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

[redacted]

DATE: MAY 3 1 2013 OFFICE: TEXAS 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 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,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center,[1] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. 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 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 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

---

[1] The petition was denied on July 7, 2010 as the petitioner failed to submit a timely response to the director's notice of intent to deny. The petition was reopened upon USCIS motion on July 16, 2010. The original denial was withdrawn and a new decision denying the petition was issued on July 26, 2010.

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 December 29, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour ($26,000 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the related occupation of 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]

On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of $3.4 million, and to currently employ 180 workers.

At the outset, the AAO notes inconsistencies in the record. In a letter dated September 24, 2010, the petitioner's president stated that the petitioner employed 48 employees and had annual revenue of $2.2 million. Furthermore, on the petitioner's IRS Form 1065, the petitioner states that the business started on January 1, 2000.

Additionally, the record reflects that the petitioner previously filed a petition on behalf of the beneficiary based upon the same labor certification. With that petition, the petitioner provided IRS Forms 1120 for 2001 and 2002 showing its Employer Identification Number (EIN) as [redacted] The tax returns also reflect two different claimed addresses [redacted]. The prior petition also included IRS Forms 1065 for 2003 through 2006, bearing the [redacted], address but using the EIN [redacted] With the instant petition, the petitioner has submitted IRS Forms 1065 for 2001 through 2006, but no Forms 1120, all with the [redacted] address and EIN [redacted] The entries on the petitioner's 2001 Form 1065 and 2001 Form 1120 are inconsistent. The director specifically requested clarification on these discrepancies in the notice of intent to deny (NOID). These inconsistencies have not been addressed by the petitioner, either in response to the NOID or on appeal.[3] The petitioner's failure to address these inconsistencies cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

---

[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).

[3] In the brief submitted on appeal and received by the AAO on September 29, 2010, counsel requests an additional 30 days to provide recent tax returns and other financial documents. As of this date, more than 32 months later, the AAO has received no additional evidence.

The petitioner has also supplied Forms W-2 showing payments made by it and various entities to the petitioner. The majority of these forms show payments made to someone using Social Security Number (SSN) However, the record contains copies of the beneficiary's federal income tax returns on IRS Form 1040, wherein he claims SSN This inconsistency raises doubts as to the evidence in the record, specifically as to whether the instant beneficiary was the actual recipient of wages paid by the petitioner.

Due to the inconsistencies in the record, the AAO finds that it is not possible to determine the nature of the petitioner's structure, finances, or even location with any certainty. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Based on the divergent nature of the evidence in the record, we are unable to perform a reliable analysis of the petitioner's ability to pay the proffered wage. Therefore, we find that the petitioner failed to establish that it possessed the continued ability to pay the proffered wage from the priority date onward.

Beyond the decision of the director,[4] 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)(1), (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 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, the beneficiary claims to qualify for the offered position based on experience as a cook with the petitioner from April 1998 to "present" (the labor certification was signed by the beneficiary on January 29, 2002); and from April 1995 to February 1997 with We note that the beneficiary filed a Form G-325A, Biographic Information, on which he stated that he began working with the petitioner in April,

[4] 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).

1999. The dates of employment listed by the beneficiary on the Form G-325A cannot be reconciled with the dates of employment listed on the labor certification.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from the petitioner stating that it had employed the beneficiary beginning on July 2001 for "over 30 hours per week." A separate letter filed in support of the previous petition stated that the beneficiary was employed by the petitioner from April 25, 1997. A third letter from the petitioner states that the beneficiary was employed by the petitioner from April 2, 1999 to "the present time." The dates claimed by the petitioner and the beneficiary are inconsistent. *See Matter of Ho, supra.*

The petitioner provided two employment verification letters on behalf of [redacted] The petitioner did not establish how employment verification letters for an unrelated beneficiary are relevant to these proceedings.

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. 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.