

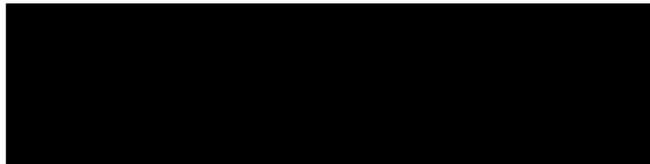
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



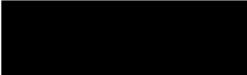
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

Date: SEP 06 2011 Office: NEBRASKA SERVICE CENTER

FILE: 

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, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook specializing in Mexican food. 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 of the visa petition. In addition, the director determined that the record did not contain sufficient credible evidence establishing that the beneficiary possessed the required two years of experience in the proffered position. 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 September 23, 2009 denial, the first 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$2850.00 per month or \$34,200.00 per year. The Form ETA 750 states that the position requires six years of elementary school education and two years experience in the job offered. On

the Form ETA 750, signed by the beneficiary on April 8, 2001, the beneficiary made no claim to have worked for the petitioner. Furthermore, the beneficiary failed to list any previous employment history with any employer at part 15 of the Form ETA 750B.

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.

The petitioner is listed on both the Form ETA 750 and the Form I-140 petition as [REDACTED] located at [REDACTED]. The petitioner did not state its Federal Employer Identification Number (FEIN) on the petition. The evidence in the record of proceeding confirmed by a review of the publicly available website at <http://kepler.sos.ca.gov/cbs.aspx> (accessed on August 23, 2011), reveals that the entity located at this address is in fact [REDACTED] and that its FEIN is [REDACTED]. The petitioner indicated on the Form I-140 petition at part 5, section 2 that it was established on September 20, 1995 and employs 55 workers, but failed to provide any information regarding either its gross annual income or net annual income. According to the financial documents in the record, the petitioner's fiscal year corresponds to the calendar year.

Relevant evidence in the record included Forms W-2, Wage and Tax Statement, reflecting wages paid by [REDACTED] to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, and 2007, Form W-2 statements reflecting wages paid by [REDACTED] with [REDACTED] to the beneficiary in 2001, Form W-2 statements reflecting wages paid by [REDACTED], with [REDACTED] to the beneficiary in 2005 and 2007, a Form W-2 statement reflecting wages paid by [REDACTED] with [REDACTED] to the beneficiary in 2006, the balance sheet of [REDACTED], for 2004, the income statements of [REDACTED], for 2005, 2006, and 2007, the statement of cash flow of [REDACTED], for 2008, the beneficiary's Forms 1040, U.S. Individual Income Tax Return, for 2001, 2002, and 2003, the beneficiary's Forms 1040A, U.S. Individual Income Tax Return, for 2004, 2005, 2006, and 2007, a letter dated January 22, 2009, regarding the beneficiary's prior employment that is signed by [REDACTED] and two letters dated January 27, 2009 and March 18, 2009, respectively, regarding the beneficiary's prior employment that are both signed by [REDACTED].

On July 27, 2009, the director issued a Request for Evidence (RFE) requesting that the petitioner provide copies of its tax returns or audited financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, to establish its continuing ability to pay the proffered wage. The director noted that the petitioner had submitted financial statements for 2006, 2007, and 2008, but that such statements would not be considered as the statements were not audited. The director also requested that the petitioner submit copies of any Form W-2 statements or Forms 1099-MISC, Miscellaneous Income, reflecting wages paid by the petitioner to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008. Finally, the director noted that the letters of employment contained in the record were not sufficient to establish that the beneficiary possessed the required two years of experience in the proffered position of a cook specializing in Mexican food as of the priority date of

April 27, 2001. Therefore, the director requested that the petitioner provide additional evidence to demonstrate that the beneficiary possessed the required two years of experience in the proffered position.

In response, the petitioner submitted a letter signed by [REDACTED] who listed his position as "Financial Officer" of [REDACTED], a letter dated August 15, 2009, regarding the beneficiary's prior employment that is signed by [REDACTED] and a letter dated August 11, 2009, regarding the beneficiary's prior employment that is signed by [REDACTED]. However, it must be noted that the petitioner failed to provide copies of either its tax returns or audited financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, as well any additional Form W-2 statements or Forms 1099-MISC reflecting wages paid by the petitioner to the beneficiary in either 2007 and 2008, despite the director's specific request to the petitioner to provide these documents.

On appeal, the petitioner's general manager asserts that the petitioner "...is one of a corporate business and it does not hold separate federal tax returns as the report of taxes is done for the whole corporate business." The petitioner's general manager contends that the petitioner's owner owns several businesses, including [REDACTED], which had also employed the beneficiary. The petitioner's general manager notes that considering the totality of the circumstances, the petitioner's employment of the beneficiary from 2001 through 2009 established its ability to pay the proffered wage. In support of the appeal, the petitioner's general manager provides copies of previously submitted documents as well as a Form W-2 statement reflecting wages paid by [REDACTED] to the beneficiary in 1996, Form W-2 statements reflecting wages paid by [REDACTED] to the beneficiary in 1996 and 1997, Form W-2 statements reflecting wages paid by [REDACTED] to the beneficiary in 1998 and 1999, a Form W-2 statement reflecting wages paid by [REDACTED] to the beneficiary in 1999, a Form W-2 statement reflecting wages paid by [REDACTED], in 1999, the beneficiary's Form 1040 tax returns for 1996, 1997, 1998, 1999, 2000, and 2008, the beneficiary's Form 1040A tax return for 2007, Form W-2 statements reflecting wages paid by [REDACTED], with [REDACTED] to the beneficiary in 2006 and 2008, a Form W-2 Form reflecting wages paid by [REDACTED], with [REDACTED] to the beneficiary in 2008, paycheck stubs from both [REDACTED] and [REDACTED] reflecting wages paid to the beneficiary in 2009, and the petitioner's balance sheets for 2006.

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. In the instant case, the record contains Form W-2 statements allegedly representing wages paid to the beneficiary by the petitioner, [REDACTED] with FEIN [REDACTED] as follows:

- 2001 – \$15,349.89 (\$18,850.11 less than the proffered wage of \$34,200.00).
- 2002 – \$18,108.58 (\$16,091.42 less than the proffered wage of \$34,200.00).
- 2003 – \$18,715.44 (\$15,484.56 less than the proffered wage of \$34,200.00).
- 2004 – \$18,984.81 (\$15,215.19 less than the proffered wage of \$34,200.00).
- 2005 – \$19,127.52 (\$15,072.48 less than the proffered wage of \$34,200.00).
- 2006 – \$19,531.43 (\$14,668.57 less than the proffered wage of \$34,200.00).
- 2007 – \$18,821.09 (\$15,378.91 less than the proffered wage of \$34,200.00).
- 2008 – \$22,337.02 (\$11,862.98 less than the proffered wage of \$34,200.00).

In addition, the record contains nineteen paychecks reflecting that the petitioner, [REDACTED], paid \$11,727.87 in wages purportedly to the beneficiary in the year 2009 up through November 1, 2009. However, the Form W-2 statements reflecting wages paid to the beneficiary by the petitioner, [REDACTED], in 2001, 2002, 2003, 2004, 2005, 2006, and 2007, list the beneficiary's social security number as [REDACTED] while the Form W-2 statement reflecting wages paid to the beneficiary by the petitioner, [REDACTED], in 2008 and the nineteen paychecks reflecting wages paid by the petitioner, [REDACTED], to the beneficiary in 2009 list the beneficiary's social security number as [REDACTED]. In addition, the beneficiary himself indicated that he did not possess a social security number but instead possessed taxpayer identification number, [REDACTED] on his Form 1040 tax returns and Form 1040A tax returns from 1996 to 2006 and only then on his Form 1040A tax return for 2007 and Form 1040 tax return for 2008, did the beneficiary list his social security number as [REDACTED]. Finally, the beneficiary failed to list a social security number in his Form I-485 and the petitioner failed to list any information in response to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to both the beneficiary and the petitioner if, in fact, either [REDACTED] is the beneficiary's social security number. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept either the Form W-2 statements or paychecks as persuasive evidence of wages paid to the beneficiary.

Regardless, assuming the Form W-2 statements and paychecks are persuasive evidence, the petitioner did not establish that it paid the beneficiary the full proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009.

It must be noted that the record contains Form W-2 statements reflecting wages paid by [REDACTED] and [REDACTED], both using [REDACTED] to the beneficiary in 2001, 2005, 2006, 2007, and 2008, as well as paychecks reflecting wages paid by [REDACTED], to the beneficiary in 2009. The petitioner's general manager acknowledges that these companies are also owned by the petitioner's owner and admits that the beneficiary had been employed by these companies. Nevertheless, the fact the petitioner, [REDACTED] with FEIN [REDACTED] possesses a different FEIN than [REDACTED], and [REDACTED] both with [REDACTED] establishes the petitioner is a separate and distinct corporate entity from [REDACTED], and [REDACTED]. Therefore, any wages paid by either [REDACTED] and [REDACTED] will not be considered in determining whether the petitioner has established the continuing ability to pay the proffered wage to the beneficiary since the priority date. Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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). 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."

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).

In response to the RFE issued by the director on July 27, 2009, the petitioner submitted a letter signed by [REDACTED] who listed his position as “Financial Officer” of [REDACTED]. In his letter, [REDACTED] indicated that the petitioner had over 100 employees and was not required to submit evidence such as tax returns or audited financial statements to establish its ability to pay the proffered wage since the priority date. However, [REDACTED] assertion that the petitioner had over 100 employees is contradicted by the petitioner’s claim that it had only 55 employees on the I-140 petition filed on June 29, 2009. In addition, the regulation at 8 C.F.R. § 204.5(g)(2) only states that if a prospective employer employs 100 or more workers, then the director may accept a statement from a financial officer of the organization. The regulation, in no way, requires the director to accept a statement from a financial officer. Further, [REDACTED] failed to submit any independent evidence to support his claim that the petitioner employed more than 100 employees. 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)).

The petitioner’s general manager indicates that tax returns for the petitioner are unavailable because the petitioner is one in a group of several companies owned by the petitioner’s owner and that taxes are filed for the whole corporate business on appeal. Regardless, as previously noted, a review of the evidence in the record of proceeding and the website at <http://kepler.sos.ca.gov/cbs.aspx> (accessed on

August 23, 2011) reveals that the petitioner is in fact a separate and distinct corporate entity, [REDACTED] with [REDACTED]. In addition, the petitioner's general manager fails to submit any independent evidence to corroborate the claim that tax returns for the petitioner are unavailable because the petitioner is one in a group of several companies owned by the petitioner's owner and that taxes are filed for the whole corporate business. Again, it must be reiterated that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Regardless, the petitioner's tax filing or accounting practices cannot serve to excuse it from submitting the evidence required by the regulations. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Although the petitioner provided the balance sheet of [REDACTED] for 2004 and 2006, the income statements of [REDACTED], for 2005, 2006, and 2007, and the statement of cash flow of [REDACTED], for 2008, all of these documents are unaudited and appear to have been prepared by the petitioner. Counsel's reliance on unaudited financial records is 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. The petitioner has failed to submit either its audited financial statements or federal tax returns for 2001, 2002, 2003, 2004, 2005, 2006, 2007, or 2008, despite the director's specific request to submit these documents in the RFE issued on July 27, 2009. Once again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Consequently, it cannot be determined whether the petitioner possessed either sufficient net income or sufficient net current assets to demonstrate its continuing ability to pay the proffered wage since the priority date. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner, [REDACTED], with FEIN [REDACTED] 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.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss

Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, no specific detail or documentation has been provided similar to *Sonegawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. While the petitioner's general manager on appeal claims that the petitioner's employment of the beneficiary from 2001 through 2009 established its ability to pay the proffered wage, an examination of wages purportedly paid by the petitioner to the beneficiary in those years does not support such a finding. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date.

The next issue to be examined in this proceeding is whether the beneficiary possessed the required two years of experience as cook specializing in Mexican food as of the priority date of April 27, 2001.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 *Madany 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. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

As previously noted, the priority date of the Form ETA 750 is April 27, 2001. At part 15 of the Form ETA 750B, which was signed by the beneficiary on April 8, 2001, the beneficiary did not list any previous employment with any employers. However, the record contains two letters dated January 27, 2009 and March 18, 2009, respectively, that are both signed by [REDACTED] two letters dated January 22, 2009 and August 15, 2009, respectively, that are signed by [REDACTED] and a letter dated August 11, 2009, that is signed by [REDACTED] all of which attest to the beneficiary's prior employment. Neither the beneficiary nor the petitioner has offered any explanation as to why the beneficiary did not list this purported employment at part 15 of the Form ETA 750B. 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.

In his letter dated January 27, 2009, [REDACTED] stated that the beneficiary worked as a cook for an unspecified employer from October 24, 1998 to November 30, 1999. In his subsequent letter dated March 18, 2009, [REDACTED] declared that the beneficiary worked as a specialty cook preparing various types of international foods such as Mexican food and American food for [REDACTED] from October 24, 1998 to November 30, 1999. Nevertheless, in her letter dated August 11, 2009, [REDACTED] testified that the beneficiary was employed as a "Steward" at [REDACTED]

██████████ from October 24, 1998 to November 30, 1999. The fact that ██████████ provided conflicting testimony regarding the position in which the beneficiary worked for this employer negates the probative value of the attestations of both parties in their respective letters relating to the beneficiary's prior employment. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In his letter dated January 22, 2009, ██████████ stated that the beneficiary worked as a cook for ██████████ from June 20, 1998 to December 13, 1999. In his letter dated August 15, 2009, ██████████ stated that the beneficiary worked part-time as a specialty cook preparing various types of food, appetizers, and dessert for ██████████ from June 20, 1998 to December 13, 1999. The record contains two Form W-2 statements reflecting wages paid by ██████████ to the beneficiary in 1998 and 1999. However, ██████████ failed to provide any indication that the beneficiary was employed or gained experience at ██████████ in the proffered position of a cook specializing in Mexican food. Further, ██████████ testimony reflects that the beneficiary was employed on a part-time basis for just less than eighteen months in a position contemporaneous with the ██████████ position.

The letters of ██████████ contain contradictory testimony regarding the beneficiary's position while he was employed by ██████████. ██████████ testified that he employed the beneficiary on a part-time basis for just less than eighteen months as a specialty cook with no mention that the beneficiary's duties at ██████████ were that of a cook specializing in Mexican food. The record is devoid of evidence resolving these inconsistencies or addressing why this experience was omitted from the Form ETA 750. Thus, it cannot be concluded that the beneficiary is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1); *see also* 8 C.F.R. § 204.5(i)(3).

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.