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

(b)(6)

DATE: APR 2 4 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a systems integration business. It seeks to employ the beneficiary permanently in the United States as a general and operations manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition.

The Director concluded that the record did not establish the petitioner's continuing ability to pay the beneficiary the proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on November 7, 2014.

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

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The Petitioner's Ability to Pay the Proffered Wage

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), allows preference classification to qualified immigrants who are members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

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

In the instant case, the petition's priority date is January 2, 2013, the date the DOL accepted the ETA Form 9089 for processing. *See* 8 C.F.R. § 204.5(d). The ETA Form 9089 states the proffered wage for the offered position of general and operations manager as $55,000 per year.[2]

[1] 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 the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

[2] On appeal, the petitioner asserts that the annual proffered wage is $52,229. However, both the Form I-140, Petition for Alien Worker, and the accompanying labor certification state the proffered wage as $55,000 per year. The record therefore establishes the annual proffered wage as $55,000.

A petitioner's ability to pay a proffered wage is an essential element in evaluating whether a job offer is realistic. *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). We generally require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage. However, we will also consider the totality of the circumstances affecting a petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the record contains: copies of the petitioner's 2013 federal income tax return; Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for 2013 and 2014; 2014 payroll documentation, and other financial documentation.[3] The record before the Director closed in October 2014, with his receipt of the petitioner's response to his RFE. As of that date, the petitioner's 2013 federal income tax return was its most recent return available.

In determining a petitioner's ability to pay, we first examine whether it employed the beneficiary during the relevant time period. A petitioner establishes its ability to pay if it submits documentation showing that it paid the beneficiary wages during the time period that equaled or exceeded the proffered wage.[4]

In the instant case, the Forms W-2 indicate that the petitioner paid the beneficiary $34,590 in 2013 and $55,324.86 in 2014. The 2014 Form W-2 appears to indicate that the beneficiary's wages exceeded the proffered wage that year. However, the Form W-2 cannot constitute the sole evidence of the petitioner's ability to pay because that form is not among the three types of documents specified by the regulation at 8 C.F.R. 204.5(g)(2) to establish a petitioner's ability to pay.

Moreover, the record indicates that the beneficiary's wage amount on the 2014 W-2 includes sales commissions. Payroll records indicate that the beneficiary's wages in 2014 differed from month to month and that he received $2,500 in sales commissions. By filing and signing the accompanying labor certification, the petitioner certified that the proffered wage "is not based on commissions, bonuses or other incentives, unless [it] guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage." 20 C.F.R. § 656.10(c)(2). The record does not contain a guarantee by the petitioner that it will pay a weekly, bi-weekly, or monthly wage that equals or exceeds the prevailing wage. After the deduction of sales commissions, the beneficiary's 2014 Form W-2 indicates that the petitioner paid the beneficiary $52,824.85, which is less than the annual proffered wage. Thus, the record does not establish the petitioner's ability to pay the proffered wage in 2013 or 2014 based on the wages it paid the beneficiary.

[3] The petitioner submitted financial statements for 2013 and the first seven months of 2014. However, the statements were not audited as required by 8 C.F.R. § 204.5(g)(2). We therefore will not consider them.

[4] In his decision, the Director pro-rated the proffered wage for 2013 as $54,698. The proration accounted for the petition's priority date of January 2, 2013 and the apparent one day in 2013 that the petitioner would not have to demonstrate its ability to pay the beneficiary. However, the record does not establish that the petitioner would have paid the beneficiary for January 1, which is a federal holiday. Moreover, we would only pro-rate a proffered wage for a period of less than one year if a petitioner demonstrated that it paid wages to the beneficiary or received net income on or after the priority date. The instant record does not demonstrate those circumstances. Therefore, we will not pro-rate the annual proffered wage for 2013.

The record does not contain 2013 payroll information other than the Form W-2, which does not specify whether the beneficiary's wages that year included sales commissions. While the beneficiary may have also received sales commissions in 2013, for the purposes of this decision we will consider the Form W-2 as indicating the petitioner's payment of $34,590 in wages to the beneficiary in 2013. However, in any future filings regarding this petition, the petitioner must submit evidence establishing whether the beneficiary's 2013 wages included sales commissions.

If we consider the beneficiary's wages in 2013 to be $34,590, the petitioner must demonstrate its ability to pay the difference between the proffered wage and the amount it paid the beneficiary, which is $21,410.

If a petitioner does not establish that it paid a beneficiary an amount equal to or greater than the proffered wage, we next examine the annual net income reflected on its federal income tax returns, without consideration of depreciation or other expenses. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Taiyang Foods, Inc. v. USCIS*, 444 Fed. Appx. 115, 115-16 (9th Cir. 2011); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 884-85 (S.D. Tex. 2014); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

Line 28 of the petitioner's 2013 IRS Form 1120, U.S. Corporation Income Tax Return, states an annual net income amount of $(2,103).[5] Because this amount does not equal or exceed the $21,410 difference between the annual proffered wage and the amount it paid the beneficiary in 2013, the record does not establish the petitioner's ability to pay based on its net income.

If a petitioner's net income is insufficient to demonstrate its ability to pay, we review its net current assets. Net current assets are the difference between current assets and current liabilities.[6] Lines 1 through 6 of a corporation's Schedule L to IRS Form 1120 indicate its year-end current assets, including any cash balance. Lines 16 through 18 of Schedule L reflect a corporation's year-end current liabilities. If the total of a petitioner's year-end net current assets and the wages paid to the beneficiary equal or exceed the proffered wage, a petitioner demonstrates an ability to pay the proffered wage.

The instant petitioner's 2013 Schedule L reflects a year-end net current asset amount of $9,211 ($84,886 in current assets minus $75,675 in current liabilities). Because this amount does not equal or exceed the $21,410 difference between the proffered wage and the amount the petitioner paid the

[5] Numbers in parentheses reflect negative amounts.

[6] Current assets generally consist of items that a corporation may liquidate within one year, such as cash, marketable securities, inventory, and prepaid expenses. *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000). Current liabilities, on the other hand, are generally obligations payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Id.* at 118.

beneficiary in 2013, the record does not establish the petitioner's ability to pay the proffered wage based on its net current assets.

Therefore, based on examinations of the wages the petitioner paid to the beneficiary, its net income, and its net current assets, the record does not establish its continuing ability to pay the proffered wage from the petition's priority date onward.

On appeal, the petitioner asserts that it paid the beneficiary an additional $19,406.83 in compensation in 2013, including monies for: educational costs; life insurance; personal trip expenses; a car lease; medical services; and an "end-of-year allowance." The petitioner submits additional evidence in support of the additional compensation and argues that the combination of the wages indicated on the Form W-2 and the additional compensation demonstrates its ability to pay the proffered wage in 2013.

However, the petitioner's claimed $19,406.83 in additional compensation does not equal or exceed the $21,410 difference between the proffered wage and the amount it paid the beneficiary in 2013. The additional compensation therefore does not establish the petitioner's ability to pay that year.

Moreover, the record does not establish that the claimed additional compensation complies with 20 C.F.R. § 656.10(c)(2), which, as previously indicated, bars the use of "commissions, bonuses and other incentives" to pay a proffered wage. The record does not explain whether the "end-of-year allowance" paid to the beneficiary constitutes a bonus or incentive. *See Matter of Kids "R" Us*, 90-INA-20, 1991 WL 120095 (BALCA Jan. 28, 1991) (*en banc*) (holding that an employer that relies on fringe benefits in its wage offer "bears a heavy burden" to demonstrate the fairness and *bona fides* of its proposal). In addition, the record does not indicate that U.S. workers were offered the same compensation as the beneficiary, whom the petitioner identifies on appeal as its "sole owner and director." *See* 20 C.F.R. § 656.17(f)(7) (stating that advertisements for an offered position must not contain wages, terms, and conditions of employment less favorable than those offered to the alien).

Further, in response to Question J.22 of the accompanying ETA Form 9089, the petitioner attested that it did not pay for any of the beneficiary's education needed to satisfy the job requirements of the offered position. However, on appeal, the petitioner submits evidence that it paid educational expenses of the beneficiary at [redacted] where he claims to have gained the qualifying education for the offered position.

For the foregoing reasons, the petitioner has not established that the wages and other compensation it paid the beneficiary in 2013 equaled or exceeded the proffered wage.

As previously indicated, we may also consider the overall magnitude of a petitioner's business activities in determining its ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning net annual incomes of about $100,000. In the year of the petition's filing, however, the petitioner's federal tax returns did not reflect sufficient resources to pay the proffered wage. The petitioner

relocated and paid rent on two locations for a five-month period that year. The petitioner also incurred substantial moving expenses and was briefly unable to conduct regular business. Despite its uncharacteristic financial difficulties, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay the proffered wage. The petitioner was a fashion designer whose work had been featured in national magazines. Her clients included the then Miss Universe, movie actresses, society matrons, and women included in lists of the best-dressed in California. She also lectured at design and fashion shows throughout the United States and at colleges and universities in California.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years the petitioner has conducted business; the established, historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary is replacing a former employee or an outsourced service; or other evidence relevant to its ability to pay a proffered wage.

In the instant case, copies of the petitioner's federal income tax returns indicate moderate growth in its annual gross income amounts and in the amounts of salaries and wages it paid since 2011. However, unlike in *Sonegawa*, the record does not indicate the petitioner's outstanding reputation within its industry or the occurrence of any uncharacteristic business expenditures or losses. The record also does not indicate that the beneficiary will replace a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this individual case, we find that the petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

The Beneficiary's Qualifying Experience

Beyond the Director's decision, the record also does not establish the beneficiary's qualifying experience for the offered position.[7]

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on the accompanying labor certification as of the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications, we must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. We may not ignore a term of the labor

[7] We may deny a petition that fails to comply with the technical requirements of the law, even if the Director did not identify all of the denial grounds in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. Dep't of Justice*, 381 F.3d at 145 (noting that we conduct appellate review on a *de novo* basis).

certification, nor may we impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of general and operations manager requires a U.S. Master of Business Administration (MBA) degree and 120 months (10 years) of experience in the job offered. The labor certification also states that the position requires experience in product/project management and in the security industry.

The beneficiary attested on the labor certification that he obtained more than 10 years of full-time qualifying experience with the petitioner in the position of general manager. The beneficiary attested that he began working for the petitioner on December 1, 2002. The beneficiary did not state any other employment experience on the labor certification.

An employer generally cannot require U.S. applicants to possess experience beyond what the alien had at the time of his hire. 20 C.F.R. § 656.17(i)(3). The only exceptions to this general rule are if the alien gained the experience while working for the employer in a position that was not "substantially comparable" to the offered position, or if the employer can demonstrate the infeasibility of training a worker to qualify for the position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii). A "substantially comparable" job means a position requiring performance of the same job duties more than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

In the instant case, the petitioner attested in response to Question J.21 of the ETA Form 9089 that the beneficiary gained qualifying experience with it "in a position substantially comparable to the job opportunity requested." However, the record does not include any evidence of the infeasibility of training a worker to qualify for the offered position pursuant to 20 C.F.R. § 656.17(i)(3)(ii). The record does not indicate whether the DOL found the beneficiary's qualifying experience with the petitioner to fall under that regulatory exception.

However, even if the beneficiary permissibly gained experience with the petitioner, the record does not establish the beneficiary's possession of the required amount of qualifying experience. The record contains an August 15, 2014 letter from the petitioner stating that the beneficiary began working for it in 2006, not in 2002 as the beneficiary attested on the labor certification.[8] The letter therefore confirms no more than seven years of experience before the petition's priority date of January 2, 2013, less than the minimum amount of 10 years specified on the labor certification.

In addition, the letter is signed by the petitioner's purported vice president, who appears to be the beneficiary's wife. Her name matches the name of the beneficiary's spouse stated on the Form I-140 and the name of the petitioner's vice president in online Florida corporate records. *See* Fla. Dep't of State, Div. of Corps., at http://search.sunbiz.org/Inquiry/CorporationSearch/ByName (accessed Feb.

[8] The record also contains a copy of the beneficiary's resume, which indicates that he has worked for the petitioner since 2002.

19, 2015). The apparent familial relationship between the beneficiary and the petitioner's vice president undermines the letter's reliability, as the letter's signer appears to have a personal interest in the petition's approval. The record therefore does not establish that the letter represents independent, objective evidence of the beneficiary's qualifying experience.

The record also contains an October 12, 2006 experience letter from an administrator on the stationery of " " stating that the beneficiary worked for that company from 2002 to 2006 as technology director, operation manager, and general manager. However, the beneficiary did not state his purported employment with on the labor certification. Rather, as previously indicated, the beneficiary attested on the labor certification that his qualifying experience included only his employment with the petitioner since December 1, 2002. The inconsistency regarding the identity of the beneficiary's employer from 2002 to 2006 casts doubt on the beneficiary's claimed qualifying experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence); *see also Matter of Leung,* 16 I&N Dec. 12, 14-15 (BIA 1976) (finding that a beneficiary's failure to attest to qualifying experience on the accompanying labor certification cast doubt on the claimed employment).

Also, the petitioner submitted corporate records indicating that the Florida Department of State administratively dissolved the beneficiary's purported, prior employer, , on September 15, 2006, about a month before the date on the company's experience letter. The issuance of the experience letter after the corporation's dissolution casts doubt on the authenticity of the letter and on the signatory's personal knowledge of the beneficiary's experience with the company.

For the foregoing reasons, the record does not establish the beneficiary's qualifying experience for the offered position by the petition's priority date.

The Beneficiary's Qualifying Education

Also beyond the Director's decision, the record does not establish the beneficiary's qualifying educational credentials for the offered position.

As previously indicated, the accompanying labor certification states that the offered position requires a U.S. MBA. The labor certification states that alternate fields of study or a foreign educational equivalent are unacceptable.

The beneficiary attested on the labor certification that he received an MBA from in the United States in 2011. The record contains copies of two diplomas awarded to the beneficiary by that university on July 14, 2012. One diploma confers a Master of Arts degree in human resource management on the beneficiary. The other states that he earned an MBA. A copy of the beneficiary's resume states that he attended from 2008 to 2010.[9]

[9] Because the petitioner conceded that the beneficiary gained experience with it in a substantially comparable position and the beneficiary did not obtain an MBA until after the start of his employment with the petitioner, the record also does not establish that the offered position truly requires an MBA. *See* 20 C.F.R. § 656.17(i)(1) (requiring the job

The record does not explain how the beneficiary obtained two graduate diplomas after two years of study and simultaneously worked full-time for the beneficiary. *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

Also, the websites of and the Accrediting Council for Independent Colleges and Schools (ACICS) indicate that ACICS accredited the university in 2010. *See* "Message From The President," at http: (accessed Feb. 23, 2015); Accrediting Council for Indep. Colls. & Schs., at (accessed Feb. 23, 2015). Because the beneficiary's resume indicates that he began attending the university in 2008, the record does not establish that the beneficiary received a qualifying degree from an accredited MBA program in the United States.[10]

For the foregoing reasons, the record does not establish that the beneficiary obtained a U.S. MBA as specified on the labor certification.

The *Bona Fides* of the Job Opportunity

Also beyond the Director's decision, we question the *bona fides* of the job opportunity.

For labor certification purposes, the term "employment" means permanent, full-time work for an employer other than oneself. 20 C.F.R. § 656.3. An offered position that constitutes nothing more than self-employment is not genuine employment under the regulation, and labor certification is barred *per se*. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *6 (BALCA July 16, 1991) *(en banc)* (citations omitted). A sponsoring employer overcomes the self-employment bar by establishing "genuine independence and vitality not dependent on the alien's financial contribution or other contribution indicating self- employment." *Id.*

Even if an offered position does not constitute self-employment, an employer must attest on a 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.*, 1991 WL 223955, at *7 (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

---

requirements on a labor certification to represent the employer's "actual minimum requirements for the job opportunity").

[10] Neither the Act nor the regulations expressly require accredited universities to issue advanced degrees. *See* section 203(b)(2)(A) of the Act (allowing preference classification "to qualified immigrants who are members of the professions holding advanced degrees or their equivalent"); 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate"). However, we interpret the regulations as requiring accredited U.S. schools to issue advanced degrees for immigration classification purposes, as accreditation ensures a basic level of educational quality and nationwide acceptance of U.S. qualifying degrees in accordance with other actions and pronouncements by Congress.

We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the geographic area of intended employment). A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, a request for Schedule A designation, or documentation of eligibility for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i).

An employer must demonstrate the existence of a *bona fide* job opportunity "[i]f 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 stock holders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees." 20 C.F.R. § 656.17(l).

In determining whether a *bona fide* job opportunity exists, we must consider multiple factors, including but not limited to, whether the alien: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Matter of Modular Container Sys.*, at *8. We must also consider whether the alien's pervasive presence and personal attributes would likely cause the petitioner to cease operations in the alien's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

In the instant case, the record indicates that the beneficiary has an ownership interest in the petitioning corporation, a familial relationship with a corporate officer, and is one of a small group of employees. The petitioner's Certificate of Incorporation, which was filed on August 22, 2006, states that the beneficiary acquired all of the company's shares of stock. *See* Fla. Dep't of State, Div. of Corps., at http://search.sunbiz.org/Inquiry/CorporationSearch/ (accessed Feb. 19, 2015). Florida corporate records also identify the beneficiary as the petitioner's president and sole director. *Id.*, at http://search.sunbiz.org/Inquiry/CorporationSearch/ByName (accessed Feb. 19, 2015).

Further, as previously discussed, the corporation's vice president, who signed the accompanying labor certificate, an employment offer, and an experience letter in the record, appears to be the beneficiary's wife. *Id.* Her name matches the name of the beneficiary's spouse stated on the Form I-140.

In addition, the petitioner stated on the Form I-140, which was filed on October 31, 2013, that it had five employees. The record contains copies of quarterly payroll tax reports indicating that the petitioner employed three workers as of June 2014. Therefore, the record indicates that the beneficiary is one of a small group of employees who work for the petitioner.

The record does not include the name of the company official with primary responsibility for interviewing job applicants and hiring employees, its corporate investment history, documentation of any family relationships between the beneficiary and other employees, and a list of all company officers and shareholders and their familial relationships to each other and the beneficiary as required by 20 C.F.R. §§ 656.17(l)(1)-(5). *See also Matter of Intervid, Inc.*, 2009-PER-00278, 2010 WL 4920433, **3-4 (BALCA Sept. 9, 2010) (finding no *bona fide* opportunity where - although an alien was unrelated to a corporation's principals; the offered position's requirements were not overly specialized or unusual; and there was not an especially small number of employees – the alien was involved in the employer's management as its chief executive officer, managing director, and chairman of the board of directors, and was responsible for hiring half of its employees).

The record indicates that neither the petitioner nor the beneficiary misrepresented his relationship to the company or its employees. In response to Question C.9 on the ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" the petitioner indicated: "Yes."

The record does not indicate whether DOL considered the beneficiary's relationship to the employer and its employees in the labor certification proceedings. We therefore will make no finding regarding the *bona fides* of the job opportunity until we consult with DOL. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring us to consult with the DOL regarding employment-based, immigrant visa petitions). However, our intended consultation with DOL does not prevent us or DOL from making further findings regarding the validity of the accompanying labor certification. *See* 20 C.F.R. §§ 656.30(d), 656.32(a) (authorizing DOL to revoke an approved labor certification if the certification "was not justified," and authorizing us to invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application").

Conclusion

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 the Director's denial of the petition. In addition, the record does not establish the beneficiary's qualifying experience or education for the offered position. Therefore, we will also dismiss the appeal for those additional reasons.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. 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). The petitioner has not met that burden.

ORDER: The appeal is dismissed.