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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 07 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and an appeal was submitted to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on October 26, 2012. Pursuant to 8 C.F.R. § 103.5(a)(5)(ii), and for purposes of correcting minor errors and entering a new decision, the AAO reopened the matter on its own motion. The appeal will again be dismissed.

The petitioner is a restaurant and banquet hall. It seeks to employ the beneficiary permanently in the United States as a cook (Indian). 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.

After dismissing the appeal, the AAO, on January 29, 2013, reopened the appeal on its own motion to correct minor errors in its decision. The petitioner was given 30 days to submit an additional brief or evidence. On February 13, 2013, the AAO received the petitioner's response. The response included a letter from counsel which conceded that the minor errors noted by the AAO in its original decision were typographical.[1] No additional brief or evidence was submitted.

The record shows that the appeal is properly filed and 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 May 21, 2009, denial, an 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 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

[1] For example, the net income for 2001, 2001, 2003, 2004, 2005, 2006, 2007, and 2003 (instead of 2008); net current assets for 2002 were incorrectly stated as -$13,191; and the decision stated that the beneficiary did not possess the required education set forth on the labor certification. These minor errors are being corrected in this decision.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is $500 per week ($26,000 per year based upon a forty-hour work week). The Form ETA 750 states that the position requires two years of experience in the proffered job as a cook.

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.[2]

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 1985 and to currently employ six 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 24, 2001, the beneficiary claimed to have worked for the petitioner since February 2001.

In addition, the record establishes that the petitioner filed three other Immigrant Petitions for Alien Worker (Form I-140) which were pending between 2001 and 2004. The proffered wages for these petitions were $22,000, $27,918, and $27,372.80. When added to the instant beneficiary's proffered wage, this obligated the petitioner to pay $103,290.80 per year between 2001 and 2004. Therefore, the petitioner must produce evidence that its job offers to the beneficiary and each additional beneficiary are realistic, and 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. 142, 144-145 (Acting Reg'l Comm'r 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).

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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 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).

The record before the director closed on April 20, 2009, with the petitioner's response to a request for evidence (RFE). The director requested information related to other employment based immigrant petitions filed by the petitioner. In response to the RFE, the petitioner provided its corporate federal income tax returns for 2001 through 2008, and information related to four other petitions pending at the instant priority date. At present, including the instant beneficiary (whose proffered wage is $26,000 per year), there are two other petitions pending (with the proffered wages of $27,918, and $27,372). Another petition (whose proffered wage was $22,000), was pending at the time of the instant priority date, and was denied on October 2004. The petitioner failed to comply with the director's request and did not give the proffered wage for the final beneficiary, whom the petitioner was obligated to pay from the time of the instant priority date until that beneficiary adjusted status in 2005. Thus, from 2001, the year containing the priority date, until 2004, the petitioner was required to establish that it possessed the continued ability to pay well in excess of $103,290, in proffered wages. Thereafter, its total wage obligations for all of its permanent immigration petitions were $81,290.

The director determined that the petitioner was unable to establish that it possessed the ability to pay the proffered wages to each beneficiary from 2001 to 2003, and consequently, the proffered job was not realistic.

In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary from the priority date 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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 petitioner's tax returns demonstrate its net income for 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income[3] of $48,323.

[3] 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

- In 2002, the Form 1120S stated net income of $46,029.
- In 2003, the Form 1120S stated net income of $58,237.
- In 2004, the Form 1120S stated net income of $107,500.
- In 2005, the Form 1120S stated net income of $155,070.
- In 2006, the Form 1120S stated net income of $183,393
- In 2007, the Form 1120S stated net income of $148,021.
- In 2008, the Form 1120S stated net income of $96,945.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the proffered wages it was required to pay. Although the petitioner's net income in 2004 was greater than $103,290, the proffered wage for the petition whose beneficiary adjusted status to lawful permanent resident in 2005 is unknown.[4] It is unlikely that the proffered wage associated with that petition is less than $4,210, which is the difference between the petitioner's net income in 2004 and the total of all other proffered wages owed to beneficiaries in that year. Therefore, the petitioner has also not established that it had sufficient net income to pay the proffered wages in 2004.

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.[5] 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 through 2004, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -$25,101.
- In 2002, the Form 1120S stated net current assets of $56,809.

(1997-2003). *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 4, 2012) (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 income (notably, capital gains income in 2003) shown on its Schedule K for 2001, 2002, and 2003, the petitioner's net income is found on Schedule K of its tax returns.

[4] To reiterate, from 2001, the year containing the priority date, until 2005, the petitioner was required to establish that it possessed the continued ability to pay well *in excess of* $103,290, in proffered wages which totals three known multiple other immigration sponsorships for which USCIS has actual wage information plus an additional one for which we do not have wage information. Thereafter, its total wage obligations for all of its permanent immigration petitions were $81,290.

[5] 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 2003, the Form 1120S stated net current assets of $12,625.
- In 2004, the Form 1120S stated net current assets of $57,777.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wages to all the beneficiaries. As noted above, the proffered wage for the additional petition pending through 2005 is unknown. Therefore, the petitioner has also not established that it had sufficient net income to pay the proffered wages to all beneficiaries in 2004.

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 in 2001 through 2004.

On appeal, counsel asserts that it should not be responsible to pay the proffered wage for one beneficiary because the petitioner withdrew the petition. The record contains a letter dated July 1, 2009, stating the beneficiary's intent to withdraw a petition. Although this would absolve the petitioner from showing its ability to pay that beneficiary after that date, it still maintains the burden of showing it could pay all wages related to immigration petitions filed from the instant priority date of April 27, 2001, until the beneficiaries obtain permanent resident status, or until the petition is denied or withdrawn. As one petition was not withdrawn until July 2009, and another was not denied until October 2004, and a third beneficiary was not granted permanent residence until 2005, the petitioner must demonstrate its continued ability to pay the proffered wages to all beneficiaries for all years that the multiple petitions remained pending or approved without withdrawal.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel asserts that in 2002 its long term capital gain of $39,281 should have been combined with its net income, which according to the petitioner's accountant would have provided $56,527 of income in that year. The capital gain in question resulted from the sale of a liquor license which the petitioning corporation had previously listed on its 2001 IRS Form 1120S, Schedule L. According to 26 U.S.C. § 1212(a), the sale of a corporate asset retains its character as an asset.[6] Thus for the purposes of computing, the long term capital gain in 2002 could have been combined with the petitioner's net current assets of $56,809. Even if the petitioner's assertion were correct, its claimed 2002 income of $96,090 is not enough to pay the combined proffered wages of $103,290.

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[6] Corporate capital losses may be used to offset capital gains in other years, but may not be used to offset ordinary income. 26 U.S.C. § 1212(a).

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 (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, counsel urges us to grant the petition under the totality of the circumstances. However, nothing in the record demonstrates the petitioner's outstanding reputation in the industry or uncharacteristic business expenditures or losses. As noted earlier, the record contains the petitioner's federal income tax returns, which show its expenditures on wages and salaries. Nothing shows how the petitioner expected to pay for an increase of its salary and wage expenses from $33,300 in 2001 by an additional $103,290.80. In fact, the petitioner's wage and salary expenditures show a downward trend since 2005, paying only $26,667 in 2007 (only $667 more than the proffered wage for the instant beneficiary). Nothing in the record suggests how the petitioner could afford such a massive increase in expenditures. Its gross receipts have been steadily nominal, its officer compensation varies and is always less than the proffered wage, and no evidence concerning its reputation or an uncharacteristic event is in the record of proceeding. 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 decision of the director,[7] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the 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'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered job as a cook. On the labor certification, signed by beneficiary on April 24, 2001, the typed portion of the form includes three entries. The labor certification lists the beneficiary's employment with the petitioner as a cook (Indian) from 2001 to present in item 15-a. The labor certification also includes two typed entries for full-time employment as a cook (Indian) with no name and address of employer in items 15-b and 15-c. The entry at item 15-c lists the dates of employment as September 1990 to May 1994 and includes a notation that the beneficiary worked part-time from June 1994 to December 1994. The entry at item 15-b lists no typed dates and the typed portion of the form states in the section for job duties "...[n]ot employed from 9/97-1/98." The name and address of the employer (Tustin, CA) and the dates of employment (February 1997 to January 2001) are written in by hand. What appears to be a DOL officer's initials and "EDD" are also hand written in the margin of the 750B next to item 15-b. .

The record also includes a letter from counsel to the DOL dated June 21, 2004. The letter includes an attached amendment to the ETA 750B, providing the name and address of the position, the dates of employment (February 1997 to January 2001), the type of business, and a job description. The amendment lists the beneficiary's name with a signature and date of June 21, 2004. We note that the signature on the ETA 750B varies markedly from the signature on the amendment. This signature discrepancy casts doubt on whether the beneficiary actually signed the ETA 750B. 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).

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

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[7] 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).

(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 includes a letter from dated April 2, 2007, on letterhead, and signed by states that the beneficiary was employed from February 1997 until January 2001. Mr. further states "[the beneficiary] worked for us on a full-time basis between February 1997 to January 2001. He started as an assistant in the Kitchen. Over time, and certainly by January 1998, he was working as a Cook." We note that this letter is inconsistent with the experience claimed on the ETA 750B which states that the beneficiary was unemployed from "9/97-1/98." Neither the petitioner nor DOL amended that material representation on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The experience claimed in this letter cannot be relied upon because of this inconsistency.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.[8] Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered 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.

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[8] In the AAO's October 26, 2012 dismissal of the appeal, the AAO stated in error that the evidence in the record does not establish that the beneficiary possessed the required *education* set forth on the labor certification. In his response to the AAO's sua sponte reopening of the matter, counsel notes that the labor certification does not include an education requirement. This is acknowledged and the correction is made herein.