experience in the job offered when he began working for the Petitioner in the offered position.

The Petitioner argues that "[t]he experience [the Beneficiary] received in Engineering is required in order to fulfill his role as VP of Business Development." The Petitioner submitted a copy of its application for a prevailing wage determination, which states that the offered position requires 120 months of experience in "Electrical/Electronic/Telecom Engineering."⁴

However, DOL regulations required the Petitioner to state the "actual minimum requirements" of the offered position on the accompanying ETA Form 9089. *See* 20 C.F.R. § 656.17(i)(1) (stating that the job requirements stated on a labor certification "must represent the employer's actual minimum requirements for the job opportunity"). As previously indicated, USCIS examines the plain language of the job offer portion of a labor certification to determine the minimum requirements of an offered position. *See K.R.K. Irvine*, 699 F.2d at 1009; *Madany*, 696 F.2d at 1010-12; *Stewart Infra-Red*, 661 F.2d at 3.

A petitioner may not require skills or experience beyond those indicated on an accompanying ETA Form 9089 and presumably advertised to U.S. workers. *See Matter of Latin Am. Enters., Inc.*, 2008-INA-00082, 2008 WL 627130, **3-5 (BALCA Mar. 3, 2008) (finding that all job duties and requirements must be known to U.S. workers). Therefore, the Petitioner's requirement of engineering experience on its prevailing wage application does not supersede the plain language of the labor certification, which only states the acceptability of experience in the offered position of vice president of business development.

The Petitioner also argues that the ETA Form 9089 does not contain space to require engineering experience for the offered position. However, contrary to the Petitioner's argument, the form includes fields in which employers may indicate acceptable experience in "alternate occupations," as well as "specific skills or other requirements." *See* ETA Form 9089, Parts H.10, H.14. Therefore, we also reject this argument.

For the foregoing reasons, the record does not establish the Beneficiary's qualifying experience for the offered position as specified on the accompanying labor certification by the petition's priority date. We will therefore affirm the Director's denial of the petition on this ground.

⁴ Employers must obtain a prevailing wage determination for an offered position before filing a labor certification application. *See* 20 C.F.R. §§ 656.10(c)(1), 656.40.

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II. THE BENEFICIARY'S QUALIFYING EDUCATION

The Director also found that the record did not establish the Beneficiary's qualifying education for the offered position by the petition's priority date.

Besides experience in the job offered, the accompanying labor certification states that the offered position requires a high school diploma or the foreign equivalent. The record includes a copy of a "Certificate of Secondary Education" and four "General Certificate[s] of Education" at "Ordinary Level[s]" from the United Kingdom.

The Certificate of Secondary Education indicates the Beneficiary's passage of examinations in five subjects (biology, chemistry, environmental studies, French, and mathematics) in 1982. The General Certificates of Education indicate his receipt of grades in four more subjects (mathematics, English language, English literature, and commerce) in 1982 and 1983.

The record also contains a March 10, 2015, evaluation of the Beneficiary's foreign education credentials by [REDACTED] for [REDACTED]. The evaluation concludes that the Beneficiary possesses the equivalent of a U.S. high school diploma.

We may treat expert testimony as an advisory opinion. *See Matter of Caron Int'l Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, if expert testimony is inconsistent with other evidence or questionable in any way, we may disregard it or afford it less evidentiary weight. *Id.*; *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (stating that expert testimony may be afforded different evidentiary weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

In the instant case, the education evaluation is inconsistent with the record. The evaluation states the Beneficiary's receipt of "a General Certificate of Education degree" in 1982. However, as previously discussed, the record shows the Beneficiary's receipt of a "Certificate of Secondary Education" in 1982 and four "General Certificate[s] of Education" in 1982 and 1983. The evaluation does not explain which of the Beneficiary's credentials it considers to be "a General Certificate of Education degree." *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (holding that a petitioner must resolve inconsistencies of record by independent, objective evidence).

However, we reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO is a non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries. *See Am. Ass'n of Collegiate Registrars & Admissions Officers*, at <http://www.aacrao.org/membership/join-aacrao> (accessed Oct. 21, 2015). EDGE is "a web-based resource for the evaluation of foreign educational credentials," the content of which is reviewed by AACRAO's National Council on the Evaluation of Foreign Educational Credentials before publication. *Id.*, at <http://edge.aacrao.org/info.php> (accessed

Oct. 21, 2015). Federal courts have found EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁵

EDGE states that a Certificate of Secondary Education in the United Kingdom is comparable to completion of senior high school in the United States.

Based on the information in EDGE, we find that the record establishes the Beneficiary's possession of the foreign equivalent of a U.S. high school diploma by the petition's priority date. We will therefore withdraw the Director's contrary finding.

III. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must also establish its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from the petition's priority date. If the petitioner did not pay the beneficiary the full proffered wage each year, we examine whether it had sufficient annual net income or net current asset amounts to pay the difference between the wage paid, if any, and the proffered wage.⁶ If a petitioner's annual net income or net current asset amounts are insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the accompanying labor certification states the proffered wage of the offered position of vice president of business development as \$156,749 per year. As previously indicated, the petition's priority date is February 15, 2013.

The record before the Director closed on March 19, 2015, with his receipt of the Petitioner's NOID response. At that time, financial records for 2013 were the most recent available. The Petitioner

⁵ *See Viraj, LLC v. U.S. Atty. Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (finding that USCIS was entitled to discount letters and evaluations that differed from the information in EDGE, "which is a respected source of information"); *Tisco Grp., Inc. v. Napolitano*, No. 09-10072, 2010 WL 3464314, *4 (E.D. Mich. Aug. 30, 2010) (finding that USCIS properly weighed the education evaluations submitted by the petitioner and EDGE information to conclude that the beneficiary lacked the equivalent of a U.S. Master's degree); *Sunshine Rehab Servs., Inc. v. USCIS*, No. 09-13605, 2010 WL 3325442, **8-9 (E.D. Mich. Aug. 20, 2010) (upholding USCIS's use of EDGE information in determining that a beneficiary's three-year Bachelor's degree was not the foreign equivalent degree of a U.S. baccalaureate); *Confluence Int'l, Inc. v. Holder*, No. 08-2665, 2009 WL 825793, *4 (D. Minn. Mar. 27, 2009) (finding that we provided a rational explanation for our reliance on EDGE information).

⁶ Federal courts have upheld our method of determining a petitioner's ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

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submitted a copy of a 2013 federal income tax return, which reflects annual net income exceeding the annual proffered wage. However, the return is in the name of a different entity with a different federal employer identification number than the Petitioner.

Counsel asserts that the Petitioner is considered a “dis-regarded entity” for tax purposes. She states that all of the Petitioner’s income flows to the company identified on the 2013 tax return.

The Internal Revenue Service (IRS) treats a limited liability company (LLC) with only one member as “an entity disregarded as separate from its owner for income tax purposes.” *See* Internal Revenue Serv., at <http://www.irs.gov/Businesses/Small-Businesses&Self-Employed/Single-Member-Limited-Liability-Companies> (accessed Oct. 21, 2015). To demonstrate its relationship to the company indicated on the tax return, the Petitioner submitted a copy of the first page of its LLC agreement.

However, the LLC agreement page does not indicate the Petitioner’s status as a disregarded entity. The agreement page states that the company identified on the tax return is one of two members of the Petitioner. The agreement page therefore indicates that the IRS would not treat the Petitioner as a disregarded entity because it has more than one member. *See Ho*, 19 I&N Dec. at 591-92 (stating that a petitioner must resolve inconsistencies of record by independent, objective evidence).

The record also contains 2013 audited financial statements of the Beneficiary’s parent firm, [REDACTED] which is a publicly traded company on the London Stock Exchange. The statements indicate that they include financial information from the parent company’s subsidiaries. However, the statements do not contain separate audited financial information regarding the Petitioner. The consolidated financial statements therefore do not establish the Petitioner’s ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 531 (Comm’r 1980) (stating that we cannot consider the assets of other enterprises in determining a petitioner’s ability to pay); *see also Sitar Rest. v. Ashcroft*, No. Civ.A. 02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (stating that the regulations at 8 C.F.R. § 204.5 do not permit us to consider the financial resources of entities without legal obligation to pay a wage).

The record does not establish the Petitioner’s submission of an annual report, federal income tax return, or audited financial statement to support its ability to pay the proffered wage from the petition’s priority date pursuant to 8 C.F.R. § 204.5(g)(2). Because the Petitioner has not submitted regulatory required evidence, the record does not establish its ability to pay. Also, for the same reason, we will not consider its ability to pay under *Sonegawa*.

The record also contains an October 20, 2014, letter from the chief financial officer of the Petitioner’s parent company. The letter states the parent company’s number of employees and gross profits and sales for 2013.

A statement from a financial officer may establish a petitioner’s ability to pay if it employs 100 or more workers. 8 C.F.R. § 204.5(g)(2). However, the chief financial officer’s letter states the number of employees and gross profits and sales of the Petitioner’s parent company, not of the Petitioner. The letter therefore does not establish the Petitioner’s ability to pay. Also, the regulations indicate that a

letter must be from a financial officer of a petitioner, not of a separate entity. *See* 8 C.F.R. § 204.5(g)(2) (stating that, “[i]n a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer *of the organization*”) (emphasis added).

In addition, USCIS records indicate the Petitioner’s filing of an I-140 petition for another beneficiary that remained pending after the instant petition’s priority date.⁷ A petitioner must establish its continuing ability to pay the proffered wage for each petition it files. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg’l Comm’r 1977). Therefore, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the other beneficiary. The Petitioner must demonstrate its ability to pay the combined wages from the priority date of the instant petition until the other beneficiary obtained lawful permanent resident, or until the other petition was denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not establish its ability to pay multiple beneficiaries).

The record does not indicate the priority date or proffered wage of the Petitioner’s other petition, or whether the Petitioner paid wages to the other Beneficiary. The record also does not indicate whether the other petition was withdrawn, revoked, or denied, or whether the other beneficiary obtained lawful permanent residence. Thus, the record does not demonstrate the Petitioner’s ability to pay the combined proffered wages of the instant Beneficiary and the beneficiary of its other petition.

For the foregoing reasons, the record does not establish the Petitioner’s continuing ability to pay the proffered wage from the petition’s priority date onward. We will therefore affirm this portion of the Director’s decision and dismiss the appeal on this ground.

IV. CONCLUSION

The record establishes the Beneficiary’s possession of the qualifying education for the offered position by the petition’s priority date. We will therefore withdraw that portion of the Director’s decision. However, as the Director found, the record does not establish the Beneficiary’s possession of the qualifying experience by the petition’s priority date or the Petitioner’s continuing ability to pay the proffered wage. We will therefore affirm the Director’s denial of the petition and dismiss the appeal.

The appeal will be dismissed for the reasons stated above. In visa petition proceedings, a 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, the Petitioner has not entirely met that burden.

⁷ USCIS records identify the other petition’s receipt number as [REDACTED]

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ORDER: The appeal is dismissed.

Cite as *Matter of N-G-M-&C- LLC*, ID# 14294 (AAO Oct. 26, 2015)