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

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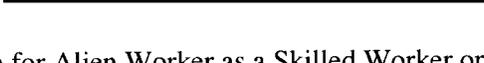
Date: FEB 13 2012

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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 retail home furnishing store. It seeks to employ the beneficiary permanently in the United States as a buyer assistant. 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 and that the offer was bona fide. 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 August 18, 2008 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether the offer was bona fide. In addition, we have identified an additional issue on appeal as to whether the petitioner presented evidence that the beneficiary had the experience required by the terms of the labor certification.

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 \$12 per hour (\$24,960 per year). The Form ETA 750 states that the position requires two years of experience in retail merchandise and includes the special requirements of "knowledge of quality and manufacturing of home furnishings. Trade show knowledge and experience. Product and design knowledge preferred."

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 2000 and to currently employ 6 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 28, 2004, the beneficiary did not claim to have worked for the petitioner.²

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

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

² As noted in the director's decision, the record reflects that the beneficiary listed her employment with the petitioner on Form G-325A, submitted in conjunction with her I-485 application for adjustment of status, from April 2001 to the date of signing, June 20, 2007. The petitioner has not addressed this inconsistency. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner did not address this issue on appeal.

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 during any relevant timeframe including the period from the priority date in April 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on October 24, 2007 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. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of -\$25,224.
- In 2002, the Form 1120S stated net income of -\$5,433.
- In 2003, the Form 1120S stated net income of \$22,723.
- In 2004, the Form 1120S stated net income of -\$19,889.
- In 2005, the Form 1120S stated net income of \$5,276.
- In 2006, the Form 1120S stated net income of -\$10,964.

Therefore, for all of the years, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁴ 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.

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 30, 2011) (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 2001, 2002, and 2007, the petitioner’s net income is found on Schedule K of its tax return for 2001, 2002, and 2007. The petitioner’s net income for 2003, 2004, and 2005 is found on line 21 of page one.

⁴According 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.

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 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$24,425.
- In 2002, the Form 1120S stated net current assets of -\$1,196.
- In 2003, the Form 1120S stated net current assets of \$7,842.
- In 2004, the Form 1120S stated net current assets of -\$15,946.
- In 2005, the Form 1120S stated net current assets of -\$15,584.
- In 2006, the Form 1120S stated net current assets of -\$11,674.

Therefore, for all of the years, the petitioner did not have 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 although the tax returns "reflect a loss for the company, an independent accountant provides evidence that the company did in fact have the needed assets and income available to pay the proffered wage." A letter from [REDACTED], a certified public accountant, was submitted in response to the director's request for evidence, which stated that the petitioner's bottom line "has fluctuated . . . due to the company expensing new asset purchases" and that the owners' wages were paid as a result of the beneficiary not being immediately available.

As to the wages paid to the petitioner's owners, the amount claimed is reflected on the line for officer compensation instead of salaries and wages paid. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] currently holds 65 percent of the company's stock and [REDACTED] currently holds 35 percent of the company's stock.⁵ No evidence was submitted to demonstrate the role of either individual in the business. Line 7 of the petitioner's Form 1120S reflected officer compensation paid as \$48,709 in 2001, \$56,584 in 2002,

⁵ [REDACTED] owned 94% of the stock in 2001 and [REDACTED] 6%. [REDACTED] ownership share gradually decreased during the period from 2002 through 2005 and [REDACTED] gradually increased until reaching the current stock ownership levels in 2005.

\$46,066 in 2003, \$0 in 2004, \$27,700 in 2005, and \$21,500 in 2006. No evidence was submitted to indicate what portion of the amount drawn as officer compensation by the owners would have been available to pay the proffered wage. Neither officer submits an attestation indicating that he or she is able and willing to forego all or a part of the officer compensation toward paying the proffered wage to the beneficiary until she obtains permanent residence. Further, the figures listed on the Forms 1120S as officer compensation differ from the figures provided by [REDACTED] as wages received by the officers in his letter dated October 23, 2007 and no other evidence, such as the owners' Forms W-2, were submitted to resolve the discrepancy. We note here that the compensation received by the company's owners during these years was not a fixed salary and fluctuated from \$0 to \$56,584.

USCIS may examine the financial flexibility that the employee-owners have in setting their compensation based on the profitability. [REDACTED], the majority owner of the petitioner, submitted a letter dated October 21, 2007 stating that the beneficiary would have "assumed many responsibilities that the current owners have assumed and as a result the salaries [of the owners] would have been reduced." This letter does not state either that the beneficiary would replace the owners' work responsibilities or that the owners would not otherwise continue to be employed by their company and continue to earn wages. If the owners performed other kinds of work, then the beneficiary could not have replaced them. In addition, it seems unlikely that the owners would not continue to work for their company and the letter sent from [REDACTED] does not suggest otherwise. As a result, the AAO will not consider the officer compensation/wages in determining whether the petitioner has the ability to pay the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Mr. Johnson also states that "the owners have access to other sources of funding outside the business to pay for [the beneficiary's] salary, if needed." 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713, stated: "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner suggests that it has the ability to pay the proffered wage because it has assets that were expensed rather than depreciated that caused the company's bottom line to be lower than could have otherwise been expected. [REDACTED] gives the example that in 2004, the petitioner purchased a \$21,000 vehicle. As the petitioner's net income and net current assets have never exceeded the amount of the proffered wage, it is unclear how adding in intermittent capital expenses would

explain the deficiency in every year. In addition, capital expenses are a real cost of doing business and as the funds were used, they were not available for paying the proffered wage.

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 either through wages previously paid to the beneficiary, 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 (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's tax returns demonstrate minimal or negative net income and net current assets in every year. The total amount of employee wages paid in 2001, 2003, and 2006 was less than the proffered wage even though the petitioner claimed to employ six workers on the Form I-140. In addition, the petitioner submitted no evidence of its reputation or that it had one off year like *Sonogawa*. 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.

Regarding whether the job offer is bona fide, the regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." The director noted in his decision

that although the job offer from the petitioner is located in Utah, the beneficiary resides with her spouse in California. On appeal, counsel states that the beneficiary maintains a residence in Utah, pays income tax in Utah, and intends to relocate to Utah to take the job offered by the petitioner. Although the Utah County Recorder verifies that the beneficiary does own property in Utah, it lists a mailing address for the beneficiary in California. See Utah County Recorder website at http://www.utahcountyonline.org/LandRecords/property.asp?av_serial=200310158004 (accessed October 3, 2011). The beneficiary's husband's business is not registered in the State of Utah, but is instead operating in Alpine, California. The address listed as the mailing address with the State of Utah is associated with Alpine Dog Ranch whose website states that the beneficiary operates as the Chief Executive Officer of the company. See <http://www.alpinedogranch.com/about/>. No tax records were submitted corroborating the claim that the beneficiary pays taxes in Utah. Although counsel states on appeal that the beneficiary "has every intention to reside permanently in Utah once . . . she can assume the permanent position of buyer for [the petitioner]," the evidence concerning the beneficiary's current employment casts doubt on whether the beneficiary intends to work for the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner submitted no evidence on appeal to demonstrate that the beneficiary intends to work for the petitioner if the petition were approved.

Although not raised by the director, on appeal, an additional issue of whether the beneficiary has the required experience has been noted. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Concerning the beneficiary's experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies:

- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
- (B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 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).

The ETA Form 750 requires two years of experience as an assistant buyer or in retail merchandise with the specific skills of "Knowledge of quality and manufacturing of home furnishings. Trade show knowledge and experience. Product and design knowledge preferred." On the Form ETA 750B, which the beneficiary signed under penalty of perjury, the beneficiary stated that she worked for Azania as a product sourcing merchandiser from October 1996 to the date of signing, April 28, 2004. The letters of experience submitted in response to the director's RFE are from [REDACTED]

The letter from [REDACTED], states that the beneficiary worked for a subdivision of his company in Los Angeles, California, from January 1997 to August 2002. 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. Thus, the experience letter from East of the Sun is called into question.

The letter from [REDACTED] was signed by [REDACTED] as CEO and states that the beneficiary worked from October 15, 1996 to December 31, 2001 as the head manager of product sourcing and merchandising for the Provo, Utah store. While this work experience is listed on the Form ETA 750B, [REDACTED] is the name of the business where the beneficiary's husband was President. A letter from a company where the beneficiary's husband serves as President 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)). Without independent evidence demonstrating the beneficiary's full-time employment with Azania Candles and Gifts, we are unable to accept the letter as evidence of the beneficiary's experience. The letter also did not state whether the beneficiary worked in a full-time as opposed to part-time position and the date of termination conflicts with the end date provided on the Form ETA 750B. In addition, the dates of employment at [REDACTED] overlap significantly and also overlap with the beneficiary's stated employment with the petitioner listed on the Form G-325A from April 2001 to June 2007. It is unclear how the beneficiary could work at two or three establishments in a full-time capacity in two different states during the period of overlap in 2001 through 2004. As stated above, "it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592. No evidence in the record resolves these inconsistencies. As a result, we are unable to conclude that the beneficiary had the required two years of experience as of the priority date. For this additional reason, the petition may not be approved.

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.