

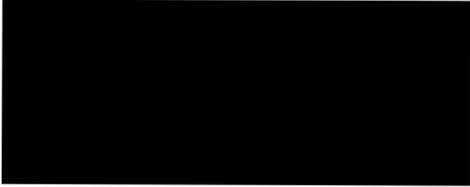


U.S. Citizenship
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File: [Redacted]
EAC-04-054-50187

Office: VERMONT SERVICE CENTER

Date: FEB 01 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting business specialized in trucking software and seeks to employ the beneficiary permanently in the United States as a programmer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 22, 2005 denial, the case was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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).

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 28, 2002.² The proffered wage as stated on Form ETA 750 for the position of a programmer is \$60,000 per year, based on a 40 hour work week. The labor certification was approved on June 18, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on December 15, 2003. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: November 1, 2000; gross annual income: \$250,000.00; net annual income: \$100,000.00; and current number of employees: 2.

On July 20, 2004, the director issued a Request for Additional Evidence ("RFE"), requesting that the petitioner submit additional evidence, specifically related to the petitioner's ability to pay, including the petitioner's federal tax returns, annual reports, or audited financial statements for the year 2003, as well as the beneficiary's W-2 Forms. Further, the RFE requested that the petitioner provide evidence that the beneficiary met the requirements as set forth in the ETA 750. Counsel responded to the RFE, however, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on November 24, 2003, the beneficiary did list that he has been employed with the petitioner from May 2002 to the present (date of signature). The petitioner submitted the following evidence of wage payment:

<u>Year</u>	<u>W-2 Wages</u>	<u>Amended W-2 Wages</u>
2005	\$59,000	

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited the validity of an approved labor certification to the specific alien named on the labor certification application (*See* 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The [redacted] decision effectively led 20 CFR § 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Citizenship and Immigration Service ("CIS," formerly the Immigration and Nationality Service, INS) based on a Memorandum of Understanding. Procedures for CIS were then set forth in a memorandum from Louis Crocetti, INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

2004	\$35,000	\$61,400.00 ³
2003	\$32,000	\$58,898.42
2002	\$16,640	\$32,491.26

The 2005 wage of \$59,000 is slightly below the proffered wage of \$60,000. The amounts initially paid to the beneficiary of \$16,640, \$32,000, and \$35,000 would be deficient standing alone for the petitioner to document its ability to pay the proffered wage. We will address the amended W-2 Forms below.

On appeal, the petitioner provides that as a result of her husband filing for divorce in 2001, she “may have neglected the affairs of Webbeens Inc.” Further, the petitioner provides, “due to lack of experience and guidance from the attorney/accountant, I paid the beneficiary in various ways and allowed him to use my and company credit cards and bank account so he could run the project while I was busy.” The petitioner further explained that she would conduct an internal audit and present evidence of payment of the proffered wage to be submitted thereafter. Counsel for the petitioner in a brief submitted contends that part of the beneficiary’s salary was initially reported on Form 1099,⁴ and that the petitioner’s accountant “found certain income and expenditures have been misapplied and due to this reason amended entire tax returns for the year 2002 and 2003 along with all relevant schedules, W-2’s etc.”

In another letter signed by the petitioner, the petitioner provides that the beneficiary “was given an advance payment to settle down to work, a company car . . . and a free house for the first four months and company credit cards.” We note that the proffered wage cannot be reduced by other payments, such as bonus or housing. The proffered wage listed on the Form ETA 750 is in the form of a salary in the amount of \$60,000.

Regarding the beneficiary’s reissued W-2 Forms, the petitioner issued the restated W-2 Forms to the beneficiary subsequent to the petition’s denial. From the petitioner’s appeal, it appears that the petitioner may have estimated other in-kind payments given to the beneficiary and converted those prior payments to “wages.” The petitioner did not address specifically the results of the internal audit, or on what basis the petitioner’s net income and the beneficiary’s wages were revised. The petitioner, however, cannot go back and correct deficient wages in order for the petition to meet eligibility. A petitioner must establish the beneficiary’s eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *See also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988), a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. Therefore, we will accept and consider the W-2 Forms initially issued. The petitioner must demonstrate that it can pay the beneficiary the difference between the wages paid, and the proffered wage.

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, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return. 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

³ The 2004 and 2003 W-2 Forms indicate that the beneficiary filed amended Forms 1040 individual tax return on March 31, 2005 following issuance of the reissued Form W-2.

⁴ We note that the record of proceeding does not contain evidence of the additional separate Form 1099 payments to the beneficiary. We further note that the beneficiary did file amended tax returns and pay taxes on the additional wages received. However, the amended filings were completed in April 2005, subsequent to the petition’s denial.

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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

The petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner's tax returns do not reflect additional income from sources other than trade or business. Line 21 reflects the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>	<u>Amended Return Net income</u>
2003 ⁵	\$474	-\$1,583
2002	\$6,300	\$316

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the forgoing years even if the wages initially paid to the beneficiary were added to the net income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

The IRS does not require that a company file Schedule L in certain circumstances. If the Form 1120 page 1 lines 1a plus lines 4 through 10 reflect an amount under \$250,000, a company is not required to file Schedule L. *See* Internal Revenue Service, Instructions for Form 1120S. Based on this standard, the petitioner reported

⁵ The petitioner did not submit its 2004 federal tax return, which based on the date of filing would not have been available at the time of filing, but may have been available at the time of appeal.

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.

an amount under \$250,000 on Form 1120, page 1 for the years 2002 and 2003. The petitioner, therefore, was not required to file Schedule L. Since the petitioner did not report its assets, or liabilities, we are unable to calculate the petitioner's net current assets.

Counsel contends on appeal that based on the restated wages, the petitioner can pay the proffered wage. Further, the wages that the petitioner paid, which were slightly under \$60,000, according to counsel, would be accepted within the DOL's 5% allowed variance of the proffered wage. We note that the petitioner must pay the proffered wage listed on the ETA 750. The petitioner would have had the option to list 95% of the proffered wage, if accepted by DOL, on the ETA 750. Since the ETA 750 has been certified at \$60,000, the petitioner may not now reduce the wage by 5%.⁷ Based on the foregoing, the petitioner has not established that it can pay the proffered wage.

Although not raised in the director's denial, the petitioner has not demonstrated that the beneficiary meets the certified requirements of the ETA 750, and the petition should have been denied on this basis as well. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's 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. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description provides:

Develop, create, modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use for optimum efficiency. May analyze and design databases within an application area, working individually or coordinating databases development as part of train.

⁷ CIS must look to the job offer portion of the labor certification, and 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Further, the job offered listed on the certified ETA 750 that the position required:

Education: BS (Bachelor of Science)
Major Field Study: Computer Science.

Experience: 2 years in the related occupation of Software Consultancy.

As addressed above, the petitioner filed to substitute the present beneficiary for the individual initially sponsored. We note that the petitioner submitted a new Form ETA 750A and ETA 750B. The petitioner is required to submit a new Form ETA 750B to list the qualifications of the new beneficiary and show that the individual meets the qualifications of the certified ETA 750A. However, on the "new" ETA 750A that the petitioner submitted, the petitioner listed the following requirements:

Education: BS (Bachelor of Science)
Major Field Study: Science.

Training: Programming, Networking

Experience: 2 years in the related occupation of Software Consultancy.

Other experience: Some management experience.

If the petitioner seeks to substitute the beneficiary into the certified ETA 750, the petitioner must demonstrate that the beneficiary has the required degree in the field of Computer Science, and not just Science. Further, the additional training and other experience listed on the uncertified ETA 750 will not be considered as a requirement. The present beneficiary must meet the requirements of the initial Form ETA 750A, which was certified. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

On the Form ETA 750B, signed by the beneficiary on November 24, 2003, the beneficiary listed prior education as: (1) JN Univ. Delhi (NDA Pune); Field of Study: Science; from June 1973 to May 1976, for which he received a Bachelor of Science degree; and (2) Microsoft Courses; Field of Study: Programming; from 1998 to 1998; and (3) Microsoft Courses; Field of Study: Networking; from 1999 to 2000, for which he received MCSE Certificates.

The petitioner submitted an academic equivalency evaluation from Cultural House Evaluation Services.⁸ The evaluation considered the beneficiary's studies, a Bachelor of Science degree from Jawaharlal Nehru University, India, which it found to be equivalent to three years of studies in mathematics in the U.S.⁹ The evaluation further considered "copies of certificates from Microsoft attesting to the completion of the Examination, Implementing & Supporting Microsoft Windows NT Server 4.0 in 2000." The evaluator

⁸ Additionally, Cultural House Evaluation Services is not a member of the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector.

⁹ The evaluation listed that the beneficiary's area of study was Mathematics. We note that the beneficiary himself listed his field of study as Science. Further, the degree certificate submitted does not list any field of study for the beneficiary.

determined that the Microsoft courses would be equivalent to a one-year program of study in computer applications from a “private computer school in the U.S.”¹⁰ Based on the combined education, and computer courses, the evaluator determined that the beneficiary had the “equivalent of the Degree, Bachelor of Science in mathematics and computer applications from an accredited institution of higher education in the U.S.”

First, if we look to the field of study on the certified ETA 750, the beneficiary’s education, even if we accepted the evaluation, would not meet the requirements. The required degree must be in Computer Science. The petitioner did not list that it would accept a degree in another field such as mathematics, or a combination of mathematics and computers.

Second, we note that the regulations define a third preference category professional as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). The beneficiary’s three-year Bachelor of Science degree would be insufficient to meet the degree standard, even if the beneficiary had the required field of study.

Further, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes, and not combined with other degrees, training, or work experience. The labor certification was not drafted to consider a Bachelor’s degree or equivalent in “education, training, or experience.” The ETA 750 did not define equivalency in this manner, and to argue that the ETA 750 should be read to include the equivalent in education, training, experience, or otherwise, would be unfair to U.S. workers without degrees, but with the equivalent in education, that may not have responded to advertisements during the labor certification recruitment phase.

¹⁰ The duration of study, and nature of the Microsoft courses that the beneficiary took are unclear. The courses may have been self-study, lasted one day, or one week - we have no way to assess the comparable academic value of the “courses.” We find the evaluation of the beneficiary’s educational equivalency questionable. Where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The beneficiary's educational background does not meet the degree requirement, or meet the specified major field of study on the certified ETA 750, and therefore, the petition should have been denied on this basis as well.

Further, the record reflects several discrepancies in the beneficiary's work experience. On the ETA 750B, the beneficiary listed the following experience: (1) Government of India, Dehli, India, Officer; from June 1977 to September 2000; job duties: "in addition to field duties from 1985 onwards, took active interest in computers, in hardware, programming and networking skills. Assembled computers, installed software, upgraded, networked. Developed intranet websites. Performed all MS Office work for presentations and also data storage."; (2) QA Group of New York, Inc., New York, New York; Programmer; December 2000 to May 2002; (3) Webbeens Inc., Reading, PA; Programmer and Project Manager; May 2002 to present.

Form G-325 submitted with the beneficiary's I-485 Adjustment of Status application, lists the beneficiary's experience as follows: (1) Webbeens Inc.; programmer; May 2002 to present; (2) QA Group of NY; programmer; May 2001 to May 2002; and (3) Ministry of Defense, Government of India; Officer; June 1977 to September 2000.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner submitted the following letters on the beneficiary's behalf:

1. Letter from [REDACTED] HQ Infantry Brigade, dated September 4, 2000;
Position title: "served in Army at various places and appointments as staff officer;"
Dates of employment: "as per records a lot of computer experience since 1993;"
Description of duties: "he has done initial assembly and installation of computer systems; upgrading and networking . . . maintenance of hardware and software . . . looked after assembly and installation of computer networks; also has knowledge of data backups, CD writing, trouble shooting of systems."
2. Letter from [REDACTED] Major Adjutant, [REDACTED], dated May 15, 1999;
Position title: not listed

Dates of employment: "has gained the following experience while serving at [REDACTED]"
Description of duties: "programming in C Language and Foxpro; programming in Visual Basic; programming in Oracle 7.2; assembly, upgrade . . . software/hardware, Networking and Administration; data back ups and recovery . . . troubleshooting."

3. Letter from [REDACTED], dated September 2000;
Position title: "senior member of our team;"
Dates of employment: July 1998 to September 2000;
Description of duties: Network Installation; System Administration; general maintenance; in-house management of 25 computers; developed knowledge of data backups, CD writing; developed three websites for our clients.
4. Letter from [REDACTED] [REDACTED] dated December 11, 2000;
Position title: Programmer;
Dates of employment: Offer letter pursuant to H-1B petition;
Description of duties: prospective job duties as programmer: to analyze business procedures; confer on output requirements; study programming systems to improve workflow.
5. Letter from [REDACTED], President, [REDACTED], dated August 6, 2004;
Position title: not listed;
Dates of employment: "initially on contract from the [REDACTED] from May 14, 2001 to May 4, 2002" and then from May 4, 2002 for [REDACTED]
Description of duties: installation of machines; provision of Internet via Cable Routers; provisions and managing of firewalls and internet security; analysis, design, and programming; collection of data; programming of website; design of commercial website.

From the first two letters submitted, it is unclear what percentage of time that the beneficiary was involved in computer related activities in comparison to his work as an Officer for the government of India. The third letter is of particular concern as the beneficiary did not list that he was previously employed with Perfect KnitVision on either his ETA 750B Form, or his Form G-325A, and the dates listed conflict with his listed experience as an Officer for the government of India. The conflict in experience raises concerns regarding the veracity of the beneficiary and the letters provided. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592.

Further, regarding the beneficiary's experience, the fourth letter does not confirm that the beneficiary worked for QA Group, only that he was offered the position. The final letter is from his present employer, and QA Group would have been a better source to verify the beneficiary's employment for the QA Group. The experience with his present employer could not be used to meet the two years of prior experience. The letters altogether would confirm one year of experience as a programmer since the letters of Perfect KnitVision, and the letters regarding his experience while employed with the government of India are in question. We would not conclude from the letters submitted that the beneficiary has met the required two years of experience, absent more specific information related to his duties while employed with the government of India.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to demonstrate that the beneficiary meets the required educational and worked experience requirements of the certified ETA 750. 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.