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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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Services

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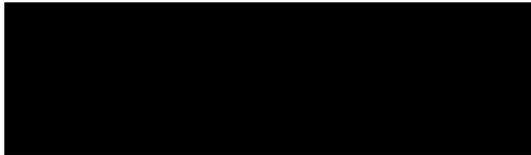


IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 travel agency. It seeks to employ the beneficiary permanently in the United States as a "book keeper aide." As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director 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 and that the record did not establish that the beneficiary had one year of experience in the proffered position as required by the Form ETA 750. 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 12, 2010 denial, the issues in this case are 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, and whether the beneficiary had one year of experience in the proffered position as required by the Form ETA 750.

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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

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

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$300 per week (\$15,600 per year). The Form ETA 750 states that the position requires one year of experience in the proffered position as a “book keeper aide”¹ plus a high school education.

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 did not provide information as to the date it was established, the number of its employees, its gross annual income or its net annual income. 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 25, 2001, 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 an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

¹ The Form ETA 750 contains “white out” in the experience block. The block reflects a handwritten one year of experience over what appears to be a typed “2” years of experience. It is unclear when this change was made: prior to submitting the form to DOL or at a different time. Nothing shows that DOL approved any correction to this requirement. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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). *See* footnote 11 regarding preclusion of certain documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, or any wages, during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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 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. 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).

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 before the director closed on July 1, 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 2008 tax return would have been the most recent return available. In the request for evidence, the director asked the petitioner to provide, in part, copies of the petitioner’s 2001 through 2008 tax returns. In response to that request, the petitioner provided copies of page one and Schedule L of its 2001 through 2007 tax returns. Copies of the complete tax returns were not provided and no explanation was offered as to why complete copies of the returns were not supplied. The petitioner submitted a copy of an Application for Automatic Extension of Time to file its 2008 tax return. The petitioner’s incomplete tax returns demonstrate its net income³ for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of \$38,094.
- In 2002, the Form 1120S stated net income of \$36,628.
- In 2003, the Form 1120S stated net income of \$22,429.
- In 2004, the Form 1120S stated net income of \$10,113.
- In 2005, the Form 1120S stated net income of \$62,316.
- In 2006, the Form 1120S stated net income of \$234,168.
- In 2007, the Form 1120S stated net income of \$245,463.

Therefore, for the years 2001, 2002, 2003, 2005, 2006 and 2007, page one of the petitioner’s Forms 1120S would state sufficient net income to pay the proffered wage. As previously noted, however, the net income of the petitioner may not be accurately determined without complete copies of the

³As set forth in footnote 4 below, net income may be affected by entries to Schedule K of the Form 1120S. Since the petitioner did not provide a complete copy of its tax returns, it cannot be determined whether its net income is accurately reflected on page one of its Form 1120S, or whether the net income would have been set forth on Schedule K of the respective returns for years 2001 through 2007.

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 (1997-2003), line 17e (2004-2005) and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 4, 2011) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner failed to submit its full tax return, we cannot definitively determine the petitioner’s net income.

petitioner's tax returns containing Schedule K for each return. The partial 2004 return provided does not state on page one of the return, sufficient net income to pay the proffered wage. In any future filings, the petitioner must submit its full tax returns.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 partial copies of the petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$141,139.
- In 2002, the Form 1120S stated net current assets of \$182,448.
- In 2003, the Form 1120S stated net current assets of \$167,909.
- In 2004, the Form 1120S stated net current assets of \$0.⁶
- In 2005, the Form 1120S stated net current assets of \$0.
- In 2006, the Form 1120S stated net current assets of \$483,206.
- In 2007, the Form 1120S stated net current assets of \$637,557.

Therefore, for the years 2001, 2002, 2003, 2006 and 2007, the partial copies of the petitioner's tax returns state 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 as the petitioner has not established its ability to pay for 2004.

⁵According 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.

⁶ It is unclear why the petitioner shows substantial net current assets in 2001, 2002, 2003, 2006 and 2007, yet shows \$0 in net current assets for 2004 and 2005. This fact is particularly in question since the petitioner submitted copies of two certificate of deposits and bank account holdings for the end of 2004, which should have been reflected in the petitioner's end of the year cash on its tax return. Nothing in the record addresses this issue. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel states that the record establishes the petitioner's ability to pay the proffered wage from the priority date onward and that the beneficiary has the experience required by the Form ETA 750. Specifically, counsel states that considering the totality of the circumstances the petitioner has established the ability to pay the proffered wage from the priority date onward. Counsel submitted copies of bank statements showing that the petitioner had certificates of deposit worth \$19,077 at the end of 2004 and stated that those funds were available to pay the proffered wage. Counsel also notes that the petitioner had depreciation of \$9,202 in 2004.⁷

With regard to the bank statements submitted by counsel on appeal detailing two certificates of deposit purportedly held by the petitioner, reliance on the balances 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. While the bank statement shows funds held in two certificates of deposit at the end of 2004 and cash in checking and savings accounts, those funds were not listed by the petitioner on its 2004 tax return for end-of-year cash on its Schedule L. The failure to list those sums on the tax return was not explained and brings into question whether the funds were, in fact, funds belonging to the petitioner, or whether the petitioner's tax returns accurately reflect all the petitioner's assets properly. It is incumbent upon the petitioner to resolve any inconsistencies 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, 591-92 (BIA 1988).

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 (Reg. Comm. 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

⁷As set forth in *River Street Donuts* at 118, depreciation represents a real expense and cost of doing business. As such, even though depreciation does not represent the current use of cash, neither does it represent sums available to pay wages.

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, the petitioner submitted incomplete copies of its tax returns in support of its ability to pay the proffered wage. Without the complete returns, the AAO cannot properly assess whether the totality of the circumstances should apply. Even considering the incomplete tax returns submitted, the 2004 tax return does not establish the petitioner's ability to pay the proffered wage for that year based on its net income or net current assets. There is nothing in the record to establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. The Form I-140 requires the petitioner to list its number of employees. This was left blank. The director requested this information, but the petitioner failed to state its number of employees in response to the RFE.⁸ In the absence of this information, the petitioner's complete tax returns, and resolution of the discrepancy of the petitioner's 2004 Schedule L and bank account information submitted, we cannot properly assess the petitioner's full circumstances and whether the totality of the circumstances would warrant favorable consideration. 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.

With respect to the second issue regarding the beneficiary's experience, counsel asserts on appeal that the failure to establish the beneficiary's prior experience as a book keeper aide was due to the incompetence of the petitioner's former representative [REDACTED] which had been "closed by the New York State Attorney General for not being authorized to practice law and misrepresentation of clients."⁹

⁸ The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

⁹ The record of proceeding contains a Form G-28 (Notice of Entry of Appearance of Attorney or Representative) listing a licensed attorney employed by the International Professional Association (IPA), as the petitioner's representative. Although the petitioner claims that the IPA was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed,

Regarding the beneficiary's qualifications for the position, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

- (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.
- ...
- (D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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) (the AAO reviews appeals on a de novo basis).

The labor certification requires one year of experience as a book keeper aide and completion of four years of high school.¹⁰ The Form ETA 750 states the beneficiary's experience as: a welder for [REDACTED] from June 2000 to present (date of signing the labor certification, April 25, 2001); welder for [REDACTED] from 1998 [no month listed] to 1999 [no month listed]; and as a book keeper for [REDACTED] from

to explain why not. The instant appeal does not address these requirements. A claim was filed against the IPA, however, nothing in the complaint against the IPA references the licensed New York attorney that filed the Form I-140 on the petitioner's behalf. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

¹⁰ Nothing in the record shows that the beneficiary completed the required high school education. Evidence that the beneficiary completed the required education must be submitted in any further filings.

1989 [no month listed] to 1991 [no month listed]. The beneficiary signed the Form ETA 750 attesting to this experience.

The petitioner initially submitted a letter from [REDACTED], Guayaquil, Ecuador which stated the beneficiary worked "for our branch office, the company, [REDACTED] from April 6, 1989 to March 31, 1990," and was then transferred to [REDACTED] working from April 1, 1990 to June 25, 1990. His position was Warehouse Assistant." As this letter states his experience as a warehouse assistant and not as a book keeper aide, the director denied the petition. Additionally, we note that this employer is different than the entity listed on the certified labor certification. On appeal, counsel states that, [REDACTED] [the entity listed on the labor certification] is a group of companies and consortium companies that is currently closed." Counsel further states that the beneficiary started with [REDACTED] as a warehouse assistant, but had been moved to another position in bookkeeping at another of the consortium's companies during 1990 to 1991." Counsel states that this information was not in the prior letter based on "inadvertent error caused by the incompetence of the petitioner's former representative." On appeal, the beneficiary submitted an affidavit, which stated in part that, "I worked at [REDACTED] a company which is owned by the Wayne Group, from 4/1989 to March 1990 and then was transferred to [REDACTED] another company which is also owned by the Wayne Group. I worked at [REDACTED] from April 1990 to June 1990."

The beneficiary listed his dates of employment on Form ETA 750 as: as a book keeper for [REDACTED] from 1989 [no month listed] to 1991 [no month listed]. The letter initially submitted states the dates of employment, for the claimed related company as: April 6, 1989 to March 31, 1990, and then following his transfer as April 1, 1990 to June 25, 1990. Counsel on appeal states his employment with the claimed related company as: "1990 to 1991 following his transfer to the related entity." The beneficiary in his affidavit states his employment dates as: April 1989 to March 1990, and then from April 1990 to June 1990. The dates between the Form ETA 750, the letters submitted, counsel's explanation on appeal, and the beneficiary's explanation on appeal all conflict. Additionally, the beneficiary's affidavit submitted on appeal seeking to correct the discrepancies in the experience states his employment end date as June 1990. Nothing states that he was employed by another company as a book keeper, or book keeper's aide until 1991 as counsel asserts. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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.* Based on the conflicts in the evidence, this letter cannot be accepted to demonstrate the beneficiary's one year of experience.

Counsel submitted, on appeal, a new experience letter from [REDACTED] Vice President, [REDACTED] which states that the beneficiary was employed by that company from March 1996 to April 1998 as a book keeper aide. The experience letter submitted by the petitioner,

on appeal, from [REDACTED] does not establish that the beneficiary had one year of experience as a "book keeper aide" as required by the Form ETA 750. This position was not listed on the Form ETA 750. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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.¹¹ The beneficiary states in his affidavit submitted that he was not informed that this experience should be listed on the Form ETA 750. The instructions state to list all jobs for the last three years, as well as to list "any other job related to the occupation for which the alien is seeking certification." This experience is specifically related. The beneficiary signed the form under the box, "Declaration of the alien," attesting that the information on the form was true and correct. As the petitioner failed to list the position with [REDACTED] on Form ETA 750, this letter will not establish that the beneficiary has the required experience to meet the terms of the certified labor certification.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the beneficiary had one year of experience in the proffered position as required by the Form ETA 750.

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.

¹¹ Additionally, we note that the director specifically requested, in his May 26, 2009 request for evidence, that the petitioner should submit employment letters to show that the alien had one year of experience as required by the labor certification. Despite this request, the petitioner did not supply the referenced experience letter until the appeal was filed. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.