identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

[redacted]

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

B6

Date: NOV 25 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a design company. It seeks to employ the beneficiary permanently in the United States as a landscape installation worker. 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 (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. 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 April 23, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour ($31,200 per year). The Form ETA 750 states that the position requires three months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *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.[1]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 18 workers. 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 27, 2001, the beneficiary claims to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage. For 2001, the petitioner submits the Internal Revenue Service (IRS) Form W-2 reflecting that the petitioner paid the beneficiary a salary of $27,049. The 2001 Form W-2 lists the beneficiary's social security number as [redacted] The Form I-140, which was signed by the petitioner under penalty of perjury on April 24, 2007, however, lists the beneficiary's social security number as "none". The Form G-325A signed by the beneficiary on April 23, 2007 also states "none" for a social security number. The petitioner also

---

[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).

submitted the beneficiary's Forms W-2 for 2008 and 2009[2] which reflect a different social security number: [redacted] Because of these inconsistencies, the record is unclear whether either of the social security numbers on the Forms W-2 in 2001, 2008 and 2009 reflects payment of wages to the beneficiary in this case. Therefore, the Forms W-2 for 2001 and 2008 will be given minimal weight, and will not be considered as probative evidence of payment of wages to the beneficiary in 2001 or 2008[3].

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.

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 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. *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

---

[2] The stated wage paid to the beneficiary is $13,200 in 2008 and $12,000 in 2009.

[3] The AAO will not analyze the petitioner's ability to pay for 2009 because the tax return was not yet due.

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).

The record before the AAO closed on January 12, 2011 with the receipt by the AAO of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due, because the petitioner had filed an income tax extension. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001-2008, as shown in the table below.

- In 2001, the Form 1120S stated net income[4] of $20,001.
- In 2002, the Form 1120S stated net income of $98,555.
- In 2003, the Form 1120S stated net income of $20,466.
- In 2004, the Form 1120S stated net income of $74,390.
- In 2005, the Form 1120S stated net income of $62,955.
- In 2006, the Form 1120S stated net income of $65,535.
- In 2007, the Form 1120S stated net income (loss) of ($149,891).

---

[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 (2001-2003) line 17e (2004-2005) line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed October 25, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2001-2008, the petitioner's net income is found on Schedule K of its tax returns.

- In 2008, the Form 1120S stated net income of $34,893.[5]

If the AAO were to consider the IRS Form W-2 wages for 2001, there would be enough to cover the deficiency in 2001. However, the petitioner would still be lacking sufficient net income to cover 2003 and 2007. Therefore, for the years 2001, 2003 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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 for 2001, 2003 and 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $24,218.
- In 2003, the Form 1120S stated net current assets of $15,908.
- In 2007, the Form 1120S stated net current assets (liabilities) of ($87,532).

For the years 2001, 2003 and 2007 the petitioner did not have sufficient net current assets to pay the proffered wage. 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.

The director found that the petitioner established the ability to pay in 2003. The AAO disagrees. As explained above, the AAO conducts appellate review on a *de novo* basis. *See Soltane*, 381 F.3d at 145. Counsel is correct in pointing out that in 2003, the amount listed as ordinary business income (net income) was $60,590. 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, or in this case, $60,590. However, as noted above, 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,

---

[5] As the petitioner had sufficient income in 2008 to cover the wage, the Form W-2 income that was not clearly creditable to the beneficiary in 2008 is not relevant to the petitioner's ability to pay for that year.

[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.

credits, deductions or other adjustments, net income is found on line 23 (2003) Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed October 25, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2003, the petitioner's net income is found on Schedule K of its tax returns, which in this case is $20,466 and is below the proffered wage of $31,200. In addition, as explained above, the Form 1120S in 2003 stated net current assets of $15,908, which is also below the proffered wage. Therefore, the AAO finds that the petitioner did not have the ability to pay the proffered wage in 2003.

As discussed *infra*, counsel also failed to show that the petitioner had the ability to pay the beneficiary the proffered wage in 2007.

Even if we were to consider payment of wages to the beneficiary in 2001 along with net income for that year as establishing ability to pay, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL in either 2003 or 2007.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of 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, there is nothing extraordinary in the record that would parallel the circumstances in *Sonegawa*. The petitioner has been in business for fifteen years and employs eighteen people. For the period of 2001 through 2005, officer compensation was less than the proffered wage; $12,562 in

2001, $13,065 in 2003. Although the officer compensation in 2007 was $104,000, the petitioner has not established that its owner would be willing or able to forego officer compensation to pay the beneficiary's remaining salary from the priority date until he obtains lawful permanent resident status. Further, the petitioner has not shown unusual circumstances in any of those years causing it to earn less money than it would typically have made. 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.

Beyond the director's decision, the AAO also finds that the beneficiary lacked the qualifying work experience necessary for this position. 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).

In the Form I-140, the petitioner requested that the beneficiary be classified as an unskilled worker. Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on April 30, 2001.

As stated above, the AAO conducts appellate review on a *de novo* basis. *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. The relevant evidence in the record includes the beneficiary's employment letters. The record does not contain any other evidence relevant to the beneficiary's qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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. at 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).

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: N/A

Experience: 3 months in the job offered.

Block 15: None

The beneficiary states that he has the requisite three months of experience in the job offered or related occupation as required on the Form ETA 750 by the petitioner. On the ETA 750B, the beneficiary lists three positions in which he obtained the requisite experience:

1) Name and Address of Employer: Self-Employed
[redacted]
Name of Job: Landscape
Date Started – Date Left: 12/2002 – Present
Kind of Business: Landscaping
No. of Hours Per Week: 40
Describe in Detail the Duties Performed: Landscape or maintain grounds of property using hand or power tools or equipment. Performs sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation. Operate powered equipment such as mowers, tractors, twin-axle vehicles, chain-saws, sod cutters & pruning saws. Mow & edge lawns. Care for established lawns by mulching, aerating, weeding, grubbing & removing thatch, and trimming and edging around flower beds, walks and walls. Use hand tools such as shovels, rakes, pruning saws, saws, hedge and brush trimmers, and axes. Prune and trim trees, shrubs, and hedges, using shears, pruners, or chain saws. Gather and remove litter. Mix and spray or spread fertilizers, herbicides, or insecticides onto grass.

2) Name and Address of Employer: [redacted]
Name of Job: Landscape Installation Crew
Date Started – Date Left: 06/1998 – 12/2002
Kind of Business: Design
No. of Hours Per Week: 40
Describe in Detail the Duties Performed: Landscape or maintain grounds of property using hand or power tools or equipment. Performs sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation. Operate powered equipment such

as mowers, tractors, twin-axle vehicles, chain-saws, sod cutters & pruning saws. Mow & edge lawns. Care for established lawns by mulching, aerating, weeding, grubbing & removing thatch, and trimming and edging around flower beds, walks and walls. Use hand tools such as shovels, rakes, pruning saws, saws, hedge and brush trimmers, and axes. Prune and trim trees, shrubs, and hedges, using shears, pruners, or chain saws. Gather and remove litter. Mix and spray or spread fertilizers, herbicides, or insecticides onto grass.

3) Name and Address of Employer: [redacted]
Name of Job: Landscape
Date Started – Date Left: 06/1996 – Present
Kind of Business: Private Household
No. of Hours Per Week: 20
Describe in Detail the Duties Performed: Landscape or maintain grounds of property using hand or power tools or equipment. Performs sod laying, mowing, trimming, planting, watering, fertilizing, digging, raking, sprinkler installation. Operate powered equipment such as mowers, tractors, twin-axle vehicles, chain-saws, sod cutters & pruning saws. Mow & edge lawns. Care for established lawns by mulching, aerating, weeding, grubbing & removing thatch, and trimming and edging around flower beds, walks and walls. Use hand tools such as shovels, rakes, pruning saws, saws, hedge and brush trimmers, and axes. Prune and trim trees, shrubs, and hedges, using shears, pruners, or chain saws. Gather and remove litter. Mix and spray or spread fertilizers, herbicides, or insecticides onto grass.

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 the present case, the petitioner submitted a job letter on behalf of the beneficiary. In this letter, the petitioner states that it employed the beneficiary from July, 2007 to the present. The petitioner does not mention that it employed the beneficiary prior to this, from 06/1998 – 12/2002, as recorded on the Form ETA 750B by the beneficiary.

More troubling, however, is the experience letter submitted by the petitioner on behalf of the beneficiary from [redacted], dated January 7, 2011. According to this letter, written by [redacted] the beneficiary worked for the company full-time from February of 1994 to April of 1997. There are two major concerns with this letter: First, the beneficiary did not represent this company or this work experience on the experience section of the Form ETA 750B. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Second, part of the date of this work experience overlaps with the beneficiary's 20-hour per week employment with [redacted] an employer that the beneficiary stated that he worked for on the ETA 750B from 6/1996 to 4/2001.

Matter of Ho, 19 I&N at 591-592, 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.

The record does not contain independent evidence resolving the inconsistencies with respect to the qualifying employment. The AAO finds that the petitioner has not established that the beneficiary had three months of experience in the job offered as of the priority date on April 30, 2001. Therefore, the record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification. For this additional reason the petition must be denied.

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.