U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S- INC.

DATE: DEC. 29, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a technology architect under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The labor certification will be reinstated. The matter will be remanded to the Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

The Director concluded that the Petitioner willfully misrepresented a material fact on the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was approved by the U.S. Department of Labor (DOL). Accordingly, the Director invalidated the labor certification and denied the petition on May 21, 2015.

The record indicates the appeal's proper filing and documents the procedural history of the case, which will be 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 relevant evidence of record, including new evidence properly submitted on appeal.[1]

I. INVALIDATION OF THE LABOR CERTIFICATION

A petition for an advanced degree professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). U.S. Citizenship and Immigration Services (USCIS) may invalidate a labor certification after its issuance upon a determination of "fraud or willful misrepresentation of a material fact involving the labor certification." 20 C.F.R. § 656.30(d).

[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.

A willful misrepresentation of a material fact requires a deliberate and voluntary misrepresentation made with knowledge of its falsity. *Xing Yang Yang v. Holder*, 770 F.3d 294, 303 (4th Cir. 2014). Fraud requires an intention to deceive. *Id.* A misrepresentation is material if it "had a natural tendency to influence" the government's decisions. *Kungys v. United States*, 485 U.S. 759, 772 (1988).

The relationship between a beneficiary and a labor certification employer is a material fact that, if concealed, prevents the DOL from scrutinizing the *bona fides* of a job opportunity. *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986); *see also* 20 C.F.R. § 656.17(l) (requiring an employer to demonstrate the existence of a *bona fide* job opportunity if a beneficiary possesses an ownership interest in an employer or a familial relationship exists between the employer's stockholders, corporate officers, or incorporators and a beneficiary).

The concealment of a relationship between a beneficiary and an employer in labor certification proceedings may constitute grounds to invalidate a labor certification in visa petition proceedings. *Silver Dragon*, 19 I&N Dec. at 404; *see also* U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed Dec. 18, 2015) (stating that a failure to disclose a familial relationship or ownership interest between a beneficiary and an employer on a labor certification "is a material misrepresentation and may therefore be grounds for denial, revocation or invalidation" of a labor certification).

A corporation's concealment on a labor certification of its relationship to a beneficiary may be willful "because the officers and principals of the organization are presumed to be aware and informed of the organization and staff of their enterprise." *Silver Dragon*, 19 I&N Dec. at 404. We must consider the circumstances existing at the time of the representation to determine whether a willful misrepresentation of a material fact occurred. *Matter of Bosuego*, 17 I&N Dec. 125, 128 (BIA 1980).

Part C.9 of ETA Form 9089 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?" In the instant case, the Petitioner answered: "No."

The Petitioner electronically filed the labor certification application on June 18, 2014. The DOL approved it on November 14, 2014. On January 15, 2015, the Petitioner's president signed the labor certification, declaring under penalty of perjury the truth and accuracy of the information on it. *See* 20 C.F.R. § 656.17(a)(1) (requiring an employer to immediately sign a labor certification upon receipt to validate it).

The Director's notice of intent to deny (NOID) noted that a copy of the Petitioner's 2014 federal income tax return and USCIS records identify the Petitioner's shareholders as its president and her parents. The shareholders' addresses on the tax return match the Beneficiary's address stated on the Form I-140, Immigrant Petition for Alien Worker. In addition, the similarity between the family

names of the Beneficiary and the father of the Petitioner's president suggested a familial relationship between them.

In a May 1, 2015, letter in response to the NOID, the Petitioner's president admitted that she and the Beneficiary are cousins. She stated that the fathers of her and the Beneficiary are brothers.

A. The Parents of the Petitioner's President

The Petitioner argues that the parents of its president "retired" effective January 2, 2014. It claims the parents, who are the Beneficiary's uncle and aunt, were not shareholders when it filed the labor certification application on June 18, 2014. Therefore, it argues that it did not willfully conceal the relationship between the president's parents and the Beneficiary on the labor certification.

For income tax purposes, shareholders' percentages of ownership are weighted for the number of days in a tax year they owned stock. *See* U.S. Internal Revenue Serv., Instructions to Form 1120S, U.S. Income Tax Return for an S Corporation, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Dec. 18, 2015). The Petitioner's 2013 federal tax return reflects ownership of 45 percent of the corporation's shares by each parent of the Petitioner's president, with the president owning the remaining 10 percent. However, the Petitioner's 2014 tax return indicates its president's ownership of more than 99 percent of its shares, with her parents owning the remainder of less than one percent.

The minute percentages of stock ownership attributed to the parents of the Petitioner's president on its 2014 tax return support the Petitioner's claims of their retirement as of January 2, 2014 and their status as non-shareholders at the time of the labor certification application's filing. However, the record still indicates a familial relationship between the Petitioner's president and her cousin, the Beneficiary, at the time of the labor certification's filing.[2]

B. Definition of "Familial Relationship"

The Petitioner argues that its response to Question C.9 on the ETA Form 9089 did not constitute a willful misrepresentation of the relationship between its president and the Beneficiary. In her May 1, 2015, letter in response to the Director's NOID, the Petitioner's president stated that she is not "a direct blood relative of the beneficiary, and hence [I] marked No for question C.9."

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[2] Online Maryland records also identify the Petitioner's president as a director of the corporation. *See* Md. Dep't of Assessments & Taxation, Charter Record Search, Articles of Incorporation, at http://sdatcert3.resiusa.org/ucc-charter/Pages/UCCSearch/ViewFiles.aspx (accessed Dec. 18, 2015). The online records do not indicate that the Petitioner's parents ever served as directors. *Id.* In addition, the Maryland records show the Petitioner's forfeiture of its corporate charter twice, in 2008 and 2014. However, the records indicate revivals of the charter, most recently on May 8, 2015. *See* Md. Code Ann. Corps. & Ass'ns, 3-512 (West 2014) (stating that a charter revival validates or restores a corporation's contracts, acts, assets, and rights to the same extent they existed as before forfeiture); *see also Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1104-05 (W.D. Wash. 2011) (finding that a Maryland corporation's revival of its charter retroactively validated its actions regarding its immigration petitions).

The Director rejected the Petitioner's argument. The Director's decision states that "question C.9 does not ask if there is a specific type of familial relationship but [rather] if there is a familial relationship. The petitioner and the beneficiary are cousins and the petitioner gave no information to show that [] the Department of Labor had been notified of the relationship."

However, the term "familial relationship" was subject to different interpretations at the time of the labor certification's filing. The DOL did not publicly define the term until its issuance of an online answer to a frequently asked question (FAQ) on July 28, 2014. *See* U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions and Answers," at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed Dec. 18, 2015).

The DOL's July 28, 2014, definition states that, for labor certification purposes, the term "familial relationship" includes "any relationship established by blood, marriage, or adoption, even if distant." *Id.* Specifically, the definition states "cousins of all degrees . . . are included." *Id.* Thus, the Petitioner's interpretation of the term "familial relationship" as including only blood relatives does not accord with the DOL's more expansive definition of the term.

However, the letter of the Petitioner's president indicates that she did not knowingly conceal her relationship to the Beneficiary *at the time of the labor certification's filing.* Her letter indicates that she did not believe a "familial relationship" existed between her and her cousin because he was not her "direct blood relative." Although the DOL later defined the term "familial relationship" to include cousins, the DOL had not published its definition at the time of the labor certification's filing. *See Bosuego*, 17 I&N Dec. at 128 (stating that circumstances at the time of an alleged misrepresentation govern).

Before the labor certification's filing, decisions of the Board of Alien Labor Certification Appeals (BALCA) found relationships between labor certification employers and their beneficiary cousins to trigger increased scrutiny of the *bona fides* of job opportunities. *See, e.g., Matter of Bombay Jewelry Co., Inc.*, 2011-PER-02917, 2013 WL 4714549 (BALCA Aug. 28, 2013) (finding that an employer did not establish a *bona fide* job opportunity where the beneficiary was the cousin of three shareholders, including two majority shareholders who made all of the employer's hiring decisions); *Matter of Dr. Lalita Reddy*, 94-INA-172, 1995 WL 445686 (BALCA July 25, 1995) (finding that a *bona fide* job opportunity did not exist where an employer tried to obtain labor certification for her cousin, a physician, as a medical assistant).

However, the BALCA decisions were not *en banc*. Also, DOL regulations do not state that BALCA decisions bind the agency. *Cf.* 8 C.F.R. § 103.10(b) (stating that decisions of the Board of Immigration Appeals and Attorney General are binding on all USCIS officers and that designated decisions serve as precedents in all proceedings involving the same issues). We therefore do not find that BALCA case law rendered the Petitioner's concealment of the relationship between its president and the Beneficiary at the time of the filing of the labor certification application a knowing misrepresentation.

As previously indicated, the Petitioner's president signed the ETA Form 9089 on January 15, 2015. Thus, she declared under penalty of perjury the truth and accuracy of the information on the labor certification after the DOL's issuance of its definition of the term "familial relationship" on July 28, 2014. This January 15, 2015, representation suggests her knowing concealment of her relationship to the Beneficiary.

However, the January 15, 2015, misrepresentation, even if knowingly made, does not appear to be material. The DOL had already approved the labor certification. Thus, the misrepresentation on January 15, 2015 did not tend to influence the DOL's decision. *See Kungys*, 485 U.S. at 772 (holding that a misrepresentation is material if it "had a natural tendency to influence" the government's decisions).

DOL regulations also barred the Petitioner from amending the labor certification application after the agency's issuance of its definition of the term "familial relationship" on July 28, 2014. *See* 20 C.F.R. § 656.11(b) (barring requests to modify applications submitted after July 16, 2007). Thus, the preponderance of the evidence indicates that the Petitioner's concealment of the existence of a "familial relationship" between its president and the Beneficiary at the time of the labor certification's filing was not knowingly made, and that its concealment after the labor certification's approval was immaterial.

The record indicates that the Petitioner did not willfully mispresent a material fact involving the accompanying labor certification. We will therefore withdraw the Director's decision and reinstate the validity of the labor certification.[3]

II. THE BONA FIDES OF THE JOB OPPORTUNITY

The Director did not consider the *bona fides* of the job opportunity.

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 a petition's denial where the accompanying labor certification was invalid for the geographic area of intended employment pursuant to 20 C.F.R. § 656.30(c)(2)).

A labor certification employer must attest 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

[3] The labor certification states the geographic area of intended employment as Maryland. Correspondence of record indicates the Petitioner's later relocation to Maryland. A labor certification remains valid only for the particular job opportunity, the foreign national, and the area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). However, online DOL information indicates that are in the same Metropolitan Statistical Area (MSA). *See* Foreign Labor Certification Data Ctr. Online Wage Library, at http://www.flc.datacenter.com/OesWizardStep2.aspx?stateName=Maryland (accessed Dec. 18, 2015); *see also* 20 C.F.R. § 656.3 (defining the term "area of intended employment" to include any place within the same MSA). Therefore, the labor certification will remain valid for the job opportunity despite the Petitioner's relocation.

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 1991) *(en banc)* (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

In determining whether a *bona fide* job opportunity exists, adjudicators must consider multiple factors, including but not limited to, whether a beneficiary: 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 the company's 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. *Id.* at *8. Adjudicators must also consider whether a beneficiary's pervasive presence and personal attributes would likely cause the petitioner to cease operations in the beneficiary's absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

If a familial relationship exists between a beneficiary and the stockholders, corporate officers, incorporators, or partners of an employer, or if the beneficiary is one of a small number of employees, the employer must demonstrate the existence of a *bona fide* job opportunity. 20 C.F.R. § 656.17(l). The employer must provide:

- A copy of its articles of incorporation, business license, or similar documents establishing the business entity;
- A list of all corporate officers and shareholders, their titles and positions in the business' structure, and a description of the relationships to each other and the beneficiary;
- The financial history of the corporation, including the total investment in the entity and the amount of investment by each officer, incorporator, and the beneficiary; and
- The name of the business official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the officials with control or influence over hiring decisions involving the offered position.

Id.

The instant record indicates a familial relationship between the Beneficiary and the Petitioner's president, and the Beneficiary's status as one of a small group of employees. As previously indicated, the Petitioner's president admits that the Beneficiary is her cousin. Also, the Form I-140 states the Petitioner's employment of 10 employees. The accompanying labor certification indicates the Petitioner's employment of the Beneficiary since January 13, 2014.

The record contains copies of advertisements for the offered position, a notice of filing, the resumes of four applicants for the position, and an email from a state workforce agency referring 30 other potential applicants. However, the record does not contain a list of all corporate officers and shareholders and their relationships, the corporation's financial history, or the name of the business official with control over the hiring for the offered position pursuant to 20 C.F.R. § 656.17(l). The record also does not contain copies of the resumes or applications of the 30 other applicants referred by the state workforce agency.

Because the record lacks required evidence, we will remand the matter to the Director for consideration of the *bona fides* of the job opportunity pursuant to *Modular Container Systems* and 20 C.F.R. § 656.17(l). The Director should notify the Petitioner of the additional required evidence and afford it an opportunity to respond.

III. THE BENEFICIARY'S QUALIFYING EXPERIENCE

On remand, the Director should also consider the Beneficiary's qualifying experience for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a 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 an accompanying 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, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Also, a petitioner for an advanced degree professional must demonstrate a beneficiary's qualifications in one of two ways. 8 C.F.R. § 204.5(k)(3)(i). A petition must be accompanied by an official academic record showing that a beneficiary has at least a U.S. Master's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(3)(i)(A). Or a petition must be accompanied by evidence that a beneficiary has a U.S. Bachelor's degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i)(B).

In the instant case, the petition's priority date is June 18, 2014, the date the DOL accepted the accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The accompanying labor certification states the minimum requirements of the offered position of technical architect as a Bachelor's degree or a foreign equivalent degree in "computer," physics, engineering, mathematics or a related field, plus 60 months, or five years, of experience in the job offered. The labor certification states the duties of the offered position as designing and developing data warehouse architecture and solutions, "using ETL, BI, OLAP, SQL and PL/SQL." The labor certification also states that the position involves testing and writing test scripts.

The Beneficiary attested on the labor certification to about 166 months of full-time related experience before joining the Petitioner in the offered position on January 13, 2014. The labor certification states the Beneficiary's possession of the following experience:

- About 19 months as a technology architect with in the United States from June 4, 2012 to January 10, 2014;
- About two months as senior associate with in the United States from March 12, 2012 to May 13, 2012;
- About 30 months as a project manager with in the United States from September 1, 2009 to March 10, 2012;
- About 28 months as a team lead (architect) with in the United States from May 1, 2007 to August 30, 2009;
- About 15 months as a consultant level 5 (architect) with in India from February 8, 2006 to May 4, 2007;
- About nine months as a senior software engineer with in India from May 5, 2005 to February 3, 2006; and
- About 63 months as a systems administrator with in India from February 5, 2000 to May 3, 2005.

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

The record contains letters from all of the Beneficiary's claimed former employers.

A. The Beneficiary's Experience with

A January 13, 2014, letter by an associate vice president on stationery states the company's employment of the Beneficiary from June 4, 2012 to January 10, 2014 and his title of technology architect at the time of his departure. However, the letter does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1).

In response to the Director's request for evidence (RFE) of February 26, 2015, the Petitioner submitted a copy of a March 3, 2015, email message from a member of U.S. separation team to the Beneficiary. The email message states the company's prohibition on the issuance of detailed experience letters on its letterhead and personal letters from managers. The Petitioner also submitted statements from two purported former coworkers of the Beneficiary, stating the Beneficiary's full-time employment with from June 4, 2012 to January 10, 2014 and describing his duties.

If required evidence is unavailable, a petitioner must demonstrate the unavailability before we can consider secondary evidence. 8 C.F.R. § 103.2(b)(2)(i). We may consider two or more affidavits from non-parties "who have direct personal knowledge of the event and circumstances." *Id.*

In the instant case, the email message demonstrates the unavailability of a required, detailed experience letter on stationery. However, the statements from the Beneficiary's purported former coworkers do not establish their direct personal knowledge of the Beneficiary's duties at The coworkers do not appear to have supervised the Beneficiary's work, as their statements identify their

positions as a technical lead and a technical architect. In addition, the record lacks documentary evidence corroborating their claimed employment with during the relevant period. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (stating that unsupported assertions do not meet a petitioner's burden of proof in visa petition proceedings).

B. The Beneficiary's Experience with

In response to the Director's RFE, the Petitioner submitted a March 6, 2015, letter from a senior human resources representative on the stationery of The letter states the company's employment of the Beneficiary as a senior associate-projects from March 12, 2012 to May 31, 2012 and describes his duties in the job offered. The record therefore appears to establish the Beneficiary's possession of about two months of qualifying experience with

C. The Beneficiary's Experience with (United States)

In response to the Director's RFE, the Petitioner submitted two letters on stationery, both dated March 5, 2015 and signed by a human resources manager. The letters state the company's full-time employment of the Beneficiary in the United States as a project manager from September 6, 2009 to March 10, 2012 and as a project leader from May 7, 2007 to September 5, 2009.

Both letters describe the Beneficiary's duties in the respective positions. However, the letter regarding his experience as a project leader from May 7, 2007 to September 5, 2009 does not state the Beneficiary's experience with PL/SQL as specified in the job duties of the offered position on the labor certification. Therefore, the record appears to establish the Beneficiary's possession of only about 30 months of qualifying experience with from September 6, 2009 to March 10, 2012.

D. The Beneficiary's Experience with

The record contains a service certificate and letter from a human resources representative on the stationery of in India, both dated June 11, 2007. The certificate and the letter indicate the Beneficiary's hiring by the company as a consultant I on February 8, 2006 and his resignation, effective May 4, 2007. However, neither document describes the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The documents also do not indicate the Beneficiary's employment as a consultant level 5 (architect), as the Beneficiary attested on the labor certification. The certificate and the letter therefore do not appear to establish the Beneficiary's qualifying experience at

In response to the Director's RFE, the Petitioner submitted a March 10, 2015, letter from a purported former coworker of the Beneficiary at The letter describes the Beneficiary's experience and states his position as a consultant level 5 at the time of his departure. However, the letter does not state the Beneficiary's use of OLAP, SQL, or PL/SQL as specified in the job duties of the offered position on the labor certification. The letter also does not explain whether the Beneficiary held other positions

with other duties at the company as suggested in the company's letter, or how long he served as a consultant level 5.

In addition, the record does not establish the unavailability of a letter describing the Beneficiary's experience from pursuant to 8 C.F.R. § 204.5(g)(1). *See* 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to demonstrate the unavailability of required evidence before we can consider other evidence). The letter from the Beneficiary's purported former coworker also does not establish the coworker's direct personal knowledge of the Beneficiary's duties at Further, the record lacks documentary evidence corroborating the claimed employment of the Beneficiary's purported coworker with during the relevant period. *See Soffici*, 22 I&N Dec. at 165 (stating that unsupported assertions do not meet a petitioner's burden of proof in visa petition proceedings). The record therefore does not establish the Beneficiary's qualifying experience with Satyam.

E. The Beneficiary's Experience with (India)

The Petitioner submitted a February 3, 2006, letter from a senior human resources manager on the stationery of in India. The letter states the Beneficiary's employment by the company from May 5, 2005 to February 3, 2006. However, the letter does not describe his experience pursuant to 8 C.F.R. § 204.5(g)(1). The letter therefore does not establish the Beneficiary's qualifying experience with in India.

The Petitioner also submitted an undated affidavit from a purported former coworker of the Beneficiary at in India. The affidavit states the Beneficiary's employment as a senior software engineer from May 2005 to February 2006 and describes his duties. However, the affidavit does not state the Beneficiary's experience with OLAP and PL/SQL, as specified in the job duties of the offered position on the labor certification.

Also, the record does not establish the unavailability of a letter from in India describing the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). Further, the affidavit from the Beneficiary's purported former coworker does not establish the coworker's direct personal knowledge of the Beneficiary's duties at in India. The record also lacks documentary evidence corroborating the employment of the Beneficiary's purported former coworker with in India during the relevant period. *See Soffici*, 22 I&N Dec. at 165 (stating that unsupported assertions do not meet a petitioner's burden of proof in visa petition proceedings). The record therefore does not appear to establish the Beneficiary's qualifying experience with in India.

F. The Beneficiary's Experience with

The Petitioner submitted a May 3, 2005, service certificate from a managing director on the stationery of The certificate states the Beneficiary's employment by the company as a system administrator from February 5, 2000 to May 3, 2005. However, the letter does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The record therefore does not appear to establish the Beneficiary's qualifying experience at SVSP.

Thus, the record appears to establish the Beneficiary's possession of about 32 months of qualifying experience: about two months with [redacted] from March 12, 2012 to May 31, 2012; and about 30 months with [redacted] in the United States from September 6, 2009 to March 10, 2012. The record does not appear to establish the Beneficiary's possession of at least 60 months of experience in the job offered as specified on the accompanying labor certification and as required for classification as an advanced degree professional.

On remand, the Director should notify the Petitioner of the deficiencies of record regarding the Beneficiary's claimed qualifying experience and afford the Petitioner an opportunity to respond.

IV. ABILITY TO PAY THE PROFFERED WAGE

The record also does not appear to establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a 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 accompanying labor certification states the proffered wage of the offered position of technology architect as $117,582 per year. As previously indicated, the petition's priority date is June 18, 2014.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner has not paid the beneficiary the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. If a petitioner's net income or net current assets are insufficient to demonstrate its ability to pay the proffered wage, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

The record demonstrates the Petitioner's ability to pay the Beneficiary's individual proffered wage. A copy of an IRS Form W-2, Wage and Tax Statement, indicates the Petitioner's payment of $70,032 to the Beneficiary in 2014. A copy of the Petitioner's 2014 federal income tax return also states net income of $65,867 and net current assets of $158,710. Both annual amounts exceed the

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Tongatapu Woodcraft Hawaii, 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), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

$47,550 difference between the wages paid to the Beneficiary and the annual proffered wage in 2014.[5]

However, USCIS records indicate the Petitioner's filing of I-140 petitions for two other beneficiaries that remained pending after the instant petition's priority date.[6] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must establish its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other two petitions pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were 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 demonstrate its ability to pay multiple beneficiaries).

The record does not document the priority dates or proffered wages of the other pending petitions, or whether the Petitioner paid wages to the other beneficiaries. The record also does not indicate whether the other petitions were withdrawn, revoked, or denied, or whether the other beneficiaries obtained lawful permanent residence.

On remand, the Director should notify the Petitioner of the required information and afford it an opportunity to provide additional evidence of its ability to pay the combined proffered wages of the applicable petitions. The Director should also allow the Petitioner to submit evidence of its ability to pay pursuant to *Sonegawa*, such as evidence of: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the Beneficiary will replace a current employee or outsourced service; or any other evidence of its ability to pay the combined proffered wages. *See Sonegawa*, 12 I&N Dec. at 614-15.

V. CONCLUSION

The record does not support the Director's invalidation of the accompanying labor certification. We will therefore withdraw the Director's decision and reinstate the validity of the labor certification. However, the record does not appear to establish the *bona fides* of the job opportunity, the Beneficiary's qualifying experience for the offered position or the requested immigrant classification, or the Petitioner's continuing ability to pay the proffered wage. We will therefore remand the matter to the Director for further consideration consistent with this opinion and the entry of a new decision.

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[5] The Petitioner files its federal income tax returns as an S corporation. S corporations with income, credits, deductions, or other adjustments from sources other than their trades or businesses reconcile their incomes on Schedule K of their IRS Forms 1120S, U.S. Income Tax Returns for S Corporations. *See* Internal Revenue Serv., Instructions for Form 1120S, 22, at https://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed Dec. 21, 2015). Because the Petitioner had additional income adjustments, it reported a reconciled amount of net income on line 18 of the Schedule K in its 2014 tax return.

[6] USCIS records identify the two other petitions by the following receipt numbers: [redacted]; and [redacted]

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FURTHER ORDER: The ETA Form 9089, case number [redacted], is reinstated.

Cite as *Matter of A-S- Inc.*, ID# 14995 (AAO Dec. 29, 2015)