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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

DATE: NOV 25 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a landscape, design and installation company. On January 15, 2010, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking the beneficiary's services permanently in the United States as a landscape gardener, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL).[1] The director denied it on August 13, 2010, because the petitioner failed to establish its ability to pay the proffered wage and the beneficiary's requisite qualifications and submitted altered, forged or fraudulent documentation.

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 AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review 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:

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[1] The record shows that the petitioner filed a Form I-140 immigrant petition [redacted] on behalf of the instant beneficiary on March 5, 2003 based on the underlying labor certification. The petition [redacted] was denied by the Nebraska Service Center director on May 16, 2009.

[2] 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).

> *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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, 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 Form ETA 750 was accepted on August 15, 2001. The proffered wage as stated on the Form ETA 750 is $11.04 per hour ($22,963.20 per year). On the Form ETA 750B signed by the beneficiary on April 3, 2001, he claimed to have worked for the petitioner in the proffered position since October 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 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.

In the instant case, the record contains W-2 forms issued by the petitioner for 2000 through 2009 as proof of the petitioner's ability to pay the proffered wage. However, the W-2 forms were issued to [redacted] for 2000 through 2002, to [redacted] for 2002 through 2007 and to [redacted] for 2008 and 2009 with three different social security numbers.

In response to a request for evidence (RFE) the director issued for a prior filing on August 9, 2004, the petitioner submitted an affidavit from [redacted] and an affidavit from [redacted] both dated August 12, 2003. In his affidavit, the beneficiary stated in pertinent part that:

> I have been employed from October 2000 to the present with Invision Land[s]cape of Vista, California under the name of [redacted] I am writing this statement to authenticate my real and true identity. To that end, I declare that I told Invision Landscape, that I was [redacted] It was in this name that I received my paychecks, W-2's and withholding taxes were paid for me by Invision Land[s]cape.
>
> I recently disclosed my correct identity of [redacted] to my employer Invision Landscape, and explained that the name[s] [redacted] was not my real name.

In his affidavit, [redacted] stated in pertinent part that:

> That I am the President and Owner of [redacted] California, and it is in that capacity that I am making this sworn statement.
>
> I have known [the beneficiary] from October 2000 to the present as he had been working for us. In that time, I have also known [the beneficiary] as [redacted]. During the time that he has been employed with our company from October of 2000 to the present, he told me his name was [redacted] This is why his paychecks and W-2's show that name.
>
> It was fairly recently that he told me that in fact his real true name is [redacted] and not the name that he had been using with us. … …

The record contains the beneficiary's identification documents including a birth certificate, Mexican identification card, Mexican passport, educational records, and California driver's license. All these documents show that the beneficiary's name is [redacted] In his affidavit, the beneficiary admitted that he knowingly used the false name of [redacted] as his identification during the employment with the petitioner from October 2000 to around August 2003. Furthermore, the beneficiary stated in his affidavit that he told his employer/petitioner that his name was [redacted] and used his name to receive his paychecks and W-2 forms from October 2000 until prior to August 2003 when this affidavit was made. The petitioner's legal representative also stated in his affidavit that he knew the beneficiary as [redacted] from October 2000 and just before August 2003 he was told that [redacted] was the beneficiary's false name. However, the record contains W-2 forms issued by the petitioner to [redacted] for 2000 through 2002. The underlying labor certification in the instant case was filed with DOL on August 15, 2001 on behalf of the beneficiary under the name of [redacted] nd the same [redacted] signed the Form

ETA 750A on April 3, 2001 under penalty of perjury. The petitioner signed the Form I-140 on November 7, 2002 and filed the immigrant petition [redacted] on March 5, 2003 on behalf of [redacted] Therefore, the petitioner's and the beneficiary's statements that the beneficiary was known to the petitioner as [redacted] and received his W-2 forms under the name of [redacted] from October 2000 to August 2003 are not true. Both the petitioner and the beneficiary provided false statements to various agencies of the United States government regarding the beneficiary's real name, eligibility to receive wages and report earnings, and authorization to work. In addition, the record contains W-2 forms issued by the petitioner to [redacted] for 2002 through 2007 with two different social security numbers. These W-2 forms prove that the petitioner also knowingly continued to use the false name and stolen social security number for the beneficiary even after he was told tha[redacted] was not the beneficiary's real name.

The W-2 forms submitted as evidence to show that the petitioner paid the beneficiary the proffered wage in the record come with different social security numbers. The W-2 forms issued to [redacted] for 2000 through 2002 contain a social security number of [redacted] for the beneficiary. While W-2 forms for [redacted] for 2002 through 2006 use a social security number of [redacted] W-2 form for 2007 uses [redacted] as the beneficiary's social security number. In addition, the beneficiary filed his tax returns for 2000 through 2006 under the name of [redacted] using the social security number or tax identification number of [redacted], and for 2007 through 2009 under the name of [redacted] with a different social security number or tax identification number of [redacted] The beneficiary used five different social security numbers and/or tax identification numbers. The record does not contain a copy of the beneficiary's social security card showing his real true social security number. Therefore, it is not clear whether the beneficiary has a real social security number or which number is his real social security number. However, it is necessarily concluded that the beneficiary has used false or fraudulent social security numbers or tax identification numbers for his employment, compensation, tax filing and immigrant proceedings. Therefore, the AAO cannot accept and consider these W-2 forms as primary evidence in determining the petitioner's ability to pay the proffered wage. The petitioner must establish its continuing ability to pay the proffered wage from the priority date to the present with its net income or net current assets.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits

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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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).

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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of $1,560,559, to have a net annual income of $12,676, and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The priority date falls on August 15, 2001 in the instant matter and thus, the petitioner's federal income tax return for its fiscal year of 2000 (covering from October 1, 2000 to September 30, 2001) is the tax return for the year of the priority date. The record before the director closed on January 15, 2010 with the receipt by the director of the petitioner's submission of the petition. As of that date, the petitioner's federal income tax return for its fiscal year of 2009 was not yet due. Therefore, the petitioner's income tax return for the fiscal year of 2008 is the most recent return available. The petitioner's tax returns for the fiscal years 2000 through 2008 demonstrate its net income and net current assets as shown in the table below.

- In the fiscal year of 2000, the Form 1120 stated net income of $31,353 and net current assets of $29,416.
- In the fiscal year of 2001, the Form 1120 stated net income of $159,613 and net current assets of $59,191.
- In the fiscal year of 2002, the Form 1120 stated net income of $108,209 and net current assets of $19,532.
- In the fiscal year of 2003, the Form 1120 stated net income of $91,827 and net current assets of $59,437.
- In the fiscal year of 2004, the Form 1120 stated net income of $55,931 and net current assets of $54,025.
- In the fiscal year of 2005, the Form 1120 stated net income of $18,529 and net current assets of $167,559.
- In the fiscal year of 2006, the Form 1120 stated net income of $3,090 and net current assets of $178,982.

[3] 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.

- In the fiscal year of 2007, the Form 1120 stated net income of $12,841 and net current assets of $105,679.
- In the fiscal year of 2008, the Form 1120 stated net income of ($34,044) and net current assets of $110,977.

Therefore, for the fiscal years 2000 through 2008, the petitioner appears to have either sufficient net income or net current assets to pay the instant beneficiary the proffered wage of $22,963.20 per year.

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. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, 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 approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for two more workers and that both of them have been approved.[4] The record does not contain any documentary evidence showing that the petitioner paid the proffered wages to these beneficiaries of the approved petitions in any relevant years. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay three proffered wages from its fiscal year 2000 through 2008.

As previously discussed, the petitioner did not have sufficient net income or net current assets to pay all three proffered wages[5] in its fiscal years 2000 and 2004. Therefore, the petitioner failed to establish its ability to pay all proffered wages for these two years, and further failed to establish its ability to pay the instant beneficiary the proffered wage for the two years because the petitioner did not have a sufficient balance to pay the instant beneficiary the proffered wage after paying the beneficiaries of the approved petitions their proffered wages with its net income or net current assets in these years.

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[4] USCIS records show that the two approved immigrant petitions are as follows:
-- [redacted] filed for [redacted] on March 5, 2003 with the priority date of August 15, 2001, and approved on December 24, 2008.
-- [redacted] filed for [redacted] on July 27, 2007 with the priority date of August 15, 2001, and approved on January 22, 2009.

[5] Assuming that the petitioner offered the same proffered wage to the other two beneficiaries as the one to the instant beneficiary, the petitioner needs at least $68,889.60 of net income or net current assets per year to establish its ability to pay all proffered wages.

Therefore, from the date the Form ETA 750 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.

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 (BIA 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 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, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 to the present. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Therefore, the petition must be denied and the appeal must be dismissed.

The next issue the AAO will discuss in this decision is whether or not the petitioner established the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is August 15, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The job qualifications for the certified position of landscape gardener are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

> Install new landscaping, such as irrigation , timers, lawns, shrubs, trees and plants. Mow, edge, prune, fertilize, trim trees using hand and power tools.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects that the proffered position requires two years of experience in the job offered.

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 represents that he has been working in the proffered position for the petitioner since October 2000. Prior to that, he worked as a carpenter for Quality Wood Works from March 1998 to October 2000 and as a gardener for [redacted]. in Mexico from December 1995 to Dece3mber 1997. He does not provide further information regarding his employment history on the form.

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.

In support of the instant petition, counsel submitted a letter dated March 24, 2009 from Arq. [redacted] the manager of [redacted] March 24, 2009 letter) as evidence of the beneficiary's qualifying experience. The English translation of this letter states in pertinent part:

> The company [redacted]. makes it constant that [the beneficiary] ... ... worked in this company from December 1st, 1995 to December 31st,1997 working 40 hours a week doing the functions of gardener in the different construction's project that the company realized in that period.

The letter also includes a description of duties the beneficiary performed during this period. However, the writer just states that he is a manager and knows the beneficiary since 1995, but does not indicate whether he is in the position having the authorization to issue an employment verification letter on behalf of the company and what resources his letter relies upon.

Further, this letter provides inconsistent information regarding the beneficiary's employment with this company. The record shows that counsel submitted this letter previously with an immigrant petition filed by the petitioner on behalf of the beneficiary.[6] With the previous petition, the petitioner initially submitted a letter dated April 2, 2001 from [redacted] ([redacted] April 2, 2001 letter). In this first letter, [redacted] states that the beneficiary was employed as a temporary worker from January to September 1995 and again from January to December 1997.

The record contains a letter dated December 14, 2009 from Arq. [redacted] signed as [redacted] December 14, 2009 letter). In this letter, [redacted] explains that the incorrect information was provided in his first letter because that letter was written by his assistant and he signed it without revision. [redacted] December 14, 2009 letter also confirms that his second letter dated March 24, 2009 states the truth about the time and responsibilities of the beneficiary working for his company. However, [redacted]' December 14, 2009 does not explain why his assistant provided incorrect information in his first letter and what sources his assistant relied upon when he/she wrote the first letter for him. Nor does the letter provide resources on which [redacted] could confirm the contents of his second letter.

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[6] The record of proceeding shows that the petitioner field the Form I-140 Immigrant Petition (WAC-03-118-53839) on behalf of the instant beneficiary on March 5, 2003 based on the underlying labor certification. The petition was denied by the director of Nebraska Service Center on June 10, 2009 because this letter provides inconsistency with the letter dated April 2, 2001 from the same employer. The petitioner did not take further action on that petition.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "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." Neither [redacted] March 24, 2009 letter submitted again with this petition nor [redacted] December 19, 2009 letter submitted the first time with the instant petition resolves the inconsistency in this matter. Without independent objective evidence, such as the former employer's personnel records, the beneficiary's income statements or tax statements in support with contents of the [redacted] March 24, 2009 letter, the AAO cannot accept the letters from [redacted] as primary evidence to establish his qualifying experience.

The record does not contain regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and therefore, the petitioner failed to establish that the beneficiary is qualified for the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial if the instant appeal were not rejected. 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. The petition remains denied.