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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: AUG 16 2010
LIN 07 076 50366

IN RE: Petitioner: [REDACTED]
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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the Nebraska Service Center for further action, consideration, and the entry of a new decision.

The petitioner is an Italian restaurant located on [REDACTED]. It seeks to employ the beneficiary permanently in the United States as an Italian style pastry baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage of \$40,664.00 per year, specifically from 2003 henceforth. The director also found that the petitioner had failed to pay the beneficiary the full proffered wage from the priority date.

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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the petitioner submitted and the DOL accepted for processing the Form ETA 750 on April 10, 2001. The rate of pay or the proffered wage stated on that form is \$19.55 per hour or

\$40,664 per year. Further, the Form ETA 750 states that the position requires a minimum of 2 years experience as a cook or in a related occupation.

To demonstrate that it has the ability to pay \$19.55 per hour or \$40,664 per year beginning on April 10, 2001 and continuing until the beneficiary obtains lawful permanent residence, the petitioner submitted copies of the following evidence:

- IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001-2006;
- The beneficiary's Forms W-2 for 2001-2006; and
- Three voided checks issued to the beneficiary in August 2007.

Upon review, the director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage specifically from 2003 onwards. The petitioner appealed the director's decision, noting that the director failed to consider the officers' compensation in denying the petition. On appeal, a letter from the petitioner's certified public accountant was submitted stating that had the "funds" (referring to the officers' compensation) been left in the corporation, the corporation would have had more than sufficient net income to cover the beneficiary's proffered wage.

On May 5, 2010 the AAO sent a request for additional evidence (RFE). The following evidence was subsequently submitted:

- Sworn statements from [REDACTED] two of the shareholders and officers of the petitioning corporation;
- Copies of the petitioner's tax returns for 2007 and 2008;
- Copies of the beneficiary's W-2s for 2007-2009; and
- Copies of ratings from Opentable.com, Yelp.com, and Zagat New York City Restaurants Survey 2010.

The single issue throughout this proceeding 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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).

The record shows that the petitioner was incorporated in 1984 and was restructured as an S Corporation as of April 1, 1989.² The tax documents indicate that the corporation had 3 shareholders or officers who share the annual profit or loss equally through 2008.³ They are [REDACTED]. Counsel for the petitioner notes in a statement dated September 5, 2007 that the petitioning corporation currently has 45 employees. The beneficiary, according to a signed statement dated August 22, 2007, has been employed by the petitioner as an Italian Style Pastry Baker since September 1994. At part B of the Form ETA 750, the petitioner indicated that it employed the beneficiary as a cook from 1987 to 1994 and as an Italian Style Pastry Baker from 1994 onwards.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, although the petitioner has established that it employed the beneficiary continuously from the priority date, it has not established that it paid the beneficiary the full proffered wage during any relevant time frame including the period from the priority date in 2001 or subsequently. Further, a review of the Forms W-2 in the record reveals that a substantial part of the beneficiary's box 1 wages came from "tips" reported by the worker as specified at box 7. These are not wages paid by the petitioner and must be subtracted out of the beneficiary's box 1 wages. Accordingly, the Forms W-2 submitted show that the beneficiary received the following wages from the petitioner:

² According the New York Department of State's website, the petitioner or [REDACTED] was incorporated on February 27, 1984. According to the tax returns submitted, the petitioner elected to be an S Corporation as of April 1, 1989.

³ In response to a request for evidence (RFE) sent by the AAO, the petitioner indicated that two shareholders currently each own 50% of the company.

- In 2001, the beneficiary received \$13,925.60 (\$26,738.40 less than the proffered wage).
- In 2002, the beneficiary received \$13,925.60 (\$26,738.40 less than the proffered wage).
- In 2003, the beneficiary received \$14,193.40 (\$26,470.60 less than the proffered wage).
- In 2004, the beneficiary received \$10,897.40 (\$29,766.60 less than the proffered wage).
- In 2005, the beneficiary received \$12,480.00 (\$28,184.00 less than the proffered wage).
- In 2006, the beneficiary received \$15,576.00 (\$25,088.00 less than the proffered wage).
- In 2007, the beneficiary received \$19,154.20 (\$21,509.80 less than the proffered wage).
- In 2008, the beneficiary received \$18,504.20 (\$22,159.80 less than the proffered wage).
- In 2009, the beneficiary received \$30,218.66 (\$10,445.34 less than the proffered wage).

The petitioner can pay the difference between the two wages – the actual wage and the proffered wage – through its net income or net current assets.

If the petitioner chooses to pay the difference by using its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record before the AAO closed on June 17, 2010 with the receipt by the AAO of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due.⁴ Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for the years 2001 through 2008, as shown in the table below.

⁴ In response to the AAO's request for additional evidence, the petitioner explains that its 2009 tax return is not yet due and submits evidence showing that it has filed an extension request with the IRS. The AAO accepts the petitioner's explanation and will not consider the petitioner's ability to pay in 2009 in this decision.

- In 2001, the Form 1120S stated net income (loss)⁵ of \$34,273 (line 23 of Schedule K).
- In 2002, the Form 1120S stated net income (loss) of \$8,038 (line 23 of Schedule K).
- In 2003, the Form 1120S stated net income (loss) of \$22,091 (line 23 of Schedule K).
- In 2004, the Form 1120S stated net income (loss) of \$12,526 (line 17e of Schedule K).
- In 2005, the Form 1120S stated net income (loss) of \$19,519 (line 17e of Schedule K).
- In 2006, the Form 1120S stated net income (loss) of \$8,094 (line 18 of Schedule K).
- In 2007, the Form 1120S stated net income (loss) of (\$364) (line 18 of Schedule K).
- In 2008, the Form 1120S stated net income (loss) of (\$42,486) (line 18 of Schedule K).

Only the petitioner's net income in 2001 is greater than the amount needed to pay the difference between the wages actually paid to the beneficiary and the beneficiary's proffered wage. The petitioner has not established that it had the ability, through its net income, to pay the proffered wage in the years 2002 through 2008.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets (liabilities) for 2002-2008, as shown in the table below.

- In 2002, the Form 1120S stated net current assets (liabilities) of \$289,437.00.
- In 2003, the Form 1120S stated net current assets (liabilities) of (\$52,064).

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax returns.

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.

- In 2004, the Form 1120S stated net current assets (liabilities) of (\$35,268.00).
- In 2005, the Form 1120S stated net current assets (liabilities) of (\$55,198.00).
- In 2006, the Form 1120S stated net current assets (liabilities) of \$145,435.00.
- In 2007, the Form 1120S stated net current assets (liabilities) of (\$73,823.00).
- In 2008, the Form 1120S stated net current assets (liabilities) of \$147,471.60.

Therefore, the petitioner had sufficient net current assets to pay the beneficiary's wage in 2002, 2006, and 2008.

Nevertheless, based on the net income and net current asset analysis above, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, specifically in 2003, 2004, 2005, and 2007. The director's determination that the petition did not have sufficient net income or net current assets in 2006 is withdrawn in light of the above analysis.

On appeal, the petitioner through its counsel of record asserts that the director has erroneously denied the petition. Specifically, counsel contends that in this case, the officers have received substantial compensation from the petitioning corporation every year throughout the qualifying period and that reducing a small portion of their salaries to pay the beneficiary's wage is not an issue. The petitioner's certified public accountant (CPA), [REDACTED] states in a statement dated February 22, 2008, that beginning in 2003 and continuing to 2006, the officers elected to compensate themselves instead of leaving the profits in the corporation. [REDACTED] further notes that had the funds (the officers' compensation) been left in the corporation, the corporation would have had more than sufficient net income to pay the beneficiary's wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business

expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO acknowledges that the petitioner has been in a competitive business since 1984. To show its good reputation, the petitioner submits ratings from Opentable.com, Yelp.com, and [REDACTED] Restaurants Survey 2010. Both Yelp.com and Opentable.com give the petitioner an overall rating of 4 and 4.1, respectively, out of 5 possible points. [REDACTED] Restaurants Survey 2010 gives the petitioner an overall average of 18, which means "good to very good." Together, the ratings from Opentable.com, Yelp.com, and [REDACTED] Restaurants Survey 2010 suggest that the petitioner enjoys some success as a restaurant.

The record also establishes that the petitioner has been growing since 2001. In 2001, the petitioner's gross sales were over \$2.9 million. From 2005 to 2008, its gross sales were consistently over \$3 million. The petitioner spent over \$675,000 on employees' wages in 2001. That figure went up to over \$800,000 in 2007 and 2008.

The petitioner's shareholders have also received significant compensation from the petitioner during the years since the priority date of the labor certification application in 2001. According to the petitioner's tax returns, the petitioner was owned by three shareholders each with one third ownership interest in the company from 2001-2008. The three officers or shareholders of the corporation received the following total compensation between 2001 and 2008: \$292,400 in 2001, \$333,400 in 2002, \$256,600 in 2003, \$227,400 in 2004, \$246,000 in 2005, \$282,600.00 in 2006, \$267,800 in 2007, and \$186,800 in 2008. In response to the RFE sent by the AAO, the petitioner indicated that two shareholders currently each own 50% of the company. These two shareholders have indicated that they are willing to forego their past, present, and future compensation to pay the difference between the wages the beneficiary received since the priority date and the proffered wage of \$40,664 per year. These two shareholders received the following total amounts as officer compensation in 2003, 2004, 2005 and 2007:⁷

- \$171,067 in 2003 (the beneficiary received \$26,470.60 less than the proffered wage in 2003)
- \$151,600 in 2004 (the beneficiary received \$29,766.60 less than the proffered wage in 2004)
- \$164,000 in 2005 (the beneficiary received \$28,184.00 less than the proffered wage in 2005)
- \$178,533 in 2007 (the beneficiary received \$21,509.80 less than the proffered wage in 2007)

The controlling shareholders of a corporation have 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 this reason, the petitioner's figures for

⁷ The amounts listed represent two-thirds of total officer compensation for 2003, 2004, 2005 and 2007.

compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

USCIS (legacy INS) has long held that it may not “pierce the corporate veil” and look to the assets of the corporation’s owners 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 or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage.

In the present case, however, the petitioner is not suggesting that USCIS examine the personal assets of the petitioner’s owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their restaurant. The petitioner’s federal tax returns show that the petitioning entity is a profitable enterprise for its owners. The restaurant earned a gross profit of \$1.7 million in 2001, and \$1.9 million in 2008. The petitioner’s longevity in the business and substantial gross profits from 2001-2008 combined with the amount of compensation paid out to its stockholders during those years indicate that the job offer is realistic and that the petitioner has the ability to fulfill its obligation to pay the beneficiary his proffered salary of \$40,664 per year.

The petition may not be approved, however, as the nature of the job duties to be performed by the beneficiary is in question. The petition will be remanded in order for the director to resolve the issues prior to the entry of a decision.

The job title listed at part A of the Form ETA 750 is “Italian Style Pastry Baker.” A letter from the petitioner dated August 22, 2007 indicates that the beneficiary has been working for the petitioner in the position of Italian Style Pastry Baker since 1994. However, the beneficiary has received substantial amounts of tips as part of his wages since 2001, casting serious doubt on the veracity of the petitioner’s claim that the beneficiary has been working solely as a baker for the petitioner. It also calls into question the nature of the job the petitioner is seeking to fill under the approved labor certification and the validity of that labor certification. If the beneficiary has not been employed as a pastry baker and if the petitioner has never intended to hire a pastry baker since the priority date, the underlying labor certification may be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (d).⁸ On remand, the director should request the petitioner to explain why the

⁸ The regulation at 20 C.F.R. § 656.30(d) states:

After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies’ procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification. If evidence of such fraud or willful misrepresentation becomes known to the CO or to

beneficiary's tip income accounts for roughly a third of his income as a pastry chef and to provide objective evidence resolving the inconsistency between his current job duties and the duties of the proposed position.

Moreover, the AAO notes that the petitioner's Form I-140 indicates that the beneficiary's status in the United States is "EWI" (entry without inspection). The Form I-140 petition as well as the Form I-485 and the Form G-325A accompanying the petition all state "none" for the beneficiary's social security number; however, the Forms W-2 issued by the petitioner to the beneficiary bear social security number [REDACTED]. It is not clear from the record whether that social security number belongs to the beneficiary or to someone else, and calls into question whether the petitioner knowingly utilized a social security number belonging to another person. It also calls into question whether the petitioner paid the beneficiary or to someone else from 2001 to 2009. On remand, the director should require the petitioner to submit Forms I-9 for its employees, the beneficiary's paystubs since 1994, a social security statement for social security number [REDACTED], and any other documents resolving the identity of the person with social security number [REDACTED]. Although this is not the basis for the director's decision in this case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to the alien's removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010). Moreover, 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. 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. 582, 591-592 (BIA 1988).

The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. The petition is remanded to the director for issuance of a Notice of Intent to Deny or Request for Evidence (RFE) consistent with the above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. The appeal is remanded to the Nebraska Service Center for further action, consideration and the entry of a new decision.

the Chief, Division of Foreign Labor Certification, the CO or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.