

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

OCT 05 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of custom cabinetry. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, the petition is accompanied by ETA Form 750, Application for Alien 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 beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 28, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 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 28, 2001. The proffered wage as stated on the Form ETA 750 is \$15.50 per hour (\$32,240.00 per year). The Form ETA 750 states that the position requires 10 years experience of the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.² On the petition, the petitioner claimed to have been established on December 18, 1995. The petitioner claims to employ 21 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary indicated that he has been employed by the petitioner since September 1997.

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, 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.

The petitioner submitted copies of the beneficiary's IRS Forms W-2, Wage and Tax Statements as shown in the table below.

- In 2001, the Form W-2 stated wages of \$38,573.75.
- In 2002, the Form W-2 stated wages of \$38,850.84.

¹ 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).

² The evidence reflects that in the 2001 and 2002 tax years, when the petitioner submitted IRS Forms 1120, the petitioner was structured as a C corporation.

- In 2003, the Form W-2 stated wages of \$17,571.24.
- In 2004, the wage/salary amount was not determinative.³
- In 2005, the wage/salary amount was not determinative.⁴
- In 2006, the Form W-2 stated wages of \$28,973.25.
- In 2007, the Form W-2 stated wages of \$52,416.00.

Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage during 2003, 2004, 2005, and 2006.

If, as in this case, 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, the petitioner showing that it 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:

³ In an effort to demonstrate its ability to pay the proffered wage, the petitioner submitted IRS Form W-2 for the 2005 tax year that was issued to the beneficiary by [REDACTED] with an address of [REDACTED] and an EIN number of [REDACTED] all of which is different from that of the petitioner. The director considered this wage amount in considering the petitioner's ability to pay the proffered wage. The AAO finds that [REDACTED], with a different name, EIN number, and different addresses than the petitioner, is a distinct legal entity whose income and assets may not be considered to establish the petitioner's ability to pay. The wages paid by [REDACTED] may not be considered to establish the petitioner's ability to pay. Therefore, the director's decision with respect to this issue will be withdrawn.

⁴ The petitioner indicated in a letter dated June 13, 2008, that it did not employ the beneficiary in 2004 or 2005.

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 or about June 17, 2008 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 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2003, the Form 1120S stated net income⁵ of (\$32,516.00).
- In 2004, the Form 1120S stated net income of \$10,996.00.
- In 2005, the Form 1120S stated net income of \$18,554.00.
- In 2006, the Form 1120S stated net income of (\$107,947.00).

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 18 (2007 of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, the petitioner’s income is found on Schedule K.

Therefore, for the years 2003, 2004, 2005, and 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. However, any suggestion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is misplaced. 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.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 as shown in the table below.

- In 2003, the Form 1120S stated net current assets of (\$16,257.00).
- In 2004, the Form 1120S stated net current assets of (\$58,997.00).
- In 2005, the Form 1120S stated net current assets of \$95,610.00.
- In 2006, the Form 1120S stated net current assets of (\$430,638.00).

The evidence demonstrates that for the years 2003, 2004, and 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

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, or its net income or net current assets.

On appeal, counsel asserts that the director erred in denying the petition. Counsel asserts that the petitioner's accounting practices hide the profitable operation of the business, and submits a letter

⁶According 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.

from the sole shareholder stating that he would have been willing and able to forego his compensation as an officer in order to pay the proffered wage in 2003 and 2006.⁷

The majority shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S, U.S. Corporate Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. In the instant case, the Forms 1120S show that officer's compensation was paid in the following amounts: \$79,500.00 in 2003, \$79,500.00 in 2004, and \$78,000.00 in 2006. The petitioner provides a letter from the sole shareholder of the corporation who specifies his desire to forego officer's compensation for 2003 and 2006, to the extent of the proffered wage. Counsel indicates that the sole shareholder has sufficient personal income to forego officer's compensation in 2003 and 2006, and submits partial copies of the sole shareholder's individual income tax returns for 2003 and 2006.

While the petitioner's sole shareholder submits Schedule E Supplemental Income and Loss to the Form 1040 indicating that he had additional sources of income in 2003 and 2006, the amounts listed on Schedule E are carried forward to page one as a line item entry on the sole shareholder's individual tax return, and are not indicative on the sole shareholder's adjusted gross income. The record does not contain the sole shareholder's complete tax returns. Further, the record does not contain any indication of the sole shareholder's personal expenditures in 2003 and 2006. As such, the record does not establish whether the sole shareholder can reasonably forego the compensation amounts of \$79,500 in 2003 and \$78,000 in 2006. 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 AAO will not consider the officer's compensation figures as additional financial resources of the petitioner.

On appeal, counsel argues that accounts receivable owed to the petitioner from affiliates of the sole shareholder in the amounts of \$60,000 and \$385,437 could have been collected and readily converted into cash. The petitioner submits a letter from its C.P.A., and cites to these amounts on the petitioner's 2003 and 2006 schedules L. The \$60,000 amount is listed as a current asset on the petitioner's 2003 Schedule L, and has already been considered in the determination of whether the petitioner has sufficient net current assets to pay the wage in 2003. The \$385,437 amount is listed as a long-term asset due the petitioner from an affiliate on Schedule L of the petitioner's 2006 tax return. The petitioner has not submitted an amendment to its 2006 tax return indicating that this amount has been reclassified as a current asset, and has not submitted a statement articulating that such a change would be possible or desirable from the affiliate's perspective. Furthermore, a

⁷ The director's finding that the petitioner had paid the beneficiary sufficient income in 2004 is withdrawn by the AAO in the instant decision. Thus, the petitioner has not had the opportunity to address the sufficiency of the sole shareholder's personal income in 2004.

petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Further, USCIS may not “pierce the corporate veil” and look to the assets of the corporation’s owner, in this case the assets of the affiliate, 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.

On appeal, the petitioner submits a letter indicating that in 2003 and 2006 the petitioner shows “loans from shareholder” in the amounts of \$7339 and \$45,893, respectively, and that these amounts consist of discretionary funds that could be readily converted to cash and available to pay the wage. The amounts are characterized as long-term liabilities on the petitioner’s Schedule L in 2003 and 2006. Thus, the record of proceedings does not demonstrate that these amounts would be readily available for use as a current asset to pay the proffered wage. If the petitioner wished to persuade USCIS that the amounts are more properly characterized as net current assets of the petitioner, then it should file an amended return properly classifying such assets, or submit audited financial statements prepared according to generally accepted accounting principles. These amounts shall be considered as they were submitted to the Internal Revenue Service on the petitioner’s tax returns, and not as funds available to pay the proffered wage.

On appeal, the petitioner states that the beneficiary did not work for the entire year in 2003 and 2006, and that the beneficiary’s work was performed by [REDACTED] and [REDACTED] who no longer work for the petitioner. The petitioner submits payroll evidence that it employed these two individuals in 2003 and/or 2006. The petitioner has not shown that these two workers replaced the work of the beneficiary in his absence, and that amounts paid to them should be considered as evidence of the petitioner’s ability to pay the beneficiary. The record does not verify the full-time employment of these two workers. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the temporary workers involved the same duties as those set forth in the labor certification. The petitioner has not documented the position, duty, and termination of the workers. If the employees performed other kinds of work, then the beneficiary could not have replaced him or her.⁸

⁸ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2003, 2004, and 2006. There are no facts paralleling those in *Sonogawa* are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2003, 2004, and 2006. The petitioner states that it has consistently high gross income, a very large payroll that it meets successfully, and that it has been successful for 10 years. 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, the petitioner showing that it paid wages in excess of the proffered wage is insufficient. While the record establishes that the petitioner is a viable business, it is incumbent on the petitioner to establish that the funds were available from its net income or net current assets for the years it did not pay the beneficiary the proffered wage. The petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, USCIS records show that the petitioner filed another immigrant petition subsequent to the priority date of the instant petition; and therefore, the petitioner must

establish that it had sufficient funds to pay the wages for both beneficiaries from the priority date and continuing to the present.⁹ 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 another petition for another beneficiary which has 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. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750B job offer. *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there is another approved petition would further call into question the petitioner's eligibility for the benefit sought.

Beyond the decision of the director, the petitioner has not established that the beneficiary has 10 years of experience as a cabinet maker. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is August 3, 2007. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

On the ETA 750B that was signed by the beneficiary, the beneficiary indicated that he was self-employed as an independent contractor/cabinet maker from December 1980 through February 1994; as a desk and cabinet maker for [REDACTED] from June 1994 through December 1996; as a cabinet maker for [REDACTED] from December 1996 through July 1997; as a cabinet maker for [REDACTED] from July 1997 through August 1997; and thereafter as a cabinet maker for the petitioner. As evidence of the beneficiary's past employment, the petitioner submitted an affidavit from the beneficiary, in which the beneficiary stated that he was an independent contractor in El Salvador and worked as a cabinet maker from December 1980 through February 1994, and further described his employment as a cabinet maker with [REDACTED] and the petitioner in the United States. The petitioner submitted an affidavit from [REDACTED] stating that the business employed the beneficiary as a cabinet maker from January 1987 through March 1993; and a letter indicating its employment of the beneficiary as a cabinet maker since 1997. The petitioner did not provide letters of employment from [REDACTED] or [REDACTED].

The beneficiary's sworn affidavit and his statements on the ETA 750B where he indicated that he was self-employed as an independent contractor from December 1980 – February 1994 are inconsistent with the letter from [REDACTED] indicating that he was employed with the company from January 1987 – March 1993. It is incumbent upon the petitioner to resolve any inconsistencies

⁹ USCIS records indicate that the petitioner filed a Form I140 petition on August 10, 2007 which was approved on June 11, 2008 (SRC 07 243 51217).

in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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, 591-2 (BIA 1988). As there is no explanation of record for these inconsistencies, the AAO will not accept this evidence to establish the beneficiary's qualifications during the time period from December 1980 – February 1994. Further, the affidavit is not accompanied by corroborating evidence of his employment as an independent contractor, such as tax returns, bank records, portfolio photographs, etc.

The petitioner submitted copies of Form W-2, Wage and Tax Statement, issued by [REDACTED] to the beneficiary for the 1996 tax year, and pay stubs for December of 1996 and January through July of 1997. The petitioner also submitted copies of Form W-2 from [REDACTED] for the 1994 and 1995 tax years; pay stubs for June, July, and September through December of 1994; pay stubs for the 1995 tax year; pay stubs for January through November 1996. The petitioner failed to submit statements from representatives of the company including the name, address and title of the writer, and a specific description of the duties performed by the beneficiary.¹⁰ See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Thus, the record does not sufficiently establish the beneficiary's employment as a cabinet maker with [REDACTED] and [REDACTED]. The petitioner's letter demonstrates, at best, that the beneficiary has been employed as a cabinet maker for four to five years; which is insufficient to establish 10 years experience as a cabinet maker.

Beyond the decision of the director, the petitioner filed the petition seeking an unskilled worker, which is the wrong classification for the job offered on the labor certification. An unskilled worker is an alien who is capable of performing labor requiring less than two years training or experience. 8 C.F.R. § 204.5(l)(2). A skilled worker is an alien who is capable of performing labor requiring at least two years of training or experience. *Id.* The determination of whether a worker is a skilled worker or unskilled worker is based on the training and/or experience requirements of the offered position as set forth in the labor certification. 8 C.F.R. § 204.5(l)(4). In the instant case, the labor certification states that the offered position requires ten years of experience in the job offered as a cabinet maker. Since the offered position requires at least two years of experience, it is properly classified as a skilled worker and not as an unskilled worker.

The petitioner however requested on its Form I-140, at part 2(g), classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Act. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this case, the appropriate remedy would be for the petitioner to file a new petition on behalf of the beneficiary with the proper fee and required documentation. The evidence submitted does not establish that the

¹⁰ The veracity of the beneficiary's sworn statement has been called into question. As such, the AAO will not accept the description of duties provided by the beneficiary on the sworn statement.

labor certification requires an unskilled worker, and for this additional reason, the petition will be denied.

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 Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

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.