



U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]  
EAC-05-232-52355

Office: VERMONT SERVICE CENTER

Date: JAN 15 2008

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

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:

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 preference visa petition was denied by the Director, Vermont Service Center, 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 pastry cook (Italian pastry cook). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 June 6, 2006 denial, the primary 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 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.

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 U.S. Department of Labor. 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 3, 2001. The proffered wage as stated on the Form ETA 750 is \$19.55 per hour (\$40,664 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed on April 1, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1992, however, it did not provide information about its gross annual income, net annual income, and current number of employees.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. On appeal, counsel submits [REDACTED]'s personal income tax returns for 2001 through 2005. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 1997 through 2005 and some newspaper articles about affect to the New York economy from the September 11, 2001 terrorist attacks. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, the petitioner asserts that the petitioner established its ability to pay the proffered wage under the rule of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 Sonegawa*, at 612.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 did not submit any evidence to show that the petitioner paid the beneficiary any amount of compensation in the relevant years. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 onwards.

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, without consideration of depreciation or other expenses. 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). In response to the director's request for evidence (RFE) issued on October 14, 2005, counsel asserted that the

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<sup>1</sup> 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) and 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 established its ability to pay the proffered wage with its gross sales, depreciation and ordinary income for the relevant years. Counsel's reliance on the petitioner's gross income and gross profit is misplaced. Showing that the petitioner's total income 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. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 1997 through 2005 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. However, the priority date in the instant case is April 3, 2001, therefore, the tax returns for 1997 through 2000 are not necessarily dispositive. The tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$40,664 per year from the priority date:

- In 2001, the Form 1120S stated a net income<sup>2</sup> of \$(36,948).
- In 2002, the Form 1120S stated a net income of \$(12,658).
- In 2003, the Form 1120S stated a net income of \$(5,819).
- In 2004, the Form 1120S stated a net income of \$(28,436).

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<sup>2</sup> 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.*

- In 2005, the Form 1120S stated a net income of \$(20,314).

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage, and thus failed to establish its ability to pay the proffered wage with its net income in these years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Counsel urges that the petitioner's cash on hand should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> 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 net current assets during 2001 were \$(67,328).
- The petitioner's net current assets during 2002 were \$(75,214).
- The petitioner's net current assets during 2003 were \$(94,872).
- The petitioner's net current assets during 2004 were \$(44,957).
- The petitioner's net current assets during 2005 were \$(68,398).

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage, and thus, it failed to establish its ability to pay the proffered wage with its net current assets in these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage as of

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

the priority date in 2001 to 2005 through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal, counsel submits [REDACTED] individual tax returns for 2001 through 2005 to further establish the petitioner's ability to pay the proffered wage. The evidence in the record shows that the petitioner is structured as a corporation and [REDACTED] holds 50% of the petitioner's stock. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In response to the director's October 14, 2005 RFE, counsel argued that the director should not disregard the amount paid as compensation to officers, implicating compensation of officers should be considered as part of the petitioner's ability to pay. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

On appeal, counsel submits [REDACTED]'s individual tax returns for 2001 through 2005. However, counsel does not document that either of the two shareholders is willing to forgo her officer compensation to pay the beneficiary the proffered wage. According to the petitioner's Form 1120S Line 7 Compensation of Officers, the two shareholders of the petitioner elected to pay themselves of \$65,600 in 2001, \$62,400 in each of the years 2002 through 2004, and \$63,600 in 2005 respectively. However, the record does not contain any evidence about the amount paid as compensation of officers to each shareholder for each of these relevant years. [REDACTED]'s individual tax returns submitted on appeal show that she reported her adjusted gross income of \$23,493 in 2001, \$51,141 in 2002, \$57,492 in 2003, \$45,481 in 2004, and \$47,491 in 2005. Counsel does not submit [REDACTED] W-2 forms for these years to support these figures, and therefore, it is not clear how much of [REDACTED] adjusted gross income is paid by the petitioner as officer's compensation for each of the years. However, it is noted that the [REDACTED] did not have sufficient adjusted gross income in 2001 to forgo her officer compensation to pay the beneficiary the proffered wage; and for 2002 through 2005, in reviewing the balance of \$10,477 in 2002, \$16,828 in 2003, \$4,817 in 2004 and \$6,827 in 2005 respectively after forgoing to pay the proffered wage from her adjusted gross income, it is unlikely that [REDACTED] could sustain herself and her family of two on the remaining income. Therefore, it appears that the petitioner is unable to establish its ability to pay the proffered wage based on its compensation of officers.

In response to the RFE and on appeal, counsel argues that rule of *Matter of Sonogawa* is applicable to the instant case and submits the petitioner's tax returns for 1997 to 2000 to support his assertions that the petitioner established its ability to pay the proffered wage under the *Sonogawa* rule. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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.

The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 was one of its best years in the context of its gross receipts, net income, and net current assets reported from 2001 through 2004.

Counsel submitted the petitioner's corporate tax returns for 1997 through 2000 as evidence showing that unusual circumstances exist in this case to parallel those in *Sonegawa*, and that the relevant years were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner. There is no doubt that economics after 9/11 terrorist attacks has been in negative circumstances. "September 11" influenced to economy negatively not only in New York, but also in the United States and even in the globe. However, simply because the business happens to be located in the New York area and simply because the labor certification application was filed in 2001 are not sufficient reasons to apply the *Sonegawa* rule to the instant case. The petitioner must establish the year 2001 was an uncharacteristically unprofitable year in a framework of profitable or successful years for the petitioner. The petitioner's tax returns for 1997 through 2000 show that the petitioner had net income of \$98,442 in 1997, \$22,594 in 1998, \$(37,926) in 1999 and \$42,629 in 2000. In the four years prior to September 11, 2001, the petitioner had two years with sufficient net income to pay the proffered wage, another year with loss and the other with insufficient net income to pay the proffered wage. As previously noted, the petitioner had negative net income in all the relevant years 2001 through 2005. Therefore, the petitioner has not established that 2001 and 2002 were the two uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner based on the fact that the petitioner had six unprofitable years out of the most recent nine years. Counsel claimed that the petitioner had net loss of \$36,948 in 2001 because of the 9/11 terrorist attacks, but the petitioner's net loss gradually rebounded to \$12,668 in 2002 and \$5,819 in 2003 showing its business was recovering from the 9/11 influence. However, counsel did not explain the reasons for the petitioner's net loss of \$28,436 in 2004 and \$20,314 in 2005. In addition, it is also noted that the petitioner paid salaries and wages of \$7,020 in 2004 and \$7,155 in 2005 respectively. Therefore, the AAO is not persuaded that unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, and it has been established that 2001 through 2005 were uncharacteristically unprofitable years in a framework of profitable or successful years. Nor does the AAO find the petitioner's potential to increase its net income or net current assets to the level with which the petitioner can pay the beneficiary the proffered wage.

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 Department of Labor.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner demonstrated that the beneficiary is qualified for the proffered position and whether the petitioner's job offer is a realistic one. 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*, 299 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Italian pastry cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Experience	
	Job Offered	2 years
	Related Occupation	0

The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his experience on Form ETA-750B and signed his name on April 1, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been unemployed since October 1995. Prior to that, he represented that he worked as a full time Italian pastry cook for [REDACTED] in Asiago, Italy from November 1992 to September 1995, and for [REDACTED] in Venice, Italy from May 1988 to October 1992. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The instant I-140 petition was submitted on August 22, 2005 with two experience letters as evidence pertinent to the beneficiary's qualifications as required by the above regulation. One experience letter in the record was dated October 15, 1995 and from [REDACTED] This letter stated concerning the beneficiary's work experience in pertinent part that:

We declare that [the beneficiary], residing at [REDACTED] at [REDACTED] was employed by us from 15/11/1992 to 31[sic]/9/1995 with the qualification of Pastry Chef with outstanding results morally and technically.

The letter was from [REDACTED] and signed by author, however, it does not contain the author's name and title in the company, therefore, it is not clear whether the letter was from an authorized representative on behalf of the former employer. The letter does not verify the beneficiary's full-time employment and does not contain a specific description of the duties the beneficiary performed. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case.

The other experience letter in the record was dated November 5, 1992 and from [REDACTED]. This letter stated concerning the beneficiary's work experience in pertinent part that:

We confirm that [the beneficiary] residing at [REDACTED] at [REDACTED], was employed by us (our company) from 15/05/1988 to 21/10/1992 with the qualifications of Pastry Chef.

[The beneficiary] was in charge of updating the menu and creation of new pastry (sweets) and preparations of tipic pastry of the Laguna Veneta.

The letter was signed but without the author's name, and the author signed the letter as Administration, therefore, it is not clear whether the letter was from an authorized representative on behalf of the former employer. The letter does not verify the beneficiary's full-time employment. Although it contains a very brief description of the duties the beneficiary performed, it is not clear whether the duties performed by the beneficiary at [REDACTED] qualify him to perform the duties described in Item 13 of the Form ETA 750A. This experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

Further, the record of proceeding contains inconsistent information about the beneficiary's employment history with these two letters and the beneficiary's statement on the Form ETA 750B. As previously noted, on Form ETA-750B, the beneficiary represented that he was unemployed from October 1995 to the present, i.e., April 1, 2001 the date when the form was signed despite the item 15 clearly requires to "[l]ist all jobs held during the last three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." The record shows that another company filed an I-140 immigrant petition on behalf of the beneficiary.<sup>4</sup> On the Form G-325A, signed by the beneficiary on January 24, 2003, accompanying the concurrently filed Form I-485 application for adjustment of status, the beneficiary, however, represented that he worked as an executive for Studio D'Arte Antica, in Padova, Italy from June 1996 to June 2001. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain such independent objective evidence to resolve the inconsistency.

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<sup>4</sup> The petition (EAC-03-182-54177) was filed for the beneficiary as a multinational executive or manager pursuant to Section 203(b)(1)(C) of the Act on May 22, 2003, and denied on April 21, 2004. A subsequent appeal was dismissed by the AAO on May 10, 2005.

In addition, CIS records show that the beneficiary has been in L-1A status since 2001<sup>5</sup> and is currently working as the president for the U.S. subsidiary of Studio D'Arte Antica. The beneficiary owns 100% of stock of Studio D'Arte Antica and 50% of the U.S. subsidiary, which imports and consigns European antiques for sale. This casts doubt on the issue of whether the beneficiary would give up his executive position and fill the proffered position working for the petitioner as an Italian pastry cook if lawful permanent residence were granted to the beneficiary based on the instant petition and further casts doubt whether the petitioner's job offer is a *bona fide* job opportunity. "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*, at 582.

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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<sup>5</sup> The first L-1A petition for the beneficiary (EAC-01-207-55645) was filed on June 20, 2001 and approved on June 27, 2001 for a period from June 21, 2001 to May 31, 2002 and the most recent L-1A petition filed for the beneficiary (EAC-06-183-53265) was filed on May 26, 2006 and approved on September 14, 2006 for a period from June 1, 2006 to May 31, 2008.