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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 2 6 2015 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as 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:

SELF-REPRESENTED

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, Nebraska Service Center, denied the immigrant visa petition and petitioner appealed the director's decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

I. PROCEDURAL HISTORY

The petitioner, a real estate marketing business, seeks to employ the beneficiary permanently in the United States as a Market Research Analyst by filing a Form I-140, Immigrant Petition for Alien Worker. Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition.[1] The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly, and the petitioner appealed the director's decision to our office.

The record shows that the petitioner properly and timely filed the appeal, and the appeal stated a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision; further elaboration will be made only as necessary.

We conduct appellate review on a *de novo* basis.[2] We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.[3] An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision.[4]

The director's September 5, 2013, denial notified the petitioner that it failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Our office issued a Request for Evidence and Notice of Intent to Deny (RFE) on February 27, 2014, notifying the petitioner of additional issues not identified by the director, including: its ability to pay the proffered wages to all of its sponsored workers; and whether the beneficiary possessed the minimum qualifications required by the labor certification. The petitioner responded to our RFE, and we consider that response in our decision.

[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); *see also* 8 C.F.R. § 204.5(a)(2).
[2] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).
[3] The Form I-290B, Notice of Appeal or Motion, instructions permit the submission of additional evidence on appeal. 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).
[4] *Supra* n. 2; *see also Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003).

II. LAW AND ANALYSIS

The issues in this case include: whether the petitioner possesses the ability to pay the beneficiary's proffered wage; whether a *bona fide* job opportunity was available to all qualified U.S. workers; and whether the beneficiary possesses the minimum qualifications for the position offered.

A. Ability to Pay the Proffered Wage

The petitioner must document its continuing ability to pay the beneficiary's proffered wage, $36,700, as stated in Part G.1 the labor certification.[5] It must demonstrate this from the petition's priority date, October onward until the beneficiary obtains lawful permanent residence.[6] The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition.[7]

The evidence in the record of proceeding shows that the petitioner is a limited liability company (LLC) taxed as a sole proprietorship.[8] On the petition, the petitioner listed May as its date of establishment, and claimed to currently employ one (1) U.S. worker. It claimed to employ two (2) workers on the labor certification. The beneficiary indicated no current or prior employment by the petitioner on the labor certification.

The petitioner must establish that a realistic job opportunity exists. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that a realistic job offer existed as of the priority date, and that the offer remained realistic for each year until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.[9] U.S. Citizenship and Immigration Services (USCIS) requires a petitioner to demonstrate sufficient financial resources to pay a beneficiary's proffered wages, however, we will also consider the totality of the circumstances affecting a petitioner's business.[10]

In determining the petitioner's ability to pay the proffered wage, we first examine whether the petitioner paid the beneficiary during that period. If the petitioner establishes by documentary

[5] 8 C.F.R. § 204.5(g)(2) (petitions for employment-based immigrants must include evidence of the employer's ability to pay the proffered wage, including annual reports, federal tax returns, or audited financial statements).
[6] *Supra*, n. 5. DOL's acceptance of the labor certification establishes the petition's priority date. 8 C.F.R. § 204.5(d).
[7] *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).
[8] An LLC, an entity formed under state law by filing articles of organization, may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.
[9] *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).
[10] *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner stated it employs only one individual, a U.S. citizen and not the beneficiary, in a letter, dated April 9, 2014.

As the petitioner failed to establish that it paid the beneficiary the proffered wage from onward, we will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.[11] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent.[12] Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage, or that the petitioner paid total wages in excess of the proffered wage, is insufficient.

We rely on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.[13] Our analysis is without consideration of depreciation or other expenses.[14]

We notified the petition in our RFE that it must demonstrate that it possessed the ability to pay the combined proffered wage of all its beneficiaries. The petitioner responded, indicating that it filed an immigrant petition for one additional worker with the same wage and priority date. Therefore, the petitioner must establish realistic job offers for each beneficiary, including that it possesses the ability to pay the combined proffered wages of each of its beneficiaries, as of the priority date of each petition and continuing until the beneficiaries obtain lawful permanent residence.[15] The combined proffered wages equal $73,400.

The record closed on April 14, 2014, with our receipt of the petitioner's RFE response. The petitioner provided its federal income tax return. The petitioner's tax returns demonstrate the following net income:[16] $36,702 for or less than the proffered wages; and $74,720 for , which is $1,320 in excess of the combined proffered wages.

Therefore, the petitioner lacked sufficient net income to pay the combined proffered wages in

[11] *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

[12] *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

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

[15] *Supra*, n. 9. USCIS records indicate that the additional beneficiary obtained lawful permanent residence in May 2014. Therefore, the petitioner must demonstrate its ability to pay that wage through that date.

[16] The petitioner's net income is reported on its member's IRS Form 1040, Schedule C at line 31.

Because the petitioner lacked sufficient net income to pay the combined proffered wages in we may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[17] The record contained unaudited financial statements; our RFE notified the petitioner that we may consider only audited financial statements pursuant to 8 C.F.R. § 204.5(g)(2). The petitioner's RFE response contained additional unaudited "profit and loss" statements for but lacked the audited financial statements or annual reports required by regulation.[18] Because IRS Form 1040, Schedule C lacks a statement of current assets and current liabilities, the record contains no evidence of the petitioner's current assets and current liabilities, preventing us from ascertaining its net current assets for [19] Therefore, the petitioner failed to establish that it had sufficient net current assets to pay the beneficiaries' combined proffered wages in .[20]

Thus, the petitioner failed to establish its continuing ability to pay the beneficiaries' combined proffered wages from the priority date onward, through an examination of wages paid to the beneficiaries, or its net income or net current assets.

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

[17] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[18] The petitioner's reliance on unaudited financial records is misplaced. *See* 8 C.F.R. § 204.5(g)(2). As the statements lack an accountant's report, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[19] The petitioner also provided its state "Return of Income," California Form 568, which does include a Schedule L, "Balance Sheets." However, this schedule indicates that the petitioner possessed $51,139 in "cash" and $3,000 in "inventories" at the end of the taxable year. Even if we were to consider the information on this return, it would cast doubt on the credibility of the information on the petitioner's federal return, which indicated no year-end cash and no inventories or costs of goods. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

[20] The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

matrons, and individuals included on lists of the best-dressed women in California. The petitioner also lectured on fashion design throughout the United States.

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

The petitioner, like the employer in *Sonegawa*, is a small business. Unlike in *Sonegawa*, where the employer was in operation for over 11 years, the petitioner here incorporated in May [redacted] began the recruitment for the labor certification process one month later, in June [redacted] and filed two labor certifications in October of the same year. Thus, the petitioner opened as a new venture shortly before attesting to DOL on Part N.3 of the labor certification that it had "enough funds available to pay the wage or salary offered the alien." The petitioner's financial activity during that year, however, fails to support that attestation. The petitioner provided selected bank statements for [redacted] covering the months of May, August, September, November, and December. The May statement indicates the petitioner opened the account on May [redacted] with a deposit of $38,100 and received a deposit of $40,058 from [redacted] on May 21, [redacted] The same month, the petitioner withdrew a total of $76,090 between May 18 and May 31, including a $38,000 payment to [redacted] a $15,000 transfer to [redacted] a $15,000 account-to-account transfer to a checking account with an unidentified owner, and an $8,000 check issued to [redacted] leaving it with $2,068 in its bank account at the end of that month. The petitioner's statements indicate that its bank charges it an account fee per month. Its August statement reflects an opening balance of $2,056, which appears to represent the same funds from its May statement, less the monthly account fee. That statement also lists a $1,800 transfer to the same checking account from the May statement. The petitioner's November statement reflects only an account maintenance fee, and no other activity. Its December statement reflects the account maintenance fee and a $160 withdrawal to the same checking account, leaving a balance of $21.00 on December 31, [redacted]

The petitioner's financial activity also conflicts with the information provided on its amended tax return. The petitioner's [redacted] IRS Form 1040X, Amended U.S. Individual Income Tax Return, states Gross Receipts or Sales of $51,772 on Schedule C, Line 1 and lists no costs of goods sold or inventory on Line 4; this information conflicts with the petitioner's bank deposits, totaling $78,158. The petitioner's [redacted] individual tax return includes other indicia of unreliability, such as reporting gambling losses of $19,805 on Line 28 of Schedule A, and an additional $4,560 in gambling losses included on Line 23 of Schedule A, despite only claiming $4,560 in gambling winnings on Line 21 of its tax return. *See* IRS, "Tax Topic 419 – Gambling Income and Losses," at http://www.irs.gov/taxtopics/tc419.html (accessed January 12, 2015) (stating tax filers must report "all gambling winnings" on Line 21 of IRS Form 1040, and that the "amount of losses you deduct may not be more than the amount of gambling income reported on your return").

The record reflects that the petitioner took in income only in May whereupon the majority of those funds were withdrawn the same month; subsequently the petitioner withdrew substantially all of the remaining $2,068 to a checking account with an unidentified owner. Thus, unlike the employer in *Sonegawa,* the petitioner in the instant case has failed to demonstrate significant financial activity or growth; rather, the record suggests that the petitioner carried out little, if any, business activity from its founding through the priority date, six months later.

On the labor certification, the petitioner attested in to having two employees but subsequently informed USCIS on the Form I-140 that it employed no workers or contractors that year. In the year following the priority date, it employed only one individual and paid wages of only $21,000 and contract labor of $3,869. Thus, unlike the employer in *Sonegawa,* the petitioner here has demonstrated a small number of employees and a low amount of wages paid for its second year of operation.

The record contains little evidence of the petitioner's operations and no evidence of its reputation. On the petition, the petitioner describes itself as a real estate marketing business. In the letter accompanying the petition, it states that it specializes in "real estate investments, property management, investment feasibility studies and solutions and drafting marketing plans, social media advertising and corporate branding for businesses and high net worth individuals who wish to do business in the United States." The petitioner provided a print out of its own website that declares the petitioner to be a "Leader in Global Marketing and Investment" and "the most trusted real estate company in the CA area." However, these same materials, printed May , also claim that the petitioner is "staffed by a highly skilled team" and is "backed by several years of experience." This information conflicts with the petitioner's own assertions that it was a startup company in and employed only one worker beginning in

The petitioner appears to be one of at least five other entities operated by the petitioner's owner, out of a single office suite.[21] The petitioner appears to be a start-up without significant investment, backing or financial capital; it is unclear from the record whether the petitioner exists as a separate, viable entity, were it to be a stand-alone entity not supported by Ms.

[21] To demonstrate the petitioner is an active business with a physical location, the petitioner provided a lease, dated July between (Landlord), documenting that Ms. maintains an office suite. The lease appears to be fully executed, as it is signed, dated, and each page initialed, by the appropriate parties. In addition, the petitioner provided a "First Amendment to Lease," dated October 22, relocating Ms. lease from in the same building. The petitioner also provided an "Assignment of Lease," purporting to be executed on April 4, The first numbered clause of the Assignment includes the statement, "Landlord acknowledges that has been do business out this location since they began doing business on April ' [*sic*]. The Assignment is signed only by Ms. in her personal capacity assigning the lease, and in her capacity as the petitioner's owner assuming the lease. It is not signed by the Landlord, indicating that it was not executed. However, clause 12.1(a) of the original lease agreement requires the Landlord's consent to "assign, transfer, … or sublet all or any part" of the lease. Therefore, the unexecuted lease, dated after our RFE, is insufficient to establish that the petitioner maintains a physical location to which U.S. applicants may be referred. 20 C.F.R. §§ 656.3 (defining "employer," "job opportunity"), 656.10(c)(8). We note that, were this assignment to be valid, it would require Ms. law firm and other entities to become the petitioner's tenants. The record fails to demonstrate any rental payments from those entities to the petitioner.

and her other ventures. The record suggests that, while the petitioner may have developed into a viable entity in later years, as of the priority date of October 11, it was not at a stage sufficient to support the two beneficiaries it sought to sponsor for employment on a permanent basis. A petitioner must establish the elements for the approval of the petition at the time of filing; a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

B. *Bona Fide* Job Opportunity

Beyond the decision of the director, we find that the petition is not supported by a *bona fide* job opportunity.[22] Under 20 C.F.R. § 626.10(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The petitioner cannot be a sham; it cannot be established for the sole purpose of obtaining labor certification for the beneficiary. *See Modular Container Systems, Inc.*, 1989-INA-228, *8 (BALCA Jul. 16, 1991) (*en banc*) (*citing Hall v. McLaughlin*, 864 F.2d 868, 874 (D.C. Cir. 1989)).

The petition is not supported by a *bona fide* job opportunity because the record establishes that the petitioner lacked a legal right to use the physical location at which it proposed to employ the beneficiary. The petitioner incorporated in in the State of California with a registered agent, Ms. residing at the same location, The petitioner's owner attested on October 11, in Part N of the labor certification that the "job opportunity is for full-time, permanent employment for an employer other than the alien." *See also* 20 C.F.R. § 656.10(c)(8). Employer is defined as an entity "that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States." 20 C.F.R. § 656.3 ("employer"). A job opportunity is defined as "a job opening for employment at a place in the United States to which U.S. workers can be referred." *Id.* at § 656.3 ("job opportunity). The record contains a lease which states without ambiguity that the sole tenant of is Ms. doing business as ' ' The petitioner possesses a separate Federal Employer Identification Number (FEIN) from Ms. making it a separate employer. *Id.* at § 656.3 (defining "employer" by its possession of a FEIN). The record contains an attempted assignment, including a provision to document the petitioner's use of the space; however, that assignment was drafted in response to our RFE, was not executed by the required parties, and did not exist for any independent purpose. Therefore, the record fails to demonstrate that the petitioner maintained the location which it attested to DOL that it possessed, and to which a U.S. worker may be referred during its recruitment for the position. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner must resolve

[22] *Supra* n.4.

any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner cannot rectify its lack of "a location within the United States" during the recruitment process by later executing a *nunc pro tunc* assignment of another employer's location. A petitioner must establish the elements for the approval of the petition at the time of filing; a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petition is not supported by a *bona fide* job opportunity because the petitioner was not operational as of the priority date. *Id.* As discussed previously, the record indicates that the petitioner employed no workers in that it possessed no physical location to which U.S. workers or the beneficiary could be referred, and that it lacked the financial resources necessary to place the beneficiary on its payroll as of the priority date. *See* 20 C.F.R. §§ 656.3; 656.10(c)(3), (4). At the time the petitioner filed the labor certification with DOL on behalf of the beneficiary, the bank records provided document that the petitioner possessed $2,068 in financial reserves, and deposited no additional funds for the remainder of the year. The petitioner's financial statements indicate that it received no income after May Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Likewise, the evidence of record establishes that the petitioner lacked the funds to pay the wage offered, or to put a U.S. worker on its payroll as of the priority date. Therefore, the job opportunity was not clearly open to any U.S. worker as of the priority date because the petitioner lacked the means to pay the offered wage, and possessed no physical location at which it could employ a worker. 20 C.F.R. § 656.10(c)(8). The petitioner cannot offer wages or terms and conditions of employment that are less favorable than those offered to the beneficiary. *See* 20 C.F.R. § 656.17(f)(7).

The Board of Alien Labor Certification Appeals (BALCA) has held that where the employer fails to adequately document that the employer exists or that a current job opening exists, certification is properly denied on the ground that no *bona fide* job opportunity exists. *See Aerial Topographic Maps*, 1994-INA-627 (BALCA 1996) (BALCA found employer's business not viable because it was unable to provide business license or tax registration, noting that a tax registration alone would be insufficient); *Tedmar's Oak Factory*, 1989-INA-62 (BALCA 1990) (documentation, not mere assertions, required to prove that employer's business existed and job opening existed when doubts arise regarding their existence).

maintains an online "Master Business Listing" of all businesses operating in the city of California. *See* City of Office of the City Treasurer,

(accessed January 28, 2015). While this listing provides a current listing of all businesses registered with the City Treasurer, the petitioner, is not listed in either its "Active Business Listing" or the "Previous Month Business Tax Listing." The petitioner's lack of a business license or tax registration suggests it is not a viable entity, that is, that it does not exist. *See Aerial Topographic Maps*, 1994-INA-627 (BALCA 1996). "All businesses operating in the City of are required to obtain a Business Tax Certificate. This includes home-based businesses, self-employed persons, and independents contractors." *See* City of Office of the City Treasurer, *Taxes and Fees* http:/ (accessed January 28, 2015). Further, while the petitioner claims to provide real estate services, it similar is not licensed by the California Department of Consumer Affairs, Bureau of Real Estate.[23] *See* http://www2.dre.ca.gov/PublicASP/pplinfo.asp?start=1 (accessed January 28, 2015). The fact that the petitioner employed no workers, and would purportedly have employed only the two beneficiaries of its immigrant petitions, casts doubt on its existence. *See* 2003-INA-276 (BALCA 2004) (employer's intention to employ only two alien workers, and no U.S. workers, "suspect" and to suggest the positions were created solely for the purpose of labor certification).

The petitioner's lack of a physical location, lack of employees, and lack of a means of conducting business as of the priority date also casts doubt on whether the petitioner would be the beneficiary's actual employer. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. The petitioner's attempt to provide an unexecuted lease to document its physical location casts doubt on the remainder of its evidence. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

Based on these issues, it is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under … section 203(b)(2) … of the Act." The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer because as of the priority date it employed no workers, it lacked a physical location, and it was not licensed to do business in the city of or as a real estate company. Thus, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

Based on the issues described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based on a *bona*

[23] Ms. maintains a current California real estate broker's license. *See* State of California, Bureau of Real Estate, (accessed January 28, 2015). She reports that she does business as ' ' but not under the petitioner's name.

fide job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

C. Beneficiary's Qualifications for the Position Offered

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

Part H of the approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) filed in support of the visa petition states that the offered position of Market Research Analyst has the following minimum requirements:

H.4.	Education: Master's.
H.4-B.	Major field of study: Business Administration.
H.5.	Training: None required.
H.6.	Experience in the job offered: None required.
H.7.	Alternate field of study: Accepted.
H.7-A.	Major field of study: Natural Sciences.
H.8.	Alternate combination of education and experience: Accepted.
H.8-A.	Alternate level of education required: Bachelor's.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	60 months.
H.10-B.	Job title of alternate occupation: International Business Manager.
H.14.	Specific skills or other requirements: None indicated.

Accordingly, the labor certification in this case requires the beneficiary to have a master's degree in business administration or in the natural sciences, or a bachelor's degree with five years of employment experience as an International Business Manager as of the visa petition's October 11, priority date.

1. Academic Qualifications

The record documents the beneficiary's academic qualifications with copies of certificates that reflect that the beneficiary was awarded a Bachelor of Arts degree by on June 26, 1981, and a Master of Arts degree on January 26, 1985, again by

The record also includes an academic transcript for the beneficiary's undergraduate degree, dated May 16, 2007. The RFE we issued on February 27, 2014 asked for a more detailed academic transcript of the courses taken by the beneficiary for his undergraduate degree, as well as a transcript of the coursework he completed for his Master of Arts degree. In response, the petitioner submitted a printout on the structure of undergraduate courses at and a March 7, 2014 statement written on the letterhead of PhD, Head of Student Operations, Secretary to the Board of Graduate Studies, which transmits a certified official transcript of the beneficiary's undergraduate coursework.

The new transcript indicates that the beneficiary's major field of study for his Bachelor of Arts degree was in Natural Sciences. While it indicates that no overall grade point is available, the transcript does report that the beneficiary graduated with first class honors from his 1979 Easter Term, and with lower second class honors in his two subsequent terms of study. Although no transcript of the coursework taken by the beneficiary for his Master of Arts degree has been provided, the petitioner submitted an evaluation of the beneficiary's education prepared by in which she indicates that the award of a Master of Arts degree does not require the beneficiary to complete a postgraduate course of study. Instead, she states that the Master of Arts degree is awarded as a mark of status within the a few years after the receipt of a Bachelor of Arts degree. Information published online by the provides similar information, indicating that a Master of Arts is awarded "not less than six years from the end of [a student's] first term of residence if two years have elapsed since they were admitted as a Bachelor of Arts." The website reports that receiving a Master of Arts degree indicates a person's standing in the University and provides admission to the University Senate. *See* https:// (accessed January 28, 2015). However, evidence provided by the beneficiary in this matter appears to indicate that his Master of Arts degree followed postgraduate studies. The beneficiary's resume submitted in support of the instant Form I-140 appears to reflect that the beneficiary's Master of Arts degree from was awarded in 1985 based on postgraduate studies begun in 1983 and completed in 1985. Therefore, we cannot determine that the beneficiary meets the primary requirements of the labor certification based on his Master of Arts degree in an unspecified field with no evidence of graduate coursework.

Therefore, we will only consider whether the beneficiary possesses the acceptable alternate combination of education and experience in order to qualify for the position offered. As the beneficiary possesses the foreign equivalent of a bachelor's degree in natural sciences, we must next consider whether the beneficiary possesses five years of qualifying experience in the position offered or as an international business manager.

2. Employment Experience

Part K of the labor certification reflects that the beneficiary has claimed the following employment experience:

- Software Architect Engineer at , beginning on August 10, 2011;

- Self-employment in an unnamed stock trading business from July 30, 2007 until August 9, 2011; and

- International Business Manager at [redacted] from January 1, 1997 until December 31, 2004.

In support of the employment claimed on the labor certification, you initially submitted a May 31, 2013 affidavit from the beneficiary in which he stated that during the period January 1997 to December 2004, he had been a founder of and investor in a number of start-up companies, including [redacted] as well as a copy of his resume. In his affidavit, the beneficiary indicated that during the period indicated, he was:

> involved in overseeing a portfolio of companies that the company has invested in, studied, research and analyzed market data pertaining to new technology trends and emerging products and services that have potential start-ups; developed and coordinated marketing programs that would promote awareness and the goods and services in the industry; studied marketing demographic data and consumer profiles with site visits to identify target audiences of media advertising; researched market conditions in the local area to determine potential competitiveness; prepared reports and graphic illustrations of findings in the industry; planned and developed marketing plans and suggestions to key management; monitored and analyzed marketing and advertising results to determine cost effectiveness of promotion campaigns, comparing cost of advertising and rate of return to business from each advertising media used. In addition, I also recruited, supervised, and trained over 100 employees. As a key manager in upper management, I also had responsibilities in profit & loss, training supervising, hiring and firing managerial positions, and overall business development and management duties.

However, as discussed in our RFE, the beneficiary's sworn statement and resume do not establish that he has the experience required by the labor certification. Qualifying experience must be supported by the evidence described in the regulation at 8 C.F.R. § 204.5(g)(1), which states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In response to our request for letters from the beneficiary's former employers, the petitioner submitted three affidavits from individuals claiming to have personal knowledge of the beneficiary's past employment:

- An April 2, 2014 statement provided by Mr. indicates that he supervised the beneficiary while the beneficiary worked for in from January 1995 until December 1997. Mr. states that the beneficiary was employed as a Chief Technology Officer (CTO) with responsibility for technology and market trend assessments regarding new products and services. He also maintains that the beneficiary oversaw technological development and the hiring of senior technical personnel across the group of companies.

- An April 3, 2014 statement from Mr. reports that he was the beneficiary's subordinate at the when the beneficiary headed the Digital Media Center team. He also states that he worked with the beneficiary on the management board of from 1994 to 1996 and that the beneficiary was the Chief Technology Officer at during the time that Mr. headed He also asserts that he collaborated with the beneficiary in 1998 when the beneficiary played a technical advisory role in the launching of via a company called He maintains that from January 1997 until December 2004, the beneficiary worked at and at companies with which Mr. competed for business.

- An April 4, 2013 statement from Mr. states that the beneficiary was an investor in a company that Mr. states he helped create and which he left in December 2001. He states that from January 1997 to December 2001, the beneficiary provided feedback regarding the way in which the internet industry was developing, shared ideas and strategies regarding potential business offerings, provided input on improving the business' market position, and gave Mr. business access to "his network." Mr. also reports that he has maintained personal and professional contact with the beneficiary since that time. He indicates that their business contacts have focused mainly on the search for start-up opportunities in and the United States.

Although we note the submission of these statements, we do not find them to satisfy the regulation at 8 C.F.R. § 204.5(g)(1) as they do not come from individuals who trained or employed the beneficiary as an International Business Manager, the employment experience required by the labor certification. We also find that the statements provided by Mr. and Mr. do not address employment claimed by the beneficiary on the labor certification and, further, that the information provided in these statements is inconsistent with the employment history claimed by the beneficiary.

In his April 2 statement, Mr. indicates that he supervised the beneficiary while the beneficiary was employed in the position of Chief Technology Officer at employment not listed by the beneficiary on the instant labor certification.[24] The Board of Immigration Appeals (BIA)

[24] The labor certification filed in support of a Form I-140 petition filed in 2007 on the beneficiary's behalf by another employer does reflect employment with

observed in *dicta* in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) that the credibility of evidence and facts asserted regarding a beneficiary's employment is lessened if that experience is not certified by DOL on the labor certification. Moreover, Mr. description of the beneficiary's duties appears inconsistent with that which he provided in a May 26, 2010 statement submitted in support of a Form I-140 petition filed in 2007 by another petitioner on the beneficiary's behalf.

In this earlier statement, Mr. identifies himself as the Chief Executive Officer of rather than as the beneficiary's supervisor at a relationship that is not explained by the record. In this letter, Mr. does not indicate that the beneficiary had any responsibility for market trend assessment relating to new products and services or that he oversaw the hiring of senior technical personnel across the of companies. Instead he states that as Chief Technology Officer (CTO) at the beneficiary was responsible for:

> all technical management and support issues, development of infrastructure, direction of technology issues and development of new technology across the entire group; made recommendations for improvements in computer system and servers; evaluated and tested software packages for computers to determine compatibility with existing system; tested computer systems to determine criticality of computer loss; set up and oversaw computer services division which dealt with troubleshooting problems to resolve computer-related problems; answered questions, applying knowledge of computer software, hardware and procedures; implemented and maintained Exchange Mail servers, File servers, Web servers, Print Servers and SQL workstations and their software configurations, trouble-shooting and maintenance; set up technical support for network systems; monitored traffic in networks to detect attacks; provided technical support to various departments with various solutions and research and managed networking issues and security.

Mr. adds that the beneficiary helped build and developed various corporate websites using HTML, JavaScript, Photoshop, Cold Fusion and Dream Weaver, database designing and writing stored procedure, programming ASP pages in VBScript and JAVA script to present interactive web pages.

The April 3, 2014 statement provided by Mr. also discusses employment not claimed by the beneficiary on the instant labor certification, specifically the beneficiary's affiliation with the and the beneficiary's technical advisory role at " via a company called Further, Mr. reports that he worked with the beneficiary both as a subordinate and a colleague, not as an employer or trainer, as required by regulation.

While Mr. April 4, 2014 statement addresses the beneficiary's affiliation with employment the beneficiary lists on the labor certification, he describes the beneficiary's involvement as being that of an investor, rather than as an International Business Manager for the

company, which is the employment claimed by the beneficiary on the labor certification. Mr. describes the beneficiary's role in the company as one in which he provided feedback regarding the development of the internet industry, shared his business ideas and strategies, and provided Mr. with access to "his network." Mr. does not state that the beneficiary was ever employed by

Further, the dates of the beneficiary's affiliation with and as reported in Mr. and Mr. statements, are inconsistent with the dates previously provided by the beneficiary.

Mr. statement indicates that he worked with the beneficiary on the management board of from 1994 to 1996, and that from January 1997 until December 2004, the beneficiary worked for and, later, for [25] However, in Part B of the labor certification that supported the Form I-140 petition filed on behalf of the beneficiary by another employer on July 13, 2007, the beneficiary claimed to have worked for from January 1995 until December 1997. In the Form G-325A, Biographic Information, the beneficiary signed on July 23, 2007, he indicated that he was employed as Chief Technical Officer by from June 1995 until April 1997.

Mr. assertion that the beneficiary worked for and then from January 1997 until December 2004 also conflicts with the beneficiary's claim on the instant labor certification and on his resume to have worked as an International Business Manager at from January 1997 to December 31, 2004. However, these dates are inconsistent with the dates of the employment the beneficiary claimed on the 2007 labor certification, which were January 1998 until December 2004. The 2007 Form G-325A, Biographic Information, reflects yet a different period for the beneficiary's employment with January 1997 until January 2004, which, in turn, is inconsistent with the dates provided by Mr. who asserts that the beneficiary was an investor/advisor to from January 1997 to December 2001.

In addition to the above inconsistencies in the beneficiary's employment history, the record also reflects that the beneficiary has provided inconsistent accounts of his more recent employment experience. In the labor certification supporting the 2007 Form I-140 petition filed for the beneficiary by another employer, the beneficiary indicated that he was unemployed from December 2004 until November 2006. However, in the 2007 Form G-325A, he describes himself as having been self-employed during much of this period. The dates that the beneficiary claims to have been self-employed as a stock trader with also vary. In the 2007 labor certification, the beneficiary indicated that his self-employment with began in November 2006. However, in the 2007 Form G-325A, the beneficiary stated that his self-employment began in June 2006. While these inconsistencies do not relate directly to the beneficiary's qualifying experience, they, nevertheless, raise concerns regarding the overall

[25] No evidence in the record indicates when the beneficiary began employment with

reliability of the beneficiary's testimony. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

The numerous inconsistencies in the beneficiary's employment history, both the history reported in the instant labor certification and that found elsewhere in the record, cast significant doubt on his qualifications for the offered position. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Accordingly, the evidence of record does not reliably establish the beneficiary's employment history. Neither does it adequately explain the employment performed by beneficiary for the multiple business entities with which he has claimed employment or affiliation or establish that this employment was performed on a full-time basis.

The petitioner failed to establish that the beneficiary has the five years of employment as an International Business Manager required by the labor certification, by failing to provide documentation of that employment. 8 C.F.R. § 204.5(g)(1). The petitioner failed to submit secondary evidence of that employment, or to establish that the required experience letters and secondary evidence was unavailable. *See* 8 C.F.R. § 103.2(b)(2).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

III. CONCLUSION

The petitioner failed to overcome the director's finding that it had not established its ability to pay the beneficiary's proffered wage. In addition, the record on appeal indicates additional grounds that would prevent the petition from being approved. The petitioner failed to establish that the beneficiary possessed the minimum requirements for the position offered, or that a *bona fide* job opportunity existed as of the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.