U.S. Citizenship and Immigration Services

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

MATTER OF B-O-M- LLC

DATE: NOV. 30, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a motor manufacturer, seeks to permanently employ the Beneficiary as a business development director under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director's decision denying the petition concludes 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, and that the Beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

## I. ABILITY TO PAY THE PROFFERED WAGE

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The priority date of the petition is February 7, 2014. The proffered wage as stated on the ETA Form 9089 is $86,445.00 per year.

The record indicates the Petitioner is structured as a limited liability company (LLC). On the petition, the Petitioner claimed to currently employ 20 workers. On the ETA Form 9089, signed by the Beneficiary on October 30, 2014, the Beneficiary did not claim to have worked for the Petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

In the instant case, the Petitioner provided Forms W-2, Wage and Tax Statements, for the Beneficiary for calendar years 2011, 2012, and 2013. The Forms W-2 for 2011 and 2012 show that the Beneficiary was employed and paid by [redacted] both years. The Form W-2 for 2013 shows that the Beneficiary was employed and paid $82,039.56 by the Petitioner that calendar year.

We note that the Form W-2 issued to the Beneficiary by the Petitioner in 2013 conflicts with the Beneficiary's representation on the labor certification that he worked for [redacted] from November 30, 2011, to February 7, 2014. We also note that the Beneficiary was approved to work in H-1B nonimmigrant status for [redacted] from November 29, 2011 to September 30, 2014, and for the Petitioner from October 1, 2014, to September 30, 2017. The Beneficiary was not authorized to work for the Petitioner in H-1B nonimmigrant status in 2013. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The Petitioner also provided the following paystubs:

- Paystubs issued by the Petitioner to the Beneficiary for the months of February 2014, to December 2014, which show a total yearly salary in 2014 (including January) of $81,165.16. Thus, the Petitioner paid the Beneficiary $5,279.84 less than the full proffered wage in 2014. In January and February 2014, he earned $6,652.88 each month, and in the remaining months of 2014, he earned $6,785.94 per month. The Beneficiary received no bonus in 2014.
- Paystubs issued by the Petitioner to the Beneficiary for the months of January, February, March, and April 2015, which show monthly salary payments of $6,785.94, $6,785.94, $7,328.82, and $7,328.82, respectively. The paystubs also reflect a bonus paid on January 30, 2015, of $6,000.00.

The Petitioner requests that we prorate the proffered wage. We will prorate the proffered wage for the portion of the year that occurred after the priority date if the record contains evidence of payment of the Beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly paystubs.

In the instant case, the Petitioner has not provided its federal income tax returns, audited financial statements, or annual reports. The Petitioner's 2012 federal tax return was submitted with its H-1B nonimmigrant petition for the Beneficiary and shows that the Petitioner files its tax return on a calendar year basis. Further, the Petitioner's Operating Agreement indicates that its fiscal year is the calendar year. Without regulatory required evidence establishing a different fiscal year, we will calculate prorated wages on a calendar year basis.

The full proffered wage is $86,445.00 per year, or approximately $236.84 per day. Since the priority date of the petition is February 7, 2014, to establish its ability to pay in 2014, the Petitioner would have to show that it paid the Beneficiary $77,683.52 for 328 days of work between February 7, 2014, and December 31, 2014. Instead, the paystubs show that the Petitioner paid the Beneficiary $73,086.66 between February 7, 2014 and December 31, 2014, which is $4,596.86 less than the prorated proffered wage.

The Petitioner asserts that it paid the Beneficiary a $6,000 bonus in January 2015 for work he performed in 2014. The Beneficiary's paystubs show that he was paid a $6,000 bonus in January 2015. The Petitioner asserts that since it uses the accrual method of accounting and that "all the facts establishing liability [for the bonus] were determined by December 31, 2014," the bonus should be considered towards the wages paid by the Petitioner to the Beneficiary in 2014. However, in determining an employer's ability to pay the proffered wage based on wages paid to a beneficiary, we do not examine when that employer was able to deduct the compensation based on its accounting method. Instead, we examine when the wages were actually paid. Thus, for 2014, we will review the total amount paid by the Petitioner to the Beneficiary during calendar year 2014, which in this case was $81,165.16. For ability to pay purposes, the bonus would count toward the wages paid by the Petitioner to the Beneficiary in 2015.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *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). If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. 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. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw., 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. 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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the Director closed on March 23, 2015, with the receipt by the Director of the Petitioner's submissions in response to the Director's request for evidence (RFE) dated December 29, 2014. As of that date, the Petitioner's 2014 federal income tax return is the most recent return available.

In his RFE, the Director specifically requested the Petitioner's 2014 federal tax return, annual report, or audited financial statements pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). In his decision, the Director stated that the petition was being denied, in part, because the Petitioner failed to provide its 2014 federal tax return, annual report, or audited financial statements. The Petitioner files its own federal tax returns, as evidenced by the 2012 Form 1120, U.S. Corporation Income Tax Return, that it filed in support of its H-1B nonimmigrant petition on the Beneficiary's behalf. It has not articulated why its 2014 federal tax return is unavailable. The Petitioner did not provide the regulatory-prescribed evidence on appeal. We are unable to calculate the Petitioner's net income or net current assets without this evidence.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the Petitioner had not established that it had the continuing ability to pay the Beneficiary the proffered wage as of the priority date through an examination of wages paid to the Beneficiary, or its net income or net current assets.

On appeal, the Petitioner asserts that since it is currently paying the Beneficiary at the proffered wage rate, it has established its continuing ability to pay the proffered wage beginning on the priority date according to the Memorandum from William R. Yates, Associate Director for Operations, USCIS, HQPRD 90/16.45, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* 2 (May 4, 2004), http://www.uscis.gov/sites/default/files/files/nativedocuments/abilitytopay_4may04.pdf (Yates Memorandum). The Petitioner asserts that there a distinction between past and current salaries and highlights the use of the conjunction "or" in the context of evidence that the Petitioner "has paid or currently is paying the proffered wage." *Id.* The Petitioner urges us to consider the wage rate paid in April 2015 as satisfying that particular method of demonstrating its ability to pay.

The Yates Memorandum provides guidance to USCIS adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the Beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." *Id.*

We consistently adjudicate appeals in accordance with the Yates Memorandum. However, the Petitioner's interpretation of the language in the memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If we were to interpret and apply the Yates Memorandum as the Petitioner urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The Petitioner must demonstrate its continuing ability to pay the proffered wage from February 7, 2014, onward. Demonstrating that the Petitioner is paying the proffered wage in 2015 may suffice to show the Petitioner's ability to pay for that year, but the Petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

On appeal, the Petitioner also asserts that has sufficient net income and current assets to pay the proffered wage. The Petitioner is a limited liability company located in Illinois and organized in Delaware. Pursuant to Illinois and Delaware law, a limited liability company is a legal entity distinct from its members. 805 Ill. Comp. Stat. 180/5-1(c) (2014); Del. Code Ann. tit. 6, § 18-201(b) (2014). Members are not liable for debts, obligations, or liabilities of the company solely by reason of being a member. 805 Ill. Comp. Stat. 180/10-10(a) (2014); Del. Code Ann. tit. 6, § 18-303 (2014). The Petitioner's sole member is Limited, a foreign company. Limited is wholly-owned by a foreign company.

The Petitioner cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for the proposition that has pledged support for the Petitioner, including payment of the Beneficiary's salary. The decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is not binding here. Although we may consider the reasoning of the decision, we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

The Petitioner claims that has a legal obligation to pay its wages because will be the Beneficiary's joint employer.[1] It states that the joint employer doctrines of the Fair Labor Standards

[1] We note that the Petitioner signed the labor certification and certified its intention to employ the Beneficiary and pay him the proffered wage, and that it had enough funds available to pay the proffered wage. did not make any similar attestations on the labor certification.

Act (FLSA) at 29 U.S.C. 201, and the Family and Medical Leave Act (FMLA) at 29 U.S.C. 2601, establish that has a legal obligation to pay the proffered wage in this case.

The FLSA establishes a minimum wage, overtime pay, record keeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. 29 U.S.C. §§ 206, 207, 211(c), 212. Under the FLSA, a single individual may be simultaneously considered an employee of more than one employer. In such cases, the joint employers are individually and jointly responsible for FLSA compliance, including paying not less than the minimum wage for all hours worked and any applicable overtime compensation. 29 C.F.R. § 791.2(a). However, executive, administrative, professional, and outside sales employees who are paid on a salary basis are exempt from the minimum wage and overtime provisions of the FLSA. 29 U.S.C. § 213(a)(1). The Petitioner filed this petition under the advanced degree professional category and has not established that the wage provisions of the FLSA apply to payment of the Beneficiary's wages in this case.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. 29 U.S.C. § 2601. The FMLA applies to public agencies and private sector employees who employ 50 or more employees for at least 20 work weeks in the current or preceding calendar year, including joint employers and successors of covered employers. 29 U.S.C. § 2611. Under the FMLA, employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and liability. 29 C.F.R. § 825.106. Foreign companies operating in the United States may be subject to FMLA with respect to United States locations and employees; however, employees working outside of the United States are not counted in determining employer coverage or liability. 29 C.F.R. § 825.105(b). The Petitioner's quarterly federal tax returns for 2014 show that it employed no more than 17 employees during any given quarter.[2] The Petitioner has not established that it is covered by the FMLA by virtue of a joint employment relationship with a foreign company. Therefore, in the instant case, the Petitioner has not established any legal obligation on the part of to pay the wages of the Petitioner.

Even if the Petitioner had established a legal obligation on the part of to pay the wages of the Petitioner, the documents submitted to the record do not establish ability to pay the proffered wage. The Petitioner submitted the 2013 annual report for and an unaudited "First-Half Year Financial Report" for . The 2013 annual report does not establish ability to pay from February 7, 2014, onward. Further, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where the Petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the financial statements for for the first-half of 2014, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The

[2] On its H-1B nonimmigrant petition filed on behalf of the Beneficiary on August 7, 2014, the Petitioner indicated that it employed a total of 25 or fewer full-time equivalent employees in the United States, including all affiliates.

unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, the Petitioner cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), for the proposition that its cash flow establishes its ability to pay the proffered wage. Cash flow is the net amount of cash and cash-equivalents moving into and out of a business. Positive cash flow indicates that a company's liquid assets are increasing, enabling it to pay its debts and expenses, return money to shareholders, and reinvest in the business.

The Petitioner provides its monthly bank statements from US Bank for the period from January 2, 2014, through February 27, 2015. The bank statements show that the Petitioner deposited funds into its checking account from two main sources: wire credits from and internal wire credits from another account that appears to be owned by the Petitioner. It also utilized a line of credit to avoid overdraft protection charges on five separate occasions. However, the bank statements do not provide a complete picture of the Petitioner's cash flow. The Petitioner did not provide an audited statement of cash flows showing its operating cash flow, its investing cash flow, and its financing cash flow. Without this statement, we cannot determine how much cash the Petitioner actually generated, and the sources of that cash.

As noted by the Petitioner on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the Petitioner's financial ability that falls outside of the Petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner was organized in 2009. In 2014, its highest number of employees during any quarter was 17. The Petitioner has not established its historical growth or the occurrence of any uncharacteristic business expenditures or losses. The Petitioner indicated that its customer base includes and that it has a reasonable expectation that its business will increase as it is "restructuring, changing the direction of [its] concentration from non-revenue based activities such as market research, development, and service to, establishing manufacturing plants in Mexico and the United States."[3] However, it provided no evidence of its reputation or plans for restructuring. 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The Petitioner did not provide any regulatory-prescribed evidence of its ability to pay the proffered wage. 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.

The evidence submitted does not establish that the Petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

## II. THE BENEFICIARY'S QUALIFICATIONS

The Beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (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 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 Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in Business Administration.[4]
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.

[3] A significant portion of the job duties for the proffered position includes research and development. It is not clear how the job offer will change, if any, based on this proposed restructuring.
[4] The Petitioner has established that the Beneficiary has the required education for the proffered position.

H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The labor certification also states that the Beneficiary qualifies for the offered position based on experience as a business development director with [redacted] located at [redacted] from November 30, 2011, to February 7, 2014. No other experience is listed. The Beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record contains an experience letter dated February 10, 2015, from [redacted] General Manager of [redacted] on [redacted] letterhead stating that the company employed the Beneficiary as a business development director "on a full-time basis for over 12 months, starting November 30, 2011." However, the letter does not specify the ending date of the Beneficiary's employment.[5]

In the instant case, the Petitioner provided Forms W-2, Wage and Tax Statements, for the Beneficiary for 2011, 2012, and 2013. The Forms W-2 for 2011 and 2012 show that the Beneficiary was employed and paid by [redacted] both years. The Form W-2 for 2013 shows that the Beneficiary was employed and paid by the Petitioner that year.

We note that the Form W-2 issued to the Beneficiary by the Petitioner in 2013 conflicts with the Beneficiary's representation on the labor certification that he worked for [redacted] from November 30, 2011, to February 7, 2014.

We also note that the Beneficiary was approved to work in H-1B nonimmigrant status for [redacted] in [redacted] Michigan from November 29, 2011, to September 30, 2014, and for the Petitioner in [redacted] Illinois from October 1, 2014, to September 30, 2017. The Beneficiary was not authorized to work for the Petitioner in H-1B nonimmigrant status in 2013, or from January 2014 to September 30, 2014.

Further, the Form I-129 filed by [redacted] on September 1, 2011, indicated that the Beneficiary would work at a location in [redacted] Michigan, while the Beneficiary indicated on the labor certification that he worked for [redacted] in [redacted] Illinois.

[5] In a letter dated August 5, 2014, in support of the Petitioner's H-1B nonimmigrant petition on behalf of the Beneficiary, [redacted] Vice President of the Petitioner, stated that the Beneficiary "has served as Business Development Director at [redacted] since December 2010."

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

The Director determined that the Petitioner had not overcome the inconsistencies in the evidence relating to the Beneficiary's experience. On appeal, the Petitioner states that the Beneficiary's payroll was transferred to the Petitioner "for accounting purposes and for convenience only" and that his duties remained the same.

The letter dated February 10, 2015, from [redacted] General Manager of [redacted] states that the company employed the Beneficiary as a business development director on a full-time basis for over 12 months, starting November 30, 2011. This statement is supported by the Beneficiary's Forms W-2 for 2011 and 2012, which show that the Beneficiary was employed and paid by [redacted] both years. Thus, the Petitioner has established with independent, objective evidence that the Beneficiary had the required 12 months of experience in the proffered position and that he met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

However, the Petitioner has not established its continuing ability to pay the proffered wage.

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). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of B-O-M- LLC*, ID# 14779 (AAO Nov. 30, 2015)