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U.S. Citizenship
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Office: TEXAS SERVICE CENTER

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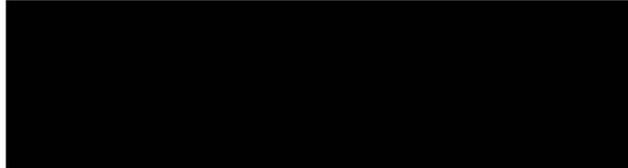
Petitioner:

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fuel wholesaler. It seeks to employ the beneficiary permanently in the United States as a purchasing agent. As required by statute, a Form 9089 Application for Permanent Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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 and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether the petitioner has demonstrated that the beneficiary has the qualifications that the Form ETA 9089 stated as required.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted on December 14, 2005. The prevailing wage as stated on the Form ETA 9089 is \$60,091 per year. The proffered wage as stated on both the Form ETA 9089 and the Form I-140 petition is \$62,000. The Form ETA 9089 states that the position requires two years of experience in the job offered.

The Form I-140 petition in this matter was submitted on March 27, 2006. On the petition, the petitioner stated that it was established during 1990 and that it employs three workers. The petition states that the petitioner's gross annual income is \$436,760 and that its net annual income is \$148,794.² Both the petition and the Form ETA 9089 indicate that the petitioner would employ the beneficiary in Georgetown, Texas.

On the Form ETA 9089, signed by the beneficiary on March 14, 2006, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have been employed as the President of Riffy's Incorporated (Riffy's) in Arlington, Texas from January 1, 1996 to December 14, 2005.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³ In the instant case the record contains (1) the petitioner's 2004 and 2005 Form 1120S, U.S. Income Tax Returns

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

² The tax returns in the record do not confirm those amounts.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19

for an S Corporation, (2) the petitioner's unaudited financial statements for 2005 and for January and February of 2006, and (3) monthly statements pertinent to the petitioner's bank accounts. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.⁴

The petitioner's tax returns show that it is a corporation, that it incorporated on October 19, 1990, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2004 the petitioner declared Schedule K, Line 17e income of \$37,583. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2005 the petitioner declared Schedule K, Line 17e income of \$2,420. At the end of that year the petitioner's current liabilities exceeded its current assets.

The instant beneficiary was also named as beneficiary on some previous Form I-140 visa petitions in the record.

The record contains a petition for the beneficiary filed by Riffy's on February 23, 1998. That petition sought approval of a visa for the beneficiary pursuant to section 203(b)(1)(C) of the Act pertinent to certain multi-national executives and managers and was supported by a November 17, 1997 employment verification letter from [REDACTED] then president of [REDACTED] then located in Houston, Texas. In that letter [REDACTED] stated that the beneficiary then owned 1/3 of that company, which was founded to engage in gift and general merchandise wholesaling. That letter further states,

In the capacity of Vice President, [the beneficiary] has functioned as Marketing Director for Riffy's, Inc. He has developed the company's overall marketing strategy and devised sales, advertising, sales promotion and public relations programs to implement and maintain the strategy. He also identified the company's target customer and developed a pricing strategy with a view towards maximizing the company's market share and profits. He forecasts future marketing trends and develops sales campaigns to achieve company goals. He coordinates sales distribution through his established relationship with our suppliers. He has the authority to hire, promote and terminate employees.

That letter further states,

[The beneficiary] will continue to develop the company's overall marketing strategy and devised sales, advertising, sales promotion and public relations programs to implement and maintain the strategy. He will continue to identify the company's target customer and

I&N Dec. 764 (BIA 1988).

⁴ The record does contain various documents pertinent to the operation of the petitioner's business, including Texas Fuels Tax Reports, stock certificates, a partnership deed, and similar documents pertinent to the corporate business of the petitioner. Those documents are not directly relevant to the petitioner's ability to pay additional wages.

developed pricing strategies with a view towards maximizing the company's market share and profits. He will continue to forecast future marketing trends and develop sales campaigns to achieve company goals. He will continue to coordinate sales distribution through his established relationship with our suppliers and the establishment of new relationships. He will continue to have the authority to hire, promote and terminate employees.

Although that description of the duties of the beneficiary's position with [REDACTED] appear to be exhaustive, they do not mention any of the duties described in the Form ETA 750 as the duties the beneficiary must have performed in order to be considered qualified for the proffered position.

Further, the record contains an August 13, 2003 Form I-140 visa petition, also filed by [REDACTED] for the instant beneficiary. An employment verification letter dated August 1, 2003, also from [REDACTED] supported that petition. That letter states that the beneficiary was the firm's marketing director and, upon the death of his father, [REDACTED] who had been president of the company, took over as president as well. The letter further stated that, in addition to his work as marketing director,

[The beneficiary was responsible for] conducting all our Board of Director's [sic] meetings where policy is set; coordinating our business affairs and policies with the [company's parent company]; hiring, firing, training and supervising personnel; conducting relationships with accountants, lawyers, bankers, real estate agents, and such regulatory agencies as may effect [sic] our business[;] and all of the usual duties of a corporation President and Chief Executive Officer in the conduct of the corporation's daily business.

The record contains a Form I-140 petition filed on April 19, 2004 by Tempus Properties, also for a multi-national executive or manager. An October 4, 2004 letter from Commodities and Textiles of [REDACTED] supported that petition. That letter states that Commodities and Textiles incorporated [REDACTED] during February of 1996 and made the beneficiary its president during April of 1998. That letter states,

In his capacity as President, [the beneficiary's] duties have included, but were not limited to, the following:

- a. Direct the company's overall trade and marketing policy.
- b. Develop and implement marketing strategy, and sale, advertising, sales promotion and public relation activities.
- c. Perform market research and review results to determine customer's needs, volume potential, price schedules and discount rates.
- d. Identify potential customers and develop pricing strategy with a view toward maximizing the company's market share and profits.

As was noted above, the instant petition was submitted on March 27, 2006, and is based on the Form 9089 in the record. That Form 9089 states that the duties of the proffered position are to,

Identify potential unbranded gas stations and truck stops and negotiate agreements for those businesses to use company brands. Research and evaluate business opportunities to

determine which gas stations and truck stops to recommend the company buys and sells. Negotiate and administer contracts with sellers and buyers of gas stations and truck stops.

The March 20, 2006 letter is from [REDACTED] and states that from January 1996 until the date of that letter the beneficiary worked for that company as a Purchasing Agent. That letter further states,

In this position, [the beneficiary] identifies potential unbranded gas stations and truck stops and negotiates agreements for those businesses to use company brands. He researches and evaluates business opportunities to determine which gas stations and truck stops to recommend the company buy and sell. He negotiates and administers contracts with sellers and buyers of gas stations and truck stops.

At that time the petitioner submitted no additional evidence in support of the claim of qualifying employment experience pertinent to the instant petition.

In order for the instant petition to be approved the petitioner must demonstrate that the beneficiary has two years of experience in the job offered. The Form 9089 states what the duties of the proffered position are and the duties described in the March 20, 2006 employment verification letter from [REDACTED] match those duties precisely. They are manifestly different, however, from the duties asserted in the previous employment verification letters from [REDACTED] and Commodities and Textiles. Those employment verification letters covered the same time period covered by the March 20, 2006 employment verification letter.

In response to a notice of intent to deny noting that discrepancy the petitioner submitted another employment verification letter from an accountant at Riffy's. That additional employment verification letter is dated May 20, 2006, and states that the beneficiary was the petitioner's vice-president and marketing director from 1996 to July 1999, in which capacity,

. . . he developed the company's overall marketing strategy and devised advertising, sales, promotion and public relations programs to implement and maintain that strategy. He also identified the company's target customer and developed a pricing strategy with a view towards maximizing the company's market share and profits.

That letter further states, however, that,

From July 1999 to present, [the beneficiary] . . . served as President and Marketing Manager. [The beneficiary] took over as President of the company and his additional duties are to locate, with the intent to acquire, any profitable business, i.e. Gas stations/convenience stores or commercial property, which he thinks would be profitable for the company's growth.

In addition, he also identifies potential unbranded gas stations and truck stops and negotiates for those businesses to use company brands. He researches and evaluates business opportunities to determine which gas station[s] and truck stops to [sic] the company should buy and sell. He negotiates and administers contracts with sellers and buyers of gas stations and truck stops.

The director denied the petition on July 20, 2006. In that decision the director found that the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date. The director further found that the petitioner had not demonstrated that the beneficiary has the employment experience that the Form 9089 stated is a requirement of the proffered position.

On appeal, counsel asserted that the evidence of record demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel noted that 8 C.F.R. § 204.5(g)(2) permits the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with documents other than tax returns. Counsel indicated that the petitioner believes that its depreciation deductions should be included in the calculations pertinent to its ability to pay the proffered wage during the salient years. Counsel further stated that the position of CIS that depreciation should not be considered creates "a reasonable dispute . . . as to whether or not the tax returns accurately reflect [the petitioner's] financial ability.

Counsel also asserted that the evidence demonstrates that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification. Counsel characterized the description of the beneficiary's duties submitted in support of the instant petition as more detailed than those previously submitted, rather than conflicting.

In his brief counsel argued that the bases for the denials of the instant petition and the previous first preference petitions are contradictory, in that the earlier decisions characterized the beneficiary's duties as not being managerial within the meaning of 8 C.F.R. § 204.5(j)(2)(C), whereas the instant decision characterized the duties described in the earlier employment verification documents as managerial. This office observes that the duties described in the earlier employment verification letters were not managerial only within the narrow sense of the regulation, and the less precise use by the director of the word "managerial" may have created confusion. However, the finding that the beneficiary does not qualify for a position pursuant to section 203(b)(1)(C) of the Act and the finding that he does not qualify for the instant proffered position are not in conflict.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁵

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel's reliance on the unaudited financial statements in the record is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's reports that accompanied those financial statements make clear that they were produced pursuant to compilation rather than audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

This office rejects the assertion that depreciation deductions represent additional funds at the disposal of a taxpayer in addition to its net income. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel implied that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁶ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel urged that because the petitioner contests the policy of not considering depreciation as an additional fund at the disposal of a taxpayer, the petitioner's bank statements and unaudited financial statements should be considered. This office has decided the issue pertinent to depreciation. That counsel and the petitioner disagree with this office's policy pertinent to depreciation does not render the petitioner's bank statements

⁶ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

and unaudited financial statements any more reliable as indices of the petitioner's ability to pay the proffered wage. The bank statements and unaudited financial statements will not be further considered.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 9089 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without

reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$62,000. The priority date is December 14, 2005. Because the priority date fell within the 2005 calendar year, which is also the petitioner's 2005 tax year, this office ordinarily would not consider evidence pertinent to the petitioner's finances during previous year, as it would not be directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In this case, however, in the absence of any evidence pertinent to subsequent years, this office will consider evidence pertinent to both 2004 and 2005.

During 2004 the petitioner has net income of \$37,583.⁸ That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence pertinent of any other funds available to it during 2004 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner has net income of \$2,420. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no reliable evidence pertinent of any other funds available to it during 2005 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on March 27, 2006. On that date the petitioner's 2006 tax return was unavailable. On May 9, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner responded to that notice on June 9, 2006 and the record is deemed to have closed on that date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of its burden to demonstrate its ability to pay the proffered wage during 2006 and later years.

⁷ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁸ When relying on tax returns for the purpose of determining a subchapter S corporate petitioner's ability to pay a proffered wage, its Line 17e Income/Loss Reconciliation is considered to be its net income.

The evidence submitted does not establish that the petitioner was able to pay the proffered wage during 2004 and 2005, the only years for which evidence was submitted. Therefore the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

Previous Form I-140 visa petitions filed for the instant beneficiary sought immigrant visas based on employment of the beneficiary pursuant to section 203(b)(1)(C) of the Act, which pertains to certain multi-national executives and managers. In order to qualify for a visa pursuant to that section, the petitioners were obliged to show that the position offered to the beneficiary was managerial or executive within the meaning of 8 C.F.R. § 204.5(j)(2)(C).

In support of those petitions, the petitioners submitted the various letters from [REDACTED] and a related company. Those employment verification letters, penned on various dates as late as August 1, 2003 and October 4, 2004 described the beneficiary's duties as including conducting Board of Directors' meetings, coordinating business affairs and policies with the company's parent company, hiring, training, supervising, and firing personnel, and conducting relationships with accountants, lawyers, bankers, real estate agents, and regulatory agencies.

Those letters do not mention any of the duties of the proffered position as described on the Form 9089, which include identifying potential unbranded gas stations and truck stops and negotiating agreements for those businesses to use company brands, researching and evaluating business opportunities to determine which gas stations and truck stops to recommend the company buys and sells, and negotiating and administering contracts with sellers and buyers of gas stations and truck stops.

Subsequently, the petitioner filed the instant petition. In order to support that petition the petitioner was obliged to demonstrate that the beneficiary has two years of experience in the duties of the job offered. Those duties, as described on the Form ETA 9089, are described above. In order to comply with that requirement, the petitioner submitted the March 20, 2006 letter, also from [REDACTED] a company of which the beneficiary has been or is a part-owner, stating that the beneficiary had worked in precisely that capacity.

A notice of intent to deny issued in this matter on May 9, 2006 noted that the duties described in the letters in support of the earlier I-140 visa petition were entirely different from those described in documents in support of the instant Form I-140 visa petition.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Faced with this apparent contradiction the petitioner submitted the letter of February 20, 2006 in an attempt to reconcile the two apparently disparate job descriptions. That letter stated that the beneficiary worked as marketing director from 1996 to July 1999, engaging in the duties described in the earlier employment verification letters, and then, in July 1999, became [REDACTED] marketing manager, engaging in the duties described in the Form 9089 as requisite to the proffered position.

First, this office notes that the explanation does not reconcile the discrepancies in the evidence. The letters of August 1, 2003 and October 4, 2004 described only the same duties previously described in the November 17, 1997 letter, duties the May 20, 2006 letter states had changed during July 1999. The explanation in the May 20, 2006 letter conflicts with the information in the August 1, 2003 and October 4, 2004 letters.

Second, pursuant to *Matter of Ho, Id.*, the petitioner was obliged to reconcile the apparent discrepancy with objective evidence, rather than merely proposing a feasible explanation. Even if the explanation in the May 20, 2006 letter had reconciled the evidence, it would not constitute independent objective evidence and would not suffice to overcome this basis for the decision of denial.

Further, this office rejects counsel's assertion that the description of the beneficiary's duties in the March 20, 2006 is the same as or similar to the descriptions in the November 17, 1997, August 1, 2003, and October 4, 2004 letters except that it contains more detail. This office will not belabor the point, except to note that the March 20, 2006 description is manifestly different from the previous descriptions and has virtually nothing in common with them.

The conflicting letters provided by Riffy's were tailored to support different visa petitions with manifestly different requirements. This suggests that Riffy's, a company in which the beneficiary is or has been part owner, is misstating the duties of his position as necessary to support his various visa petitions.

Based on the apparent contradictions between the November 17, 1997, August 1, 2003, and October 4, 2004 employment verification letters and the March 20, 2006 employment verification letter provided in support of the instant petition, this office finds that all of the beneficiary's employment verification letters are unreliable and cannot be used to support the proposition that the beneficiary has the employment experience required by the approved labor certification in this case. The petition was correctly denied on this additional basis, which has not been overcome on appeal.

The petitioner has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and has failed to demonstrate that the beneficiary is qualified for the proffered position. The appeal will be dismissed for both 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.