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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER DATE: MAR 05 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] is a retail discount store. It seeks to employ the beneficiary permanently in the United States as an assistant sales manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). 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 and that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

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.

As set forth in the director's denial, issues in this case are whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and, whether the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

Beyond the decision of the director, another issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the priority date as well as the proffered wages of each of the beneficiaries of other employment based petitions from the priority date. 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*, 229 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).

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.

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

[1] The petitioner is [redacted] According to the record, the petitioner does business as [redacted]

> 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $41,397.20 per year. The Form ETA 750 states that the position requires two years of experience.

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 at 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On July 12, 2007, the director issued a Request for Evidence (RFE) asking, *inter alia,* for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date and onwards, and, regarding the beneficiary's work experience before the priority date. Specifically, the director instructed the petitioner to submit complete federal tax returns for years 2001, 2002, 2003, 2004, 2005, and 2006, annual reports, or audited financial statements.

The director instructed the petitioner, if applicable, to submit Wage and Tax Statements (W-2) or Form 1099-MISC Statements issued by the petitioner to the beneficiary for the time period 2001to 2006 inclusive.

The director also instructed the petitioner to demonstrate its ability to pay the beneficiary's wage and the wages for all beneficiaries for which it has filed I-140 petitions.

In response to the RFE, counsel submitted a letter dated August 1, 2007; the petitioner's Form 1120S tax returns for the years 2001, 2002, 2003, 2004, 2005 and 2006; a letter from the petitioner's accountant dated July 20, 2007; the Certificate of Incorporation of the petitioner filed August 9, 1999; a "Lease Extension Agreement" dated December 23, 2004; a 2004 W-2 issued by the

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

petitioner to the beneficiary in the amount of $7,059.00; eight checks issued by the petitioner to the beneficiary in the equal amounts of $688.65 for the time period June 4, 2007, to July 23, 2007; two copies of pages printed from the website <www.mapquest.com> as accessed on August 1, 2007; a page printed from the website <http://www.google.com/maps...> as accessed July 16, 2007; and a page printed from the website <http://www.flcdatacenter.com...> as accessed on July 16, 2007.

On January 8, 2008, counsel submitted an explanatory letter dated January 7, 2008, and, *inter alia*, the following: a letter from the petitioner dated December 24, 2007; a letter from the petitioner's accountant dated December 5, 2007; cancelled checks from another corporation, some with business invoices attached, accompanied by a handwritten note stating "some of the payments made by [redacted] on behalf of the stores [redacted] made by [redacted] other co-;" tax returns of other entities; a commercial space agreement between the petitioner and [redacted] dated March 26, 2000; the petitioner's inventory reports dated in 2001, 2002, and 2005; and, approximately 35 of the petitioner's bank checking statements from February 28, 2001, to January 10, 2006.[3]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the tax returns in the record, the petitioner stated it was established on August 9, 1999. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, 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 a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, 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. Comm. 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

[3] Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The petitioner submitted a 2004 W-2 issued by the petitioner to the beneficiary in the amount of $7,059.00 and eight checks issued by the petitioner to the beneficiary in equal amounts of $688.65 for the time period June 4, 2007, to July 23, 2007. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of

> funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on August 6, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 was the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income[4] of <$5,443.00>[5].
- In 2002, the Form 1120S stated net income of $11,991.00.
- In 2003, the Form 1120S stated net income of $51,593.00.
- In 2004, the Form 1120S stated net income of $30,717.00.
- In 2005, the Form 1120S stated net income of $26,611.00.
- In 2006, the Form 1120S stated net income of $40,187.00.

Therefore, for the years for which tax returns were submitted, the petitioner did not have sufficient net income to pay the proffered wage in years 2001, 2002, 2004, 2005, and 2006.

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[4] 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed February 8, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, there were no additional income, credits, deductions or other adjustments on the petitioner's Schedules K. The petitioner's net income is found on Form 1120S, Line 21 of its tax returns.

[5] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets[7] as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $20,878.00.
- In 2002, the Form 1120S stated net current assets of $32,869.00.
- In 2003, the Form 1120S stated net current assets of $44,462.00.
- In 2004, the Form 1120S stated net current assets of $45,179.00.
- In 2005, the Form 1120S stated net current assets of $40,790.00.
- In 2006, the Form 1120S stated net current assets of $55,977.00.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage as of the priority date in years 2001, 2002, as well as 2005 through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in finding that the petitioner did not have the ability to pay the proffered wage for the years cited since the petitioner "had assets which could be used to pay the wage." Further, counsel contends that the personal income and assets of a stockholder of the business are a source to pay the proffered wage.

The AAO notes that the petitioner has submitted the joint personal tax returns of its stockholder and the tax returns of other entities reputedly owned or controlled by the petitioner's shareholder. Since counsel has not specified or delineated what assets "could be used to pay the wage," the contention could have two meanings.

First, if counsel is referring to assets not already considered in the above computation to determine the petitioner's net current assets, it is only the petitioner's current assets as found on Schedule K of

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[6] 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.

[7] The owner of the petitioner stated in a letter dated December 24, 2007, that he has submitted evidence of assets in 2001, 2002, and 2005, which were not stated on the petitioner's tax returns. Since no audited financial statement, or an annual return was submitted for those years, the AAO is unable to analyze or review this additional evidence.

Form 1120S that are to be considered. Further, since these "other" assets are not specified, the AAO has insufficient information to analyze and review counsel's general reference to "assets."

Second, concerning assets, counsel states additionally that the director should have considered the personal income and assets of the owner as a source to pay the proffered wage, or, the assets of other corporations. Counsel also contends that the common owner of all the businesses for which evidence was submitted "routinely" transfers funds from one entity to another, and that the funds from other entities are evidence of the petitioner's ability to pay. Counsel's contentions are misplaced. 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. 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."

Counsel cites an unpublished AAO decision[8] for the proposition that owners of corporations may set their own salaries and compensation which could be used to pay the proffered wage. Other than counsel's assertion,[9] there is no offer by the shareholder/owner of the petitioner to pay the proffered wage from either officers' compensation or his salary (if any). Since the petitioner stated no officers' compensation from 2001 to 2005, and only $3,110.00 in 2006, counsel's contention that officers' compensation could be a source of funds is not supported by the evidence submitted in this case. Further, no evidence of the shareholder/owner's wage or salary was submitted. There is evidence of the shareholder's share of income in the returns through the years but again there is no offer to make the shareholder's share of income a source of funds to pay the proffered wage.

Counsel asserts that the petitioner's inventory is evidence of the petitioner's ability to pay the proffered wage. "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. As already discussed above, net current assets were less than the proffered wage in 2001, 2002, and 2005. Further, the value of inventories owned by the petitioner and their ability to produce future income cannot be evidence of the ability to pay.

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[8] Counsel refers to a decision issued by the AAO concerning the use of officers' compensation, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[9] The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petitioner in his letter dated December 24, 2007, urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an assistant sales manager will significantly increase profits for the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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. 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 a 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 did have a steady increase in gross receipts from 2001 through 2006 with only year 2006 lower than the year before. However, despite the increase in gross receipts, in 2001, 2002, and 2005, petitioner's net income and/or net current assets were insufficient to pay the proffered wage despite the fact that the compensation of officers was nil for all years excepting 2006. For the six year period for which tax returns were submitted, the salaries and wages paid by the petitioner were nominal. No cost of labor expense was stated on the tax returns. There is a paucity of information concerning the petitioner's business reputation in its market sector, or its prospects for growth.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage in years 2001, 2002, as well as 2005.

Beyond the decision of the director, an additional issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the two beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. The petitioner has filed one other petition. The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the ETA Form 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner has not submitted evidence to demonstrate that it had the ability to pay the proffered wages for both the petitions it has filed from the priority date through the present.

An additional issue is whether the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

Section 203(b)(3)(A)(i) of 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on April 30, 2001.

On appeal, counsel asserts that the director erred "by finding that the experience letter provided by the beneficiary should not be found credible."

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the Form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed by the [redacted], as an assistant sales manager between the dates February 1996 to July 1999.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented, above a warning for knowingly and willfully falsifying or concealing a material fact, the

beneficiary was employed by [redacted] as an assistant sales manager from February 1996 to June 2000. There is no explanation in the record for this inconsistency in employment dates.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

The record of proceeding contains two employment references. The first reference is from [redacted]" of Mumbai, India, dated March 18, 2005. According to the letter the beneficiary was employed as an import manager from March 1991 to October 1996. The director specifically noted in his decision, that the employment reference from '[redacted]' describing the beneficiary's experience as an import manager is not evidence of the beneficiary's qualifications as an assistant sales.

The second reference is from [redacted] of Mumbai, India, dated January 28, 2000 by [redacted] According to the reference the beneficiary was employed there as an assistant sales manager from February 1996 to July 1999.

On appeal, counsel submits an additional job reference letter from [redacted], of Mumbai, India, dated November 22, 2007, by [redacted] again stating the beneficiary was employed there as an assistant sales manager from February 1996 to July 1999. According to counsel's letter dated January 7, 2008, the letter was prepared to "track" the job duties language stated in the labor certification.

The AAO notes that the job duties stated in Form ETA 750, Part A, Item 13, the beneficiary's job duties stated in the Form ETA 750, Part B, and the job reference from [redacted] are approximately the same in content, language and text. Since the prior employment reference, and the described job duties are almost identical in format as well as content, they appear to be pre-prepared by a third party, and presumably, they are not the statements of either the petitioner or [redacted] If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d

1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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). Further, there is no correlative evidence to support the beneficiary's employment history such as cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns.

Therefore, the letter statements are insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. This is assuming for the sake of argument that a comparison can be made, since the duplicate labor certification does not provide a job description.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding for the reasons above stated. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.