

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

(b)(6)

DATE: **AUG 06 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a roofing business. It seeks to employ the beneficiary permanently in the United States as a roofing supervisor. 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. 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 April 18, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 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, 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$30.19 per hour (\$62,795.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in the related occupation of roofer.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year begins on August 1st and ends on July 31st, thus the priority date falls within the period reported on the 2000 tax return. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claims to have worked for the petitioner 40 hours per week as a roofer from April 1997 to the present. On Section 15.b. of Part B of the Form ETA 750 where additional employers are to be listed, a handwritten notation states "see amendments 12/15/06" and lists the dates January 1994 to March 1997. Attached to the labor certification is a letter dated December 19, 2006, from [REDACTED], on [REDACTED] letterhead which states that the beneficiary worked as a roofer for the company, of which Mr. [REDACTED] was the owner, in 1994, 1995, 1996, and 1997.

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'l Comm'r 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'l Comm'r 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Forms

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).

1099-MISC were submitted indicating that the petitioner paid the beneficiary miscellaneous income according to the table below.

- In 1999, the Form 1099 stated income paid to the beneficiary of \$23,012.00.²
- In 2002, the Form 1099 stated income paid to the beneficiary of \$24,872.60.
- In 2003, the Form 1099 stated income paid to the beneficiary of \$23,018.75.
- In 2004, the Form 1099 stated income paid to the beneficiary of \$13,424.65.
- In 2005, the Form 1099 stated income paid to the beneficiary of \$8,157.
- In 2006, the Form 1099 stated income paid to the beneficiary of \$4,219.20.
- In 2007, the Form 1099 stated income paid to the beneficiary of \$6,535.
- In 2008, the Form 1099 stated income paid to the beneficiary of \$10,396.40.

Therefore, as the proffered wage was \$62,795.20 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms 1099 but would be obligated to demonstrate its ability to pay the difference between income it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Income Paid	Balance
2000	\$62,795.20	\$0	\$62,795.20
2001	\$62,795.20	\$0	\$62,795.20
2002	\$62,795.20	\$24,872.60	\$37,922.60
2003	\$62,795.20	\$23,018.75	\$39,776.45
2004	\$62,795.20	\$13,424.65	\$49,370.55
2005	\$62,795.20	\$8,157.00	\$54,638.20
2006	\$62,795.20	\$4,219.20	\$58,576.00
2007	\$62,795.20	\$6,535.00	\$56,260.20
2008	\$62,795.20	\$10,396.40	\$52,398.80

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

² As the Form 1099 submitted from 1999 covers a period prior to the priority date of April 30, 2001, it is not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally.

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).

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).

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. The record before the director closed on April 3, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due; however, it has been submitted into the record. Therefore, the petitioner's income tax return for 2007 is the most recent return available. As stated previously, the petitioner's fiscal year begins on August 1st and ends on July 31st, thus the priority date falls within the period reported on the 2000

tax return. The petitioner did not submit tax returns for 2000, 2001, 2002, or 2003. The petitioner's tax returns demonstrate its net income for 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2004, the Form 1120 stated net income of -\$3,385.00.
- In 2005, the Form 1120 stated net income of \$126.00.
- In 2006, the Form 1120 stated net income of \$22,505.00.
- In 2007, the Form 1120 stated net income of \$5,257.00.

Therefore, for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not demonstrate sufficient net income to pay the proffered wage.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of \$11,670.00.
- In 2005, the Form 1120 stated net current assets of \$11,796.00.
- In 2006, the Form 1120 stated net current assets of \$31,424.00.
- In 2007, the Form 1120 stated net current assets of \$35,892.00.

Therefore, for the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner's financial statements should be considered, the petitioner is reasonable in assuming that its business and profits will continue to increase, and the

³According 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.

petitioner's past payments of income to the beneficiary demonstrate its ability to pay the proffered wage. Counsel argues that the cash flow as demonstrated by the financial statements sufficiently demonstrates the petitioner's ability to pay the proffered wage and cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). Counsel also cites *Menard, Inc. v C.I.R.*, 560 F.3d 620 (7th Cir. 2009) and notes as the court did in *Construction and Design Co. v. USCIS* that a company might make its profits disappear into officers' salaries.

The AAO notes that 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 AAO further notes that *Construction and Design Co. v. USCIS* dealt with a Subchapter S corporation which can choose to have its corporate income pass through the corporation to be taxed as individual income to the shareholders, while in the instant case, the petitioner is a C corporation which does not pass its income through the corporation to be taxed at the individual level. Furthermore, Judge Posner stated that the fact that the alien was working as an independent contractor (for less than the proffered wage) fails to show an ability to pay the proffered wage because there are other costs of direct employment such as employment taxes beyond those USCIS considers in a proffered wage analysis. Judge Posner noted that "[i]f the firm has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can 'afford' that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure." In the instant case, the petitioner has not sufficiently demonstrated cash flow through its tax returns to be able to pay the salary along with its other expenses, and the financial statements submitted are not acceptable evidence of the petitioner's cash flow. In addition, the AAO notes that the highest amount of income the petitioner in the instant case paid in any one year to the beneficiary was less than half of the proffered salary ($\$24,872.60 / \$62,795.20 = 39\%$). Further, the Forms 1099 submitted for 2004 through 2008, which ranged from \$4,219.20 to \$13,424.65, are not reflective of full-time employment. Thus in the instant matter, the petitioner would be required to pay not only the difference in salary but also substantial amounts of employment taxes. The ability of the petitioner to pay a small percentage of the proffered wage does not demonstrate its ability to pay the entire proffered wage. In regard to the possibility of a company making its profits disappear into officers' salaries, the AAO notes, as did Posner in *Construction and Design Co. v. USCIS*, that the record does not contain a suggestion that the petitioner planned to cut officers' salaries by enough to pay the remaining balance of the proffered wage.

The AAO also notes that the record contains copies of the petitioner's bank statements. Counsel's 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. 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(s), such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner’s net current assets.

Counsel also asserts that the beneficiary is a highly skilled roofer with his own following of clientele, and the addition of that extra business will result in more income to the petitioner with which to pay the beneficiary. However, the AAO notes that the record contains no evidence to support this claim that the beneficiary’s personal roofing clients will require the services of the petitioner resulting in sufficient additional income with which to pay the beneficiary. Further, claims of future additional business do not address the petitioner’s inability to pay the proffered wage as of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. 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’r 1971).

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The AAO disagrees with counsel’s assertion that past payment of income paid to the beneficiary as a subcontractor further demonstrates the petitioner’s ability to pay the proffered wage. The financial analysis above notes the payments made by the petitioner to the beneficiary and calculates the remaining balance necessary to demonstrate the ability to pay the proffered wage. The petitioner failed to demonstrate its ability to pay the proffered wage in each year beginning with the priority date. In this matter, it is not sufficient that a petitioner demonstrate that it had the ability to pay a portion of the proffered wage. The petitioner must demonstrate its ability to pay the entire proffered wage.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 (Reg'l Comm'r 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to include the regulatory-prescribed evidence of copies of annual reports, federal tax returns, or audited financial statements required by 8 C.F.R. § 204.5(g)(2) for four of the eight years under review. The petitioner's gross receipts during the relevant years varied as did the amount spent on subcontractors. No wages or salaries were paid except for those paid to the two owners of the company, which are the only two people the petitioner indicated on the Form I-140 that it employs. While the petitioner has been in business approximately fifteen years, it does not pay substantial compensation to its owners. The petitioner did not submit evidence sufficient to demonstrate that the owner was willing and able to forego officer compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. 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 decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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

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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).

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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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'r 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job of roofing supervisor or the related occupation of roofer. On the labor certification, signed by the beneficiary on April 27, 2001, where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] the alien is seeking certification," the beneficiary claims to have worked for the petitioner 40 hours per week as a roofer from April 1997 to the present. On Form ETA 750 where additional employers are to be listed, a handwritten notation states "see amendments 12/15/06" and lists the dates January 1994 to March 1997. The notation is not stamped and initialed by the approving DOL office. The labor certification was accompanied by a letter dated December 19, 2006, from [REDACTED], on [REDACTED] letterhead which states that the beneficiary worked as a roofer for the company in [REDACTED], of which Mr. [REDACTED] was the owner, in 1994, 1995, 1996, and 1997.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains: 1) a letter from the petitioner dated March 17, 2009, stating that the beneficiary has been employed with the petitioner as a roofer from April 1997 until the present; 2) a letter dated March 21, 2009, from [REDACTED], former vice-president of "unexisting [REDACTED]" for which no address is given, which states that the beneficiary worked for the company as a roofer from January 1994 until March 1997, and the letter mentioned above which was dated December 19, 2006, from [REDACTED], on [REDACTED] letterhead which states that the beneficiary worked as a roofer for the company in [REDACTED] Illinois, of which Mr. [REDACTED] was the owner, in 1994, 1995, 1996, and 1997.

The AAO notes that the names of the prior employer are not the same. One letter indicates the name of the former employer was [REDACTED] while the other letter states the name of the company was [REDACTED]. The letter dated March 21, 2009, from [REDACTED] failed to include an address of the business. 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).

Further, 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.

Therefore, as the letters from [REDACTED] contain inconsistencies and the position did not appear to have been originally listed on the Form ETA 750B, they are not sufficiently persuasive.

Furthermore, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.⁴

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)⁵ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,⁶ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers

⁴ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. *See E & C Precision*.

⁵ 20 C.F.R. § 656.21(b)(5) [2004].

⁶ *See Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

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must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

Thus, only the experience attested to on the letters from Mr. [REDACTED] may be considered, and these letters fail to demonstrate that the beneficiary has the required experience.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.