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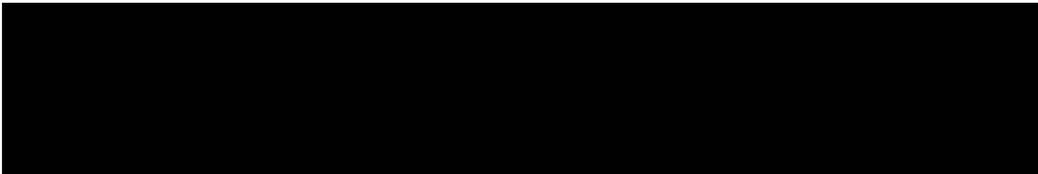
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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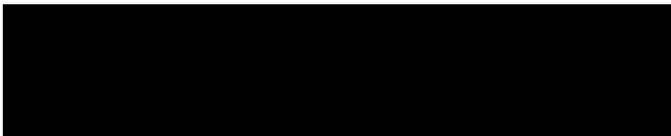
IN RE: Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).¹ 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.

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.

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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 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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.09 per hour (\$20,987.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.³

On the petition, the petitioner claimed to have been established in 1990 and to currently employ 40 workers. On the Form ETA 750B, which was signed by the beneficiary on July 9, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted by the director, USCIS electronic records show that the petitioner filed at least seven other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In addition to the instant petition, the petitioner has filed I-140 petitions on behalf of the following beneficiaries: [REDACTED]

[REDACTED] and [REDACTED]. The petitioner has indicated that the proffered wage for each of these beneficiaries is \$10.35 per hour (\$21,528.00 per year). The combined proffered wage for these beneficiaries is \$150,696.00. The petitioner must establish that it had the ability to pay the proffered wage for each of these beneficiaries as well as to the beneficiary of the instant petition. Therefore, the petitioner must establish that it had the continuing ability to pay a total of \$171,683.20 as of the priority date.

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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Further, the record does not contain evidence that the petitioner employed and paid the beneficiaries of the other I-140 petitions in 2001 or 2002. Therefore, for those years, the petitioner must establish that it had the ability to pay the full proffered wage of \$171,683.20.

The record contains copies of Forms W-2, Wage and Tax Statement, issued by the petitioner to [REDACTED] and [REDACTED] for the year 2003. These forms W-2 show that the petitioner paid \$7,830.00 to [REDACTED] and \$7,400.00 to [REDACTED] in 2003.⁴ Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wages and wages paid to the beneficiaries in 2003, which is \$156,453.20.

For 2004, the record contains copies of Forms W-2 which show that the petitioner paid \$3,240.00 to [REDACTED] and \$8,100.00 to [REDACTED]. Therefore, the petitioner must establish that it

⁴ The record also contains a copy of the Form W-2 issued by the petitioner to [REDACTED] for the year 2003. However, it does not appear that the petitioner filed an I-140 petition on behalf of [REDACTED] therefore the wages paid to [REDACTED] are not relevant to the petitioner's ability to pay the proffered wages.

had the ability to pay the difference between the proffered wages and wages paid to the beneficiaries in 2004, which is \$160,343.20.

For 2005, the record contains a copy of a Form W-2 which shows that the petitioner paid \$6,954.71 to [REDACTED]. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wages and wages paid to the beneficiaries in 2005, which is \$164,728.49.

For 2006, the record contains copies of Forms W-2 which show that the petitioner paid \$3,240.00 to [REDACTED] and paid \$3,240.48 to [REDACTED]. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wages and wages paid to the beneficiaries in 2006, which is \$168,443.20.

For 2007, the record contains a Form W-2 issued to [REDACTED] which show that the petitioner paid \$10,455.11 to [REDACTED] in 2007. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wages and wages paid to the beneficiaries in 2007, which is \$161,228.09.

If the petitioner does not establish that it employed and paid the beneficiary, or, in this case, the beneficiaries, an amount at least equal to the proffered wages during that period, USCIS will next 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 receipts and wage expense is misplaced. 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 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

The record contains copies of tax returns for the years 2002 through 2006. The record also contains a portion of the individual tax return for _____ for the year 2001. Specifically, the record includes a copy of the Schedule C, Profit or Loss from Business, from _____ 2001 tax return. Although the business name listed on the Schedule C is _____ it is not clear that this is the same entity as the petitioner as the employer ID number listed on the Schedule C _____ is different than the tax ID number listed on the Form I-140 petition _____ Further, counsel states that the petitioner is a California corporation established on July 11, 1990, whereas the Schedule C is reserved for sole proprietorships.⁵ Accordingly, as the employer listed on the Form ETA 750 and the petition is a corporation, this 2001 Schedule C is not relevant to establishing the corporation’s ability to pay the proffered wage. However, even assuming that the petitioner was a sole proprietorship in 2001, and this evidence is relevant, USCIS would determine the petitioner’s ability to pay the proffered wage based on the sole proprietor’s adjusted gross income as listed on the Form 1040, U.S. Individual Income Tax Return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). The record includes a letter from _____, which states that _____ had adjusted gross income of \$647,000 in 2001. However, there is no documentary evidence in the record to support this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner has failed to establish its ability to pay the proffered wage in 2001.

⁵ See, 2009 Instructions for Schedule C, available at <http://www.irs.gov/pub/irs-pdf/i1040sc.pdf> (accessed January 5, 2010)(stating “Use Schedule C (Form 1040) to report income or loss from a business you operated or a profession you practiced as a sole proprietor.”).

For the years 2002 and 2003, the petitioner submitted Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120 stated net income of \$22,856.00.
- In 2003, the Form 1120 stated net income of -\$1,231.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2003. Although the petitioner's net income exceeded the proffered wage for the instant petition in 2002, as noted above, the petitioner has filed multiple petitions. The petitioner's net income in 2002 was insufficient to pay the combined proffered wages of all beneficiaries.

For 2004, 2005 and 2006, the petitioner submitted Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner's tax returns demonstrate its net income for the years 2004 through 2006, as shown in the table below.⁶

- In 2004, the Form 1120S stated net income⁷ of \$44,843.00.
- In 2005, the Form 1120S stated net income⁸ of \$368,720.00.
- In 2006, the Form 1120S stated net income⁹ of \$453,506.00.

Therefore, the petitioner did not have sufficient net income to pay the combined proffered wages for all beneficiaries in 2004. The petitioner did have sufficient net income to pay the combined proffered wages in 2005 and 2006.

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

⁶ 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 line 17e (for the years 2004-2005) or line 18 (for the year 2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 5, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁷ Ordinary income reported on line 21.

⁸ As listed on line 17e of Schedule K. See note 4 above.

⁹ As listed on 18 of Schedule K. See note 4 above.

¹¹ 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.

petitioner's current assets and current liabilities.¹¹ 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 did not submit any evidence of net current assets for 2001. The petitioner's tax returns for 2002 through 2004 demonstrate its net current assets as shown in the table below.

- In 2002, the Form 1120 stated net current assets of \$55,563.00.
- In 2003, the Form 1120 stated net current assets of -\$5,743.00.
- In 2004, the Form 1120S stated net current assets of \$16,217.00.

For the years 2003 and 2004, the petitioner has failed to establish that it had sufficient net current assets to pay the proffered wage. Although the petitioner's net current assets exceeded the proffered wage for the instant petition in 2002, as noted above, the petitioner has filed multiple petitions. The petitioner's net current assets in 2002 were insufficient to pay the combined proffered wages of all beneficiaries.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel asserts that there is another way to establish the petitioner's ability to pay the proffered wage. Specifically, counsel states that the amounts listed as liabilities on Schedule L of the petitioner's tax returns under the headings "Loans from Shareholders" and "Retained Earnings" are not "in reality" liabilities which would impact the petitioner's ability to pay the proffered wage. As explained above, USCIS considers current assets and current liabilities in determining the petitioner's ability to pay the proffered wage. Current liabilities are listed on lines 16 through 18 of Schedule L. "Loans from Shareholders" is listed on Line 19 of Schedule L, and "Retained Earnings" is listed on Line 24 of Schedule L. Because these amounts are not listed on lines 16 through 18, they were not considered in determining the petitioner's ability to pay the proffered wage and, therefore, even if counsel's argument were accepted it would not establish the petitioner's ability to pay the proffered wage.

As noted by counsel, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner's gross revenues totaled \$2,171,615.00 in 2002, \$2,620,206.00 in 2003, \$703,623.00 in 2004, \$2,994,520.00 in 2005 and \$3,300,559.00 in 2006. Thus, while the petitioner's gross revenues have increased since 2002, the petitioner did not establish steady growth between 2002 and 2006. Further, the petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record does not establish that the beneficiary was qualified to perform the proffered position. 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 at 1002 n. 9 (noting that the AAO reviews appeals on a de novo basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the Application for Alien Employment Certification, Form ETA 750A, item 14, states that the minimum experience for a worker to satisfactorily perform the duties of specialty cook is two years of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

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

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.

In response to a Request for Evidence from the director, the petitioner submitted letter from [REDACTED], owner of [REDACTED], which stated that the beneficiary had worked as a cook “since May 1996 to today.” The letter is not dated and therefore does not establish that the beneficiary had two years of experience as required by the labor certification application. Further, the beneficiary indicated on the Form ETA 750 that she was employed as a cook at [REDACTED] beginning in February 2002. No other employment experience is listed on the Form ETA 750. 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 petitioner has failed to resolve the inconsistency between the information provided on the labor certification and the information provided in the letter from [REDACTED]. Therefore, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position with two years of experience in the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.