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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



BE

DATE: JUL 20 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 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

**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 describes itself as an “electronics” company. It seeks to employ the beneficiary permanently in the United States as a field service engineer. 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 February 23, 2010 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.

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 July 27, 2004. The proffered wage as stated on the Form ETA 750 is \$36,200 per year. The Form ETA 750 states that the position requires one year of

experience in the proffered position or one year of experience as a service technician, network technician or network engineer.

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.<sup>1</sup>

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, to have a gross annual income of \$662,255. The petitioner did not list its current number of employees on the Form I-140 even though that information was requested. According to the tax returns in the record, the petitioner's fiscal year runs from March 1 to the end of February. On the Form ETA 750B, signed by the beneficiary on July 15, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'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. The petitioner did submit, however, W-2 Forms which show wages paid to the beneficiary as follows:

- 2004 - \$1,732.53
- 2005 - not submitted
- 2006 - not submitted
- 2007 - not submitted

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<sup>1</sup> 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).

- 2008 - \$34,400
- 2009 - \$38,400<sup>2</sup>

The W-2 Form shows wages paid which exceed the proffered wage in 2009, which would be prima facie proof of the petitioner's ability to pay in that year upon resolution of the issues noted in footnote 2. In 2004 and 2008 the petitioner is required to show the ability to pay the difference between the proffered wage and wages paid to the beneficiary similarly upon resolution of the issues in footnote 2. Those sums are set forth below. In all other relevant years the petitioner is required to show the ability to pay the full proffered wage of \$36,200.

- 2004 - \$34,457.47
- 2008 - \$1,800

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 (1<sup>st</sup> 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and

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<sup>2</sup> The record contains conflicting information regarding the beneficiary's employment with the petitioner. On two Forms G-325A submitted with two separate Forms I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary did not state any employment with the petitioner although those forms were dated April 29, 2011, and the prior form August 3, 2007. The failure to list the beneficiary's employment with the petitioner raises doubts regarding the credibility of the evidence submitted. Additionally, the beneficiary's name appears last on state work force Quarterly Reports without a listed social security number like other employees. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In any further filings, the petitioner would need to submit evidence from an official source that these earnings are accurate, such as IRS certified W-2 statements and/or state certified quarterly tax returns.

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 February 17, 2010 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 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003 through 2008, with the exception of the 2004 tax year for which a tax return was not provided, as shown in the table below.

- In 2003, the Form 1120 stated net income of (\$2,191).<sup>3</sup>
- The petitioner did not provide a copy of its 2004 tax return even though a copy was requested by the director in a Request For Evidence.<sup>4</sup>
- In 2005, the Form 1120 stated net income of (\$1,410).
- In 2006, the Form 1120 stated net income of (\$1,781).
- In 2007, the Form 1120 stated net income of \$0.
- In 2008, the Form 1120 stated net income of \$0.

Therefore, for the years 2003, 2005, 2006, 2007 and 2008, the petitioner's tax returns do not state sufficient net income to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary. The petitioner did not demonstrate sufficient net income to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary in 2004 as it failed to provide a copy of its 2004 tax return, as stated above. While the petitioner did not submit a copy of its 2009 tax return, the 2009 W-2 Form submitted would provide prima facie proof of the petitioner's ability to pay the proffered wage in 2009 as the W-2 Form states wages paid to the beneficiary which exceed the proffered wage if the petitioner is able to resolve the discrepancies outlined above.

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.<sup>5</sup> 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 2003 through 2008, with the exception of tax year 2004 for which no tax return was provided, as shown in the table below.

- In 2003, the Form 1120 stated net current assets of (\$20,970).<sup>6</sup>

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<sup>3</sup> The 2003 tax return is for a year which precedes the July 27, 2004 priority date and will only be considered in a totality of the circumstances analysis.

<sup>4</sup> The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>6</sup> The 2003 tax return is for a year which precedes the July 27, 2004 priority date and will only be considered in a totality of the circumstances analysis.

- The petitioner did not provide a copy of its 2004 tax return even though a copy was requested by the director in a Request For Evidence.
- In 2005, the Form 1120 stated net current assets of (\$25,702).
- In 2006, the Form 1120 stated net current assets of (\$30,980).
- In 2007, the Form 1120 stated net current assets of (\$12,209).
- In 2008, the Form 1120 stated net current assets of (\$9,583).

Therefore, for the years 2003, 2005, 2006, 2007 and 2008, the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary. The petitioner did not demonstrate sufficient net current assets to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary in 2004 as it failed to provide a copy of its 2004 tax return, as stated above. While the petitioner did not submit a copy of its 2009 tax return, the 2009 W-2 Form submitted would provide prima facie proof of the petitioner's ability to pay the proffered wage in 2009 as the W-2 Form states wages paid to the beneficiary which exceed the proffered wage upon resolution of the discrepancies above.

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, or the difference between the proffered wage and wages paid to the beneficiary, as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Again, as noted above, the petitioner would be able to demonstrate its ability to pay the proffered wage in 2009 only based upon a W-2 Form which stated wages paid to the beneficiary which exceed the proffered wage if it can resolve the issues outlined above.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage, or the difference between wages paid to the beneficiary and the proffered wage, from the priority date based upon the totality of circumstances in the case.

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.

The petitioner submitted copies of a shareholder's personal tax returns for the years 2003, 2004, 2005, 2006, 2007 and 2008 in support of its assertion that has maintained the ability to pay the proffered wage from the priority date onward. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner asserts that it could have used officer compensation paid to its officers to pay the beneficiary's proffered wage. The shareholders of a corporation have 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, in certain circumstances, be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. In this instance, however, the petitioner did not submit a sworn statement from its officer[s] indicating a willingness to forego all or a portion of officer compensation paid in order to pay the proffered wage. Further, the petitioner did not submit a list of personal living expenses for any officer receiving officer compensation which would establish that any such officer had the ability to forego officer compensation and still meet his or her personal financial obligations. Under these circumstances, the officer compensation paid to the petitioner's officers may not be considered as additional sums with which to pay the proffered wage. As the petitioner's tax returns reflect \$0 or negative net income in each year, and negative net current assets, the petitioner would need to rely wholly on officer compensation for 2005, 2006 and 2007.<sup>7</sup> The AAO cannot conclude that is reasonable. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

It is noted that the petitioner relies upon a non-precedent decision of the AAO (LIN 02 216 52949) in support of its theory of the case and the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of United States Citizenship and Immigration Services (USCIS), formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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

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<sup>7</sup> Additionally, as the petitioner failed to submit a tax return for 2004 as requested by the director and as noted above, the petitioner may not rely on officer compensation claims in the absence of required regulatory evidence.

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 tax returns demonstrate negative or zero net income and negative net current assets 2003 through 2008 (tax returns for 2004 were not provided). The petitioner's gross receipts decreased by almost one-half from 2003 to 2008. The petitioner has not provided evidence of increased financial strength, growth or profitability from the priority date onward. The record does not establish that the petitioner's reputation in the community is such that it is more likely than not that it has maintained the continuing ability to pay the proffered wage from the priority date onward. 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.

Beyond the decision of the director, the petition may not be approved because the evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. 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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on July 26, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The AAO conducts appellate review on a *de novo* basis. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>8</sup>

<sup>8</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the beneficiary must have one year of experience in the proffered position or one year of experience as a service technician, network technician or network engineer. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Further, the record does not establish that the beneficiary has the required experience noted on the labor certification (one year of experience in the proffered position of field service engineer, or one year of experience as a service technician, network technician or network engineer). The petitioner submitted a letter from the Department Chair-Mathematics at Houston Community College - Central Campus which states that the beneficiary worked as a network administrator from January 2002 to August 2002 and as a computer technician from February 1997 to February 1998.<sup>9</sup> This information conflicts with experience attested to by the beneficiary on the Form ETA 750 which states that the beneficiary worked as a research assistant for the University of Houston from August 2001 to December 2003. The letter is further in conflict with a Form G-325A signed by the beneficiary on February 12, 2005 under penalty of law which states that he worked as a teaching assistant at the University of Houston from 2002 through the date of signature, and the second Form G-325A signed by the beneficiary on April 29, 2011, which states that he worked for the University of Houston from August 2002 to December 2009 as a "Research Assistant/Faculty." This letter is additionally in conflict with a letter dated February 2, 2010 from the University of Houston, Department of Engineering Business Administrator states that the beneficiary worked as a research assistant 20

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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).

<sup>9</sup> As the beneficiary's Form ETA 750B shows that he was a student at from January 1996 to August 1999, and from January 2002 to December 2003, it is unclear that this experience was full-time. Additionally, this experience was not listed on the Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

hours per week from August 1, 2002 until he graduated in May 2005. A second letter states that he was a Research Assistant for the University of Houston from September 1, 2002 to May 4, 2006. A third letter is dated August 22, 2003 and merely states that he was a Research Assistant for the University of Houston as of that date. The petitioner must resolve the conflicts in claimed experience in any future filings. 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). Based on the conflicts set forth above, the evidence does not establish that the beneficiary has the experience required for the position offered.

Accordingly, 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.