U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 16 2008

LIN-06-217-50831

In re: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center ("director"), denied the immigrant visa petition. The petitioner filed an appeal, which the director determined was untimely filed and treated as a Motion to Reopen and Reconsider. Upon reconsideration, the director affirmed his prior decision. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is in the business of paving, and seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's May 13, 2008 decision, the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 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). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[1]

The record shows that the appeal is properly filed, timely and makes 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 of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 27, 2001. The proffered wage as stated on Form ETA 750 is $27.29 per hour,[2] which is equivalent to an annual salary of $56,763.20 per year based on 40 hour work week. The labor certification was approved on December 8, 2004, and the petitioner filed the I-140 Petition on the beneficiary's behalf on July 10, 2006. On the Form I-140, the petitioner listed the following information: date established: 1988; gross annual income: $411,957; net annual income: not listed; current number of employees: three.

On November 14, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit evidence that the beneficiary had the required two years of prior work experience. The letter that the petitioner initially submitted was deficient as it did not list the dates of the beneficiary's prior employment; and for the petitioner to submit a letter to confirm that the petitioner intended to employ the beneficiary in accordance with the terms of the labor certification. The petitioner responded.

On February 9, 2007, the director issued a second RFE for the petitioner to submit evidence of its ability to pay the beneficiary the proffered wage for the years 2002 to the present. Additionally, the RFE requested that the petitioner provide evidence of W-2 wages paid, if the petitioner paid the beneficiary. The petitioner responded. Following consideration of the petitioner's response, on July 23, 2007, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, but the director determined the appeal was untimely filed. The director treated the untimely appeal as a Motion to Reopen or Reconsider in accordance with 8 C.F.R. §

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[2] The petitioner initially listed an hourly salary of $18.89 per hour, but DOL required that the salary be increased to $27.29 prior to certification.

The petitioner initially listed its name and address on Form ETA 750 as: [redacted] Haverstraw, NY 10927. Prior to certification, the petitioner amended its address to: Stony Point, NY 10980-3654. DOL stamped this correction as accepted.

103.3(a)(2)(v)(B)(*2*).[3,4] After reopening the decision on Motion based on the petitioner's new evidence submitted, the director determined that the petitioner failed to overcome the deficiencies in the evidence and affirmed his decision that the petition remain denied. The petitioner appealed and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship & Immigration Services ("USCIS") will 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 case at hand, the beneficiary listed on Form ETA 750B, signed on March 7, 2001, that the petitioner employed him from April 20, 1995 to the present as a cement mason.

The petitioner submitted a letter dated January 2, 2006, which stated that the beneficiary "has been employed with us since April, 1995 [sic] like independent contract worker and was paid on cash [sic]." The letter continues, "In October, 2006 [sic] [the beneficiary] obtained his social security and since this date he appears in the payroll record [sic]."[5] The petitioner did not provide any pay evidence for the beneficiary either from the date of hire, or from the date that the petitioner claimed that they added the beneficiary to the payroll. Therefore, as the petitioner has not documented any prior wages paid, it must demonstrate that it can pay the full proffered wage for the years from 2001 through 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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 Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v.*

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[3] The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director treated the late appeal as a motion.

[4] On appeal, counsel questions why the director asserts the first appeal was untimely filed. The record reflects that the petitioner's initial submission was rejected on August 24, 2007 as the petitioner failed to submit the proper filing fee. As the appeal was initially submitted with the wrong fee, and resubmitted after the requisite 33 day filing period, the appeal was untimely filed. *See* 8 C.F.R. § 103.2(a)(7) (receipt date is assigned when filing is properly completed).

[5] The petitioner's owner dated the letter in January 2006, although based on the February 2007 date of the petitioner's RFE response, and his reference to the beneficiary's October 2006 payroll listing, it would appear that he wrote the letter in January 2007.

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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed December 11, 2008). The petitioner lists additional income and/or deductions in 2003, 2005, and 2006 so the net income will be taken from Schedule K for those years. In the years 2001, 2002, and 2004, the petitioner does not list any additional income. Therefore, we will take the petitioner's net income from line 21 for those years:

Tax year[6]	**Net income or (loss)**[7]
2006[8]	$128,148

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[6] The petitioner's 2001 to 2003 tax returns list an address of: [redacted] Stony Point, NY 10980. The petitioner's 2004 to 2006 list an address of: [redacted], NY 10927. The reason for this difference is unclear, particularly as the petitioner amended its Form ETA 750 on March 22, 2004 to reflect the reverse, that its address new address was [redacted] Stony Point, NY, deleting the address originally listed of [redacted] West Haverstraw, NY 10927. New York state corporate records reflect a corporate address for "[redacted]" of: [redacted] Stony Point, NY. *See* http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p (accessed December 4, 2008). The 2001 tax return lists only "[redacted]." All other tax returns list "[redacted]" and "[redacted]" on the second line. All the tax returns do reflect the same federal employer identification number (FEIN).

[7] We note that the director considered the petitioner's net income from page 1, line 21 of the tax returns, which accounts for the difference in the net income listed herein, and the net income listed in the director's decision. This difference accounts for the director's determination in 2005 that the petitioner could pay the proffered wage from its net income. However, the net income as listed on Schedule K factoring in additional income and/or deductions would not reflect the petitioner's ability to pay the proffered wage in 2005.

2005	$44,812
2004	$80,463
2003	$13,378
2002	$29,594
2001	$410

The petitioner's net income would allow for payment of the beneficiary's proffered wage only in the years 2004 and 2006. The petitioner would not be able to demonstrate its ability to pay out of its net income in 2001, 2002, 2003, or 2005.

Additionally, we note that USCIS records reflect that the petitioner has sponsored a second beneficiary for permanent residence. The petitioner would need to be able to demonstrate that it could pay both sponsored workers from their respective priority dates onward. From the record, the petitioner has not established that it can pay the instant beneficiary the proffered wage, or that it could pay a second sponsored worker the required wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Tax year	**Net current assets**
2006	$13,341
2005	-$83,981
2004	-$76,929
2003	-$102,503
2002	-$56,816
2001	-$12,805

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets for either the instant beneficiary or for the second sponsored worker.[9]

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[8] Based on the date that the petition was filed, the petitioner's 2007 federal tax return would not have been available.

[9] Additionally, the petitioner's federal tax returns reflect that the petitioner has paid the following amounts in salaries: 2001: $13,800; 2002: $15,300; 2003: $15,600; 2004: $14,050; 2005: $44,812; and 2006: $30,412. The petitioner listed on Form I-140 that it employed three workers. The salaries paid to all workers accounts for less than the proffered wage in all of the relevant years (without

The petitioner additionally submitted bank statements for the years 2001 through 2003. The statements show significant variation in the amount that the petitioner had in its account from a low balance of $12,926.68 (as of December 25, 2003) to a high balance of $75,243.10 (as of May 27, 2002). The statements reflect that the petitioner makes significant deposits in the months represented, but also that the business has substantial outflow in debits and checks.

Regarding the bank statements, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. The bank statements would not demonstrate the petitioner's ability to pay the two sponsored workers from their respective priority dates until each obtains permanent residence.

The director had additionally questioned in his decision whether the bank returns reflected the petitioner's funds. The bank statements listed the name and address of '[redacted] Haverstraw, NY 10927, and not [redacted] as listed on the petition. The director cited *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980) that 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. *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."

On appeal, counsel contests the director's assertion that the bank statements do not relate to the petitioner. Counsel asserts that from a review of the petitioner's tax returns, "it is evident . . . that both names are used for the same business, sharing the identical federal employer ID number."

While we acknowledge that both names are used on the tax returns and only one FEIN number is listed, counsel fails to explain the variance in the business names and addresses. It is incumbent on 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).

Further, for the reasons set forth above, the petitioner's bank records do not demonstrate the petitioner's ability to pay the two sponsored beneficiaries.

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consideration of officer compensation). Further, we note that the tax returns do not reflect that the petitioner has paid any "costs of labor."

On appeal, counsel asserts that "an 'S' corporation, [is not like] a regular corporation. It has only two shareholders who each own 50% of the company's stock . . . The assets and liabilities of an 'S' corporation 'pass through' to its owners." In contrast to *Matter of Aphrodite Investments, Ltd.*, counsel asserts that if the petitioner had been established as a partnership or sole proprietorship, that the shareholders' assets would be considered. While this is a correct statement, the petitioner is incorporated as an S corporation and has been since the time of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As an S corporation, the petitioner may obtain certain favorable tax benefits from this structure. However, the petitioner cannot argue hypothetically that it could pay, or the owner's assets should be considered based on the fact that it could have structured the business differently. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Counsel cites to *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, asserts that where the petitioner has not demonstrated sufficient net income or net current assets to pay the proffered wage, that USCIS should "consider the overall magnitude of the entity's business activities and the totality of the circumstances." Counsel asserts that USCIS may consider "such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, or the occurrence of any uncharacteristic business expenditures or losses." Additional factors that counsel cites to are "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 to be relevant to the petitioner's ability to pay the proffered wage."

In contrast to *Sonegawa*, counsel has failed to identify any "occurrence of any uncharacteristic business expenditures or losses." The petitioner provided no evidence of its reputation within the industry. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, the petitioner's tax returns reflect extremely low wages paid to workers, and no costs of labor paid. The petitioner's tax returns and other evidence submitted would not demonstrate its ability to pay the instant beneficiary, or the second sponsored worker. Accordingly, we would not conclude that the petitioner has demonstrated its ability to pay the proffered wage for the instant beneficiary, or that it could pay for both sponsored workers.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's 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. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" description for a Cement Mason states the job duties as:

> Moves discharge chute of truck to direct concrete into forms. Finished concrete surfaces using power trowel. Helps to build walls, sidewalks, patios and pavement.

Further, the job offered listed that the position required:

Education:	none.
Major Field Study:	none.
Experience:	2 years in the job offered, Cement Mason.
Other special requirements:	none.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, from April 20, 1995 to the present (date of signature, March 7, 2001), position: cement mason; and (2) Arquitec, Cuenca, Ecuador, from January 1993 to February 1995, position: cement mason.[10]

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) *Other documentation*—
>
> > (A) *General.* 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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner initially submitted the following letter:

> Letter from [redacted], Architect, Arquitec, Cuenca, Ecuador, dated February 2, 2001;
> Position title: not specifically listed, refers to the beneficiary and states he was "of the profession Cement Mason;"
> Dates of employment: not listed;
> Description of duties: "worked under my responsibility on different projects of Urbanization and Home Construction that were realized in the city of Cuenca."

The director sent an RFE for the petitioner to submit evidence that the beneficiary had the required two years of prior experience as the letter that the petitioner initially submitted failed to list the beneficiary's dates of employment or adequately describe the beneficiary's job duties.

The petitioner submitted a second letter:

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[10] We note that the name and address of the employer, as well as the name of the job, kind of business, hours worked, and the job description, all contain "white out" over the original entries, and the beneficiary initialed and dated the changes April 8, 2004. However, the changes do not contain the DOL correction approval stamp and leaves the record unclear as to whether DOL approved the changes or the changes were made after certification and prior to filing the petition with USCIS. If the petitioner pursues this matter further, clarification of this issue must be provided.

Letter from [redacted], Architect, Arquitec, Cuenca, Ecuador, dated January 12, 2007;

> Position title: "worked for my company in the functions of Cement Mason;"
> Dates of employment: April 1989 to November 1994;
> Description of duties: "his duties were to build surfaces of cement as: floors, sidewalks, walls and curbs in urban development projects and construction of dwellings."

The beneficiary's listed dates of employment on Form ETA 750, January 1993 to February 1995, are inconsistent with the prior experience letter submitted. Doubt cast on any aspect of the petitioner's proof may, of course, 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. 582, 591 (BIA 1988). It is incumbent on 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. *Id.* at 591-592.

The petitioner also submitted a letter that it had employed the beneficiary since April 1995 as an "independent contract worker" and paid him in cash until he received a social security number. However, the petitioner provided no pay evidence from any date to document the beneficiary's employment.

Accordingly, as the prior experience letter is inconsistent with the claimed dates of experience, and the other documentation is insufficient to establish prior employment, we would not conclude that the petitioner has sufficiently demonstrated that the beneficiary has the experience required for the position offered.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. Accordingly, 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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.