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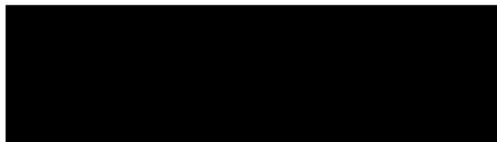
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: APR 13 2012

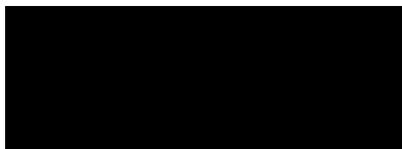
Office: TEXAS SERVICE CENTER

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,

Elizabeth McCormack

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 jewelry design service. It seeks to employ the beneficiary permanently in the United States as a first line supervisor, customer service. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 July 10, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. As identified in the AAO's Request for Evidence and Notice of Derogatory Information (RFE), an additional issue was identified on appeal concerning whether the petitioner demonstrated that the beneficiary has the required experience as of the priority date.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on March 21, 2007. The proffered wage as stated on the ETA Form 9089 is \$22 per hour (\$45,760 per year). The ETA Form 9089 states that the position requires two years of experience as a first line supervisor in customer service.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1992 and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 12, 2007, the beneficiary claimed to have begun working for the petitioner on April 22, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 submitted the following Forms W-2:

- The 2007 Form W-2 states that the petitioner paid the beneficiary \$30,047.84.
- The 2008 Form W-2 states that the petitioner paid the beneficiary \$32,887.50.
- The 2009 Form W-2 states that the petitioner paid the beneficiary \$20,962.50.
- The 2010 Form W-2 states that the petitioner paid the beneficiary \$40,037.50.

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).

In the instant case, the petitioner demonstrated that it paid the beneficiary less than the proffered wage in each year. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage, which is \$15,712.16 in 2007, \$12,872.50 in 2008, \$24,797.50 in 2009, and \$5,722.50 in 2010.

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 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on May 1, 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, it is unclear whether the petitioner's 2007 federal income tax return was available. However, in response to the AAO's RFE, the petitioner provided its tax returns for 2007 through 2010. The petitioner's tax returns demonstrate its net income, as shown in the table below.

- In 2007, the Form 1120S stated net income² of \$154,029.
- In 2008, the Form 1120S stated net income of \$782.
- In 2009, the Form 1120S stated net income of \$21,046.
- In 2010, the Form 1120S stated net income of \$24,795.

Therefore, for the years 2008 and 2009, the petitioner did not have sufficient net income to pay the difference between the actual wage paid and the proffered wage.

Although the net income in 2007 and 2010 exceeded the difference between the proffered wage and actual wage paid, the petitioner has not demonstrated its ability meet its wage obligations because, the petitioner has also filed two Form I-129 nonimmigrant petitions since April 2008. USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certification and of the two non immigrant H-1B workers on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. The petitioner must establish that it has the ability to pay the combined salaries

² 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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 14, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2007, the petitioner's net income is found on Schedule K of its tax return for that year. For 2008 through 2010, the net income is shown on line 21 of page one.

of \$95,000 for the I-129 petitions in addition to the difference between the actual wage paid and the proffered wage to this beneficiary in each year. No evidence appears in the record to evidence that the petitioner has paid the nonimmigrant workers the full proffered wage or that it otherwise could meet its wage obligations for all three sponsored workers.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007 through 2010, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of \$222,427.
- In 2008, the Form 1120S stated net current assets of \$219,631.
- In 2009, the Form 1120S stated net current assets of \$54,512.
- In 2010, the Form 1120S stated net current assets of -\$58,993.

Therefore, for the years 2007 and 2008, the petitioner demonstrated sufficient net current assets to pay the difference between the actual wage paid and the proffered wage to this beneficiary as well as the proffered wage to the other two sponsored workers. The petitioner's net current assets in 2009 and 2010 are insufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage to the instant beneficiary as well as the proffered wage to the other two sponsored workers.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary and the two nonimmigrant workers 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.

In response to the director's RFE, the petitioner submitted a copy of its December 2007 bank statement. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate

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.

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 in determining the petitioner's net current assets.

Counsel asserts on appeal that the wages of a departed employee should be considered in its ability to pay the proffered wage to the beneficiary since the employee "was not replaced." The record contains a 2007 Form W-2 for a worker other than the beneficiary which states that this worker was paid \$52,000 in that year. No further evidence was submitted establishing that this worker left the petitioner's employ or that the petitioner has replaced or will replace this worker with the beneficiary. Instead, counsel states in his response to the director's RFE that the departed employee worked as a production manager and not as a first line supervisor, customer service as described in the ETA Form 9089.

In response to the AAO's RFE, the petitioner submitted a letter from its president citing this former employee, a second production manager, and a production assistant who departed the company as sources of additional funds available to pay the proffered wage. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the production managers and the production assistant involve the same duties as those set forth in the ETA 9089. The petitioner has not documented the position, duty, and termination of any worker who performed the duties of the proffered position. If any such employee performed other kinds of work, then the beneficiary would not have replaced him or her. Counsel argues that even though the other worker is not being replaced by the beneficiary, as no replacement has been hired, the salary set aside for the production manager position would be available to pay the beneficiary the proffered wage. Counsel states on appeal that salaries come from the same coffer, so if the production manager position was not being funded, the salary amount should be included in the net income or net current asset figure as funds available to the company. The record does not include the salaries, dates of employment, and dates of departure of the workers noted by the petitioner. The petitioner must establish the ability to pay the beneficiary and the other workers sponsored as nonimmigrants as of the priority date. The petitioner has not submitted sufficient evidence that it has such an ability in 2009 and 2010, as noted above.

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 ETA Form 9089 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 *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's gross receipts were over \$1.5 million in each year for which tax returns were submitted. In addition, the petitioner paid high amounts of total wages in every year, met its wage obligations to the instant beneficiary and the other sponsored workers in two years, and has been in business for over 10 years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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).

As noted in the AAO's RFE, discrepancies exist between the experience claimed by the beneficiary on the ETA Form 9089 and that listed on a prior application. Specifically, on the prior application, the beneficiary stated that she was unemployed from November 1999 to the date the application was filed, May 2002 and that she worked for [REDACTED] from March to November 1999. On the ETA Form 9089, the beneficiary stated that she began working for the petitioner on April 22, 2002, worked for [REDACTED] from June 10, 2001 to April 7, 2002, and for [REDACTED] from June 1, 1998 to August 1, 2000. The AAO's RFE noted that the petitioner previously stated that [REDACTED]

██████████ and ██████████ paid the beneficiary “in cash only therefore she does not have pay stubs from her employment at either location” and that ██████████ does not keep any sort of payroll records. The RFE stated that independent and credible evidence of the beneficiary’s experience was necessary to meet the experience requirements of the ETA Form 9089. The AAO’s RFE further noted that “it is incumbent upon 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).

In response, the petitioner stated that the beneficiary’s prior application was prepared by a non-attorney advisor at a time when the beneficiary spoke little to no English so was completely reliant on that assistance in completing the application. The affidavit submitted from the beneficiary stated that she handwrote the answers to questions that were translated by a friend and that she “focused and carefully answered” questions pertaining to that application and “forgot to write about [her] work experience at ██████████ characterizing that omission as a “mistake.” She further stated that she worked full time at ██████████ from June 1, 1998 through August 1, 2000 and worked part-time at ██████████ during that same time. The petitioner also submitted a letter from ██████████ dated December 5, 2011 stating that the beneficiary worked as a production supervisor from June 1, 1998 through August 1, 2000. ██████████ also stated that he paid the beneficiary in cash, does not keep payroll records, and that Indonesia does not have any sort of official income reporting such as the U.S. Form W-2.

Although counsel notes that the petitioner was not assisted by an attorney but by an agent, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon ineffective assistance against accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

The AAO requested in the RFE that the petitioner submit independent and credible evidence to overcome the discrepancy between the dates provided for employment on the ETA Form 9089 and the prior application. The beneficiary’s affidavit does not provide independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The letter from ██████████ does not provide independent evidence of the beneficiary’s experience to overcome the discrepancies in the applications. Although ██████████ states that no records are available in Indonesia since the beneficiary was paid in cash and Indonesia does not have an income tax, the petitioner has not attempted to submit secondary evidence that is objective and independent. Where a discrepancy exists such as here where the beneficiary signed two applications under penalty of perjury, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) provides that the petitioner must

“resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” The petitioner has not provided contemporaneous documents or other independent and objective evidence, instead of documents generated for the purpose of the current petition. As a result, the petitioner did not provide sufficient evidence to demonstrate that the beneficiary had the required two years of experience required by the terms of the labor certification.

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.