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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER Date:

FEB 28 2011

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 \$630. 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 pawn shop/jewelry store. It seeks to employ the beneficiary permanently in the United States as a manager pursuant to Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), 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 December 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$48,000 per year. The Form ETA 750 states that the position requires three years of experience in 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

On the petition, the petitioner claimed to have been established on January 30, 1995. However, the evidence in the record of proceeding shows that the petitioner was incorporated as a C corporation on March 11, 1985 and elected as an S corporation on April 1, 2003. According to the tax returns in the record, the petitioner's fiscal year ran from April 1 to March 31 for 2001 and 2002, from April 1 to December 31 for 2003 and on calendar year since 2004. The petitioner did not provide the information about its gross annual income and net annual income on the petition but claimed to have 10 employees.² On the Form ETA 750B, signed by the beneficiary on February 28, 2003, 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, 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).

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 beneficiary did not claim to have worked for the petitioner. However, the petitioner stated that the beneficiary has been working for the petitioner since he obtained his employment authorization document in

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² In the affidavit of [REDACTED] dated February 5, 2009 submitted on appeal, the petitioner claimed that it currently has 11 employees.

October 2008 and submitted the beneficiary's paystubs covering from October 1, 2008 to the first week of 2009. These paystubs were submitted with counsel's appeal brief dated February 6, 2009. As of that date the beneficiary's Form W-2, Wage and Tax Statement (Form W-2), for 2008 should have been available. However, the petitioner did not submit the beneficiary's 2008 W-2 form, nor did counsel explain why the W-2 form was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). W-2 forms would have demonstrated the amount of wages the petitioner reported to the IRS and further revealed its ability to pay the proffered wage through examination of wages actually paid to the beneficiary.

The petitioner claimed that the beneficiary started the employment after he obtained his employment authorization document in October 2008. The beneficiary's paystubs show that the petitioner paid the beneficiary \$11.12 per hour for regular hours and \$16.68 per hour for overtime hours from October 26, 2008 and the total year-to-date earnings as of December 28, 2008 were \$8,671.21, including regular pay of \$4,003.20, overtime pay of \$1,951.56 and bonus of \$2,716.45. The regulation at 20 C.F.R. § 656.10(c)(2) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The record contains no evidence that the petitioner guaranteed any bonuses or overtime payment if it is not required by the job to the beneficiary. The petitioner may not, therefore, count any portion of the bonuses and overtime payments the beneficiary received during the salient years as evidence of its own ability to pay the proffered wage.

Therefore, the petitioner demonstrated that it paid the beneficiary a partial proffered wage of \$4,003.20 in 2008, and thus, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$48,000 for 2001 through 2007 and the difference of \$43,996.80 between wages actually paid to the beneficiary and the proffered wage for 2008.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

On appeal, counsel asserts that depreciation must be added back to net income and considered in determining the petitioner's ability to pay the proffered wage based on the accountant letter. Counsel's assertion is misplaced. 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 118. "[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 the petitioner's tax returns for its fiscal years of 2001 through 2007. These tax returns demonstrate the petitioner's net income as shown in the table below.

- In the year of 2001 (4/1/01-3/31/02), the Form 1120 stated net income³ of \$1,603.
- In the year of 2002 (4/1/02-3/31/03), the Form 1120 stated net income of \$748.
- In the year of 2003 (4/1/03-12/31/03), the Form 1120S stated net income⁴ of \$12,122.

³ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

- In the year of 2004, the Form 1120S stated net income of \$3,392.
- In the year of 2005, the Form 1120S stated net income of \$2,082.
- In the year of 2006, the Form 1120S stated net income of \$183,984.
- In the year of 2007, the Form 1120S stated net income of \$118,718.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the full proffered wage of \$48,000 per year while the petitioner's net income for 2006 and 2007 was sufficient to pay the beneficiary the full proffered wage respectively.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel's requests to consider loans to shareholder as part of net current assets and to deduct accounts payable from the petitioner's current liabilities are misplaced. 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005), on line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 16, 2011) (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 Schedule K for these years, the petitioner's net income is found on line 21 of its tax returns.

⁵ 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.

the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of (\$126,101).
- In 2002, the Form 1120 stated net current assets of (\$50,897).
- In 2003, the Form 1120S stated net current assets of (\$103,115).
- In 2004, the Form 1120S stated net current assets of (\$152,105).
- In 2005, the Form 1120S stated net current assets of (\$88,405).

For the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. The record does not contain regulatory-prescribed evidence, such as an annual report, tax return or audited financial statements, for 2008 and therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the difference of \$43,996.80 between wages actually paid to the beneficiary and the proffered wage that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, 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.

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The record contains the petitioner's financial statements for 2001 through 2008. However, counsel's reliance on unaudited financial records is also misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel submitted a letter dated January 16, 2009 from [REDACTED] certified public accountant and an affidavit of [REDACTED] stated in his letter that he discovered that the amount listed as accounts payable on page 4, schedule L of each of the tax returns consists of cash advances to the petitioner by companies owned by [REDACTED]

██████████ and therefore, they should not be considered as current liabilities in lines 16 to 18 of Schedule L on the tax returns. ██████████ confirmed in his affidavit that he is the sole shareholder of the petitioning corporation, ██████████ and submitted these two companies' corporation documents in support with his affidavit.

The AAO cannot accept counsel's request for reasons discussed below. First of all, a corporation is a separate and distinct legal entity from its shareholders and other business entities, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record shows that ██████████ and ██████████ are separate corporations under the Florida laws. Cash advances made by these two corporations to the petitioner cannot be considered as cash advances made by ██████████ personally. Secondly, even if the cash advances were made by ██████████ personally, they must be considered as the petitioner's accounts payable or loans from shareholders, but cannot be considered as part of the petitioner's assets because the petitioner is a separate and distinct legal entity from ██████████. In addition, the CPA's letter cannot be accepted as evidence to establish that the petitioner had sufficient net current assets because it is not regulatory-prescribed evidence in determining the petitioner's ability to pay the proffered wage. Even if the CPA discovered errors in calculating the petitioner's net current assets on the tax returns, it must be evidenced with amended tax returns or audited financial statements. The record does not contain any amended tax returns or audited financial statements of the petitioner for any of these relevant years. 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)).

██████████ also stated in his affidavit that the petitioner owns a property at current value of \$1,400,000 and submitted supporting documents. However, real property is not current assets listed on lines 1 through 6 of the schedule L. Further, it is unlikely that a petitioner would sell or encumber such a significant asset to pay an employee's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the 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 (BIA 1967). 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 the instant case, while it is noted that the petitioner has been in the business for a long time, it did not yield sufficient profits to hire a new employee, especially a manager and to pay him an annual salary of \$48,000 for five out of the seven relevant years for which the petitioner submitted its tax returns. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all five years from 2001 to 2005 were uncharacteristically unprofitable years for the petitioner. 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 director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss this issue. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 complete six years of grade school and six years of high school education, and also 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 education, he represented that he attended elementary/middle school from 1974 to 1987, attended high school from 1989 to 1990, attended university from 1991 to 1995 in Colombia, and attended University of Miami for special courses in 2002. On the section eliciting information of his work experience, the beneficiary represented that he worked for [REDACTED] as a manager from December 1991 to March 1996. Prior to that, he worked for [REDACTED] from December 1989 to October 1990 and from December 1990 to November 1991. He did not provide any additional information concerning his employment background on that form.

The record of proceeding contains the beneficiary's certificates of participation in Creole 1 and Creole 2 issued by Miami Dade College on February 21, 2005 and April 18, 2005 respectively, grade reports for courses of Using Change to Your Advantage, Managing Day-to-Day, Understanding the Supervisory Role in Spring 2002 at Miami University School of Continuing Studies Emerging Manager Certificate Program and certificate of completion of the requirements in Diamond Essentials issued by Gemological Institute of America on April 23, 2007. However, the record does not contain any documentary evidence showing that the beneficiary completed six years of high school education prior to the priority date in this case, i.e. April 30, 2001. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the required education prior to the priority date.

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 any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In response to the director's request for evidence (RFE) dated October 3, 2008, counsel submitted an experience letter dated October 9, 2008 from the beneficiary's alleged former employer. This letter is in foreign language on the letterhead of [REDACTED] in Barranquilla, Colombia and the English translation states in pertinent part that:

This letter is to certify that [the beneficiary] ... worked as Manager for this company from December 1, 1991 to March 15, 1996, in a 40 hours per week schedule.

The letter also includes a specific description of duties performed by the beneficiary in that company. However, it is noted that the person writing and signing this letter on behalf of the president of [REDACTED] is [REDACTED]. The record shows that at the time of filing the instant petition and the time of this experience letter, [REDACTED] is the president of the petitioning corporation in the United States. The record does not contain any evidence showing that [REDACTED] is the president of [REDACTED] in Barranquilla, Colombia as well. The letter does not indicate the sources from which [REDACTED] is able to be in the position to verify the beneficiary's experience abroad 17 years ago.

Further, the beneficiary stated on the labor certification application which he signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury that he attended Autonomous University of the Caribbean pursuing his bachelor's degree in the filed of communications from 1991 to 1995. Neither the letter nor the beneficiary provides explanation as to how the beneficiary managed full-time studies for his bachelor's degree program and his full-time job as a manager at [REDACTED] at the same time during the years 1991 to 1995. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistencies. 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. *Id.* Therefore, the AAO cannot accept this experience letter as primary evidence to establish the beneficiary's requisite three years of experience in the job offered as set forth on the labor certification and thus, the petitioner failed to demonstrate that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.