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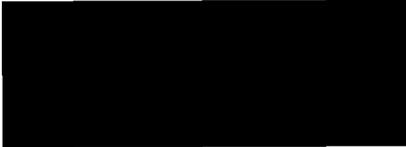
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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JUL 13 2010

FILE: [REDACTED]
LIN 08 062 51581

Office: NEBRASKA SERVICE CENTER

Date:

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:

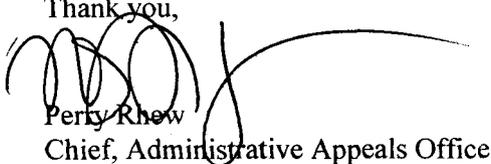


INSTRUCTIONS:

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.

Thank you,


Perty 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 identified itself as a corporation on the I-140 petition and provided no further information on the ETA Form 9089 with regard to its specific business operation. Based on the job duties described for the proffered position, it deals in the cutting or carving of stone. It seeks to employ the beneficiary permanently in the United States as a stone cutter or carver. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States 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 in 2008. The director also determined that the petitioner had not submitted evidence of the petitioner's ability to pay the proffered wage as of the 2001 to 2005 while the petitioner was owned by another company. 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 May 6, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also address the successor in interest issue as it relates to the petitioner when it examines the petitioner's ability to pay the proffered wage. The AAO will also examine whether the petitioner established that the beneficiary possesses the requisite prior work experience.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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).

Here, the ETA Form 9089 was accepted on April 30, 2001.¹ The proffered wage as stated on the ETA Form 9089 is \$25,000 to \$26,000 per year. The ETA Form 9089 states that the position requires thirty-six months of prior work experience.

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.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on November 8, 2001, to have a net annual income of \$58,000, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 14, 2007, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel submits a letter dated July 2, 2009 with a photocopy of the beneficiary's three pay stubs from November 15, 2008 to December 31, 2008. Counsel points out that the first pay stub establishes that the beneficiary's earnings for the two week period in question and the year to date earnings are identical thus establishing that the beneficiary's wages began during this pay period. Counsel also notes the biweekly wages are \$1,083.33, based on the second pay stub. Counsel states that the beneficiary either earned \$466.66 a week or \$560 a week, depending on whether he worked five or six weeks in 2008. Counsel concludes that this rate of pay would result in an annual salary of either \$24,266 or \$29,120, a rate equal to or greater than the proffered wage.³ Counsel asserts that the petitioner would like to submit additional evidence of the petitioner's ability to pay the proffered wage but that the petitioner's president is presently in Brazil. Counsel requests an additional 30 days to provide the evidence. To date, the AAO has received nothing further from the petitioner.

¹ The ETA Form 9089 on page one indicates that the petitioner sought to utilize the filing date from a previously submitted Application for Alien Employment Certification (ETA 750).

² 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).

³ The AAO notes that the proffered wage is \$25,000 to \$26,000. Thus the lower \$466.66 weekly (or \$24,266.32 per annum) would not be equal to or greater than the proffered wage of \$25,000 to \$26,000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel states that the beneficiary started working for the petitioner in the last quarter of 2008, and suggests that the AAO take the beneficiary's documented wages for 2008 and apply them to the entire 2008 tax year as evidence of whether the petitioner established its ability to pay the proffered wage in that year. However, the record is not clear as to when the beneficiary actually began working for the petitioner. Counsel on appeal states the beneficiary either worked five or six weeks with no further substantiation of this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains a G-325A Biographic Information, in which the beneficiary states that he worked for the petitioner from July 2002 to November 14, 2007, the date that he signed the G325A form. The ETA Form 9089, also signed by the beneficiary on November 14, 2007, does not indicate that the beneficiary ever worked for the petitioner prior to this date. *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.

Thus, the record is not clear that the beneficiary's documented 2008 wages are representative of the entire year. For purposes of these proceedings, the AAO will accept the documented quarterly wages in its analysis of the petitioner's ability to pay the proffered wage, but will not utilize the quarterly wages to establish that the petitioner paid the beneficiary the proffered wage during 2008, without further examination.

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 demonstrated that it paid the beneficiary \$2,800 in 2008, which is less than the proffered wage. The petitioner also

submitted a pay stub for the beneficiary's wages for pay period March 16, 2009 through March 31, 2009. The pay stub indicates the beneficiary was paid \$1,083 for a two week period, and that as of March 31, 2009, a period of three months, his year to date earnings were \$6,499.33. In his decision, the director determined that this pay stub established that the petitioner was paying the beneficiary an annualized wage of \$28,167. However, the AAO notes that the petitioner's Forms 941 for tax year 2008 indicate that the petitioner has had varying numbers of employees during the four quarters of 2008. In the first and second quarter, the petitioner had one employee, in the third quarter, it had three employees, and in the fourth quarter, it had four employees. The record does not support that the petitioner would necessarily offer the beneficiary wages for the entire year. Therefore the AAO would withdraw the director's determination with regard to the petitioner's ability to pay the proffered wage in 2009.⁴ For purposes of these proceedings, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2008, and that it can pay the entire proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, and 2007.

In his decision, the director referred to the need for the petitioner to provide evidence with regard to any previous owner of the petitioner. Based on the April 30, 2001 priority date, the director in his RFE dated March 5, 2009, requested the petitioner's tax returns from the years 2001 through 2008. In response, counsel states that the petitioner tried to contact the previous owners, but was unable to get copies of the relevant tax forms.

To date, the record contains no information on the identity of the previous owner, when any purchase of the original petitioner took place, or any further evidence with regard to a possible successor-in-interest issue in the instant matter. See *Matter of* [REDACTED], 19 I&N Dec. 481 (Comm. 1986). By way of background, *Matter of* [REDACTED] involved a petition filed by [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20*

⁴ The AAO also notes that the record closed as of April 16, 2009, and thus the petitioner did not have to establish its ability to pay the proffered wage at the time of the director's decision. If the petitioner pursues this matter further, it should provide the petitioner's corporate federal tax return for 2009, and any other evidence, such as the beneficiary's W-2 form to establish its ability to pay the proffered wage in 2009.

C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).⁵ This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

⁵The regulation at 20 C.F.R. § 656.30(d) (1987) states:

(d) After issuance labor certifications are subject to invalidation by the INS 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 application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In the instant matter, the petitioner has not identified its previous owner, the date of any claimed ownership change, or provided any documentation as to the transfer of ownership from one business entity to another business entity. The petitioner only indicates on its tax returns that it incorporated on May 5, 2005, and on the I-140 petition, it indicates it was established on November 8, 2001. Neither assertion further substantiates the claimed change of ownership of the petitioner.

Based on this lack of evidence with regard to the successor in interest issue, the instant petition cannot be approved. Further based on the discussion above, the petitioner's lack of response to the request for evidence as to the actual change in ownership, could be grounds to invalidate the labor certification.

For illustrative purposes only, the AAO will examine the instant petitioner's ability to pay the proffered wage for the years in which tax returns have been submitted.

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, 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 before the director closed on April 16, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2006, the Form 1120S stated net income⁶ of \$9,038.

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 on either 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-pdf/i1120s.pdf> (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 no additional income, credits, deductions, or other adjustments shown on its Schedules K for tax years 2006 and 2008, the petitioner’s net income is found on Schedule K of its tax returns. The petitioner did not submit Page Two of its Schedule K for tax year 2007; however, the AAO will utilize the figure for ordinary income, on line 21 for this year.

- In 2007, the Form 1120S stated net income of -\$34,453.
- In 2008, the Form 1120S stated net income of -\$111,812.

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the entire proffered wage, and in tax year 2008, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages of \$2,800 and the proffered wage of \$25,000.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 for 2008, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$72,616.
- In 2007, the Form 1120S stated net current assets of 69,799.
- In 2008, the Form 1120S stated net current assets of -\$68,670.

Therefore, for the years 2006 and 2007, the petitioner did have sufficient net current assets to pay the proffered wage. However, it did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage of \$25,000 in 2008.

Therefore, from the date the ETA Form 9089 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 2001 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

⁷According 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.

Beyond the decision of the director, the AAO questions whether the petitioner has established that the beneficiary has the three requisite years of prior work experience as a stone carver. 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).

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the 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). According to the plain terms of the labor certification, the applicant must have three years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he had worked as a stone cutter and carver for [REDACTED] Texas from November 1, 2004 to June 1, 2006; and as a stone cutter and carver for [REDACTED] Houston, Texas from March 1, 2001 to August 10, 2004. He does not provide any additional information concerning his employment background on that form.

As stated previously, the record of proceeding also contains a Form G-325 Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation abroad, he represented that he had worked as a stone cutter for the [REDACTED]

Houston, Texas from June 1998 to February 2001; for 9103 G 1960 Fm West, Houston, Texas, as a stone cutter from February 2001 to June 2002, and that he worked for the petitioner as a stone cutter from July 2002 to November 14, 2007, the date he signed the Form G325 A. Thus, discrepancies with regard to the beneficiary's work experience exist between the ETA Form 9089 and the Form G325A.

In response to the director's RFE, the petitioner submitted two letters of work verification. The first one is dated July 23, 2001 and is written by [REDACTED] manager, [REDACTED], [REDACTED] Texas. Mrs. [REDACTED] states that the beneficiary was hired by the company in May 1998 and worked for it until June 2001. This letter conflicts with the contents of the ETA Form 9089. The ETA Form 9089 states the beneficiary worked for the company for May 1, 2001 to August 10, 2004. These claimed periods of work experience are entirely distinct, with no overlap. The AAO further notes the locations of [REDACTED] and Granite on the ETA 9089 is in Houston, Texas, while the letter writer uses an address of Sugarland, Texas. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

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, 19 I&N Dec. 582, 591-592 (BIA 1988) further 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 second letter of work verification is dated July 30, 2001, and is written by [REDACTED], [REDACTED] Argentina. Mr. [REDACTED] states that the beneficiary worked for the company as a marble cutter and fabricator from August 1996 to April 1998.

The AAO notes that this work experience is not contained in the ETA Form 9089, and cannot be utilized to establish the beneficiary's prior three years of work experience as a marble cutter and carver. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner submitted no letter of work verification from [REDACTED], the beneficiary's claimed most recent employer. Thus the letters of work verification either contain discrepancies in dates of employment, or are not noted on the Form ETA 9089. The AAO finds that the petitioner has not established that the beneficiary possesses three years of prior work experience as a stone cutter or carver. The AAO withdraws this part of the director's decision.

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.

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.