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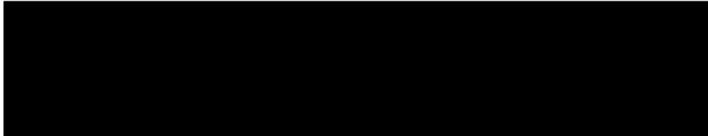
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



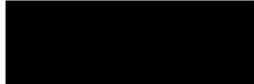
U.S. Citizenship
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Date: **MAR 09 2012**

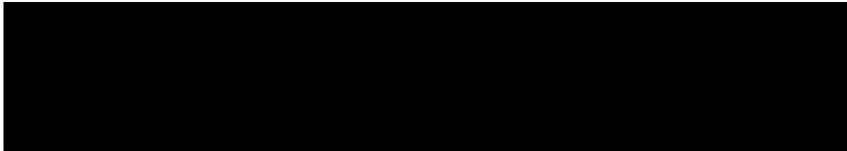
Office: TEXAS SERVICE CENTER

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen, which was denied by the director on February 25, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the AAO affirms the director's denial.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian Specialty Cook. As required by statute, the petition is accompanied by an 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 and that the beneficiary did not satisfy the minimum level of experience stated on the ETA Form 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 30, 2008 denial, the issues in this case are whether 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 beneficiary satisfied the job requirements stated on the ETA Form 9089.

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.

Successor in Interest is not established

On November 16, 2011, the AAO issued a Request for Evidence (RFE) notifying the petitioner that the record contains a 2009 tax return for [REDACTED] with a Federal Employer Identification Number [REDACTED] which is different from the original petitioner [REDACTED]. The AAO asked the petitioner to explain the relationship between the two entities and, if the petitioner is claiming that [REDACTED] is a successor-in-interest to the petitioner, to submit evidence of this successorship.

In response to the RFE, the petitioner submitted a Lease Modification and Extension Agreement; an Application for Liquidators Permit; and an Application for Retail Permit. The petitioner did not submit a bill of sale or agreement of sale. Counsel also submitted the petitioner's 2009 tax return indicating that it had zero revenue in that year. Accordingly, the original petitioner appears to have ceased doing business.

Only a U.S. employer desiring and intending to employ the beneficiary may maintain an immigrant petition for the instant classification. 8 C.F.R. § 204.5(c). Therefore, if a petitioner terminates its business and no longer plans to employ the beneficiary, the petition and appeal before this office have become moot. See 8 C.F.R. § 205.1(a)(iii)(D) (a petition approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case). A labor certification is only valid for the particular job opportunity certified therein. 20 C.F.R. § 656.30(c)(2). Therefore, the only way for a petitioner to support a Form I-140 with a labor certification approved for a different employer, including one that has ceased conducting business, is for that employer to establish that it is a successor-in-interest to the original employer.

A claimed successor may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986) (*Matter of Dial Auto*). Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. See *Matter of International Contractors, Inc.*, 89-INA-278 (BALCA Jun. 13, 1990). Third, the petitioning successor must prove that it is eligible for the immigrant visa in all respects. See 8 C.F.R. § 204.5(l)(3). The burden is on the petitioner to establish each of the three elements by a preponderance of the evidence. See 8 U.S.C. § 1361; see also *Matter of Chawathe*, 25 I&N Dec. 369, 374-76 (AAO 2010).

Evidence of transfer of ownership must show that the successor not only acquired assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482; see also *Matter of Horizon Science Academy*, 2006-INA-46 (BALCA Mar. 8, 2007).

In order to establish eligibility for the immigrant visa in all respects, the petitioning successor must support its claim with all necessary evidence, including evidence of ability to pay to the proffered wage. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has failed to establish a valid successor relationship for immigration purposes. The evidence fails to establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business. The only documents in the record pertaining to successorship are a Lease Modification and Extension Agreement; an Application for Liquidators Permit; and an Application for Retail

Permit. These documents show only the modification of lease obligations and the transfer of alcohol stock and sales authority. The record does not establish that any of the assets or obligations necessary to the business have been transferred, e.g., inventory (other than alcohol), equipment, goodwill, employee obligations, or food service contracts.

Therefore, as [REDACTED] has not been established to be a successor-in-interest, and the original petitioner is out-of-business, the petition and appeal before the AAO are moot. There is no intention or desire by the original petitioner to employ the beneficiary, and the labor certification is not valid for a job opportunity made by a different employer for a different business. The AAO will dismiss the appeal for this reason. 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).

Ability to Pay the Proffered Wage has not been established

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on January 5, 2007. The proffered wage as stated on the ETA Form 9089 is \$12.85 per hour (\$26,728 per year).

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

As noted above, it has not been established that [REDACTED] is a bona fide successor-in-interest to the original petitioner. Therefore, the tax returns and financial strength of the purported successor is not relevant to evaluating the original petitioner's ability to pay the proffered wage. In fact, the petitioner in this matter, [REDACTED], is out-of-business and had zero receipts in 2009, the most recent year for which tax returns were submitted for that entity. Nevertheless, even assuming that [REDACTED] were a successor-in-interest entitled to maintain the instant petition, the record also does not establish that this alleged successor could have paid the proffered wage to the beneficiary.

The evidence in the record of proceeding shows that the petitioner was structured as an S corporation in 2007 and 2008. The alleged successor was structured as a C corporation in 2009 and 2010. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$1,546,716, and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year was based on a calendar year while its alleged successor's fiscal year runs from March 1 to February 28. On the ETA Form 9089, signed by the beneficiary on March 13, 2007, the beneficiary did not claim to have worked for the petitioner as of the date that the ETA Form 9089 was signed.²

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The record contains the beneficiary's Forms W-2 for 2008 through 2010 showing compensation received from [REDACTED]. [REDACTED] states that the restaurant's owner, [REDACTED] "is the owner and or manager of a number of restaurants." Since the restaurant and [REDACTED] are allegedly owned by [REDACTED] it is argued that the wages paid to the beneficiary by [REDACTED] should be considered in determining the petitioner's ability to pay the proffered wage. However, because a corporation is a separate and distinct legal entity from its owners and

² It is claimed that the beneficiary began working for the restaurant in 2008.

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'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record is devoid of evidence that the beneficiary's wages originated with the petitioner or its alleged successor-in-interest before being paid by [REDACTED]. Therefore, the AAO will not consider the Forms W-2 as evidence of the petitioner's or the alleged successor's ability to pay the proffered wage.

If, as in this case, the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the required 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 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).

The record before the director closed on October 24, 2008 with the receipt by the director of the petitioner’s motion to reopen (MTR). As of that date, the petitioner’s 2007 federal income tax return was the most recent return available.³ On appeal, the petitioner submitted its or its alleged successor’s 2007 through 2010 tax returns which will be considered in this decision for sake of argument. *See supra*. The original petitioner’s tax returns for 2007 and 2008 were filed as an S corporation.⁴ The alleged successor-in-interest’s tax returns for 2009 and 2010 were filed as a C corporation.⁵

The tax returns show net income as detailed in the table below:

Year	Net Income
2010 (March 1, 2010 to February 28, 2011)	\$9,392
2009 (March 1, 2009 to February 28, 2010)	\$22,391
2008 (January 1, 2008 to December 31, 2008)	-\$63,209
2007 (January 1, 2007 to December 31, 2007)	\$22,203

³ The original petitioner’s FEIN is listed inconsistently in the various documents. The Form I-140 lists the FEIN as [REDACTED]. The tax returns list the FEIN as [REDACTED]. Counsel submitted independent, objective evidence in response to the AAO’s RFE clarifying that the petitioner’s FEIN is [REDACTED].

⁴ 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 18 of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 9, 2011) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

⁵ 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.

It has not been established that either corporation had sufficient net income to pay the full proffered wage for each of the relevant years. Furthermore, the record does not contain any tax return covering the period January 1, 2009 to February 28, 2009. Therefore, USCIS will review net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 tax returns demonstrate end-of-year net current assets as shown in the following table.

Year	Net Current Assets
2010 (March 1, 2010 to February 28, 2011)	\$19,635
2009 (March 1, 2009 to February 28, 2010)	-\$10,329
2008 (January 1, 2008 to December 31, 2008)	\$42,555
2007 (January 1, 2007 to December 31, 2007)	Schedule L Not Accepted ⁷

The petitioner's and its alleged successor's net current assets were insufficient to pay the proffered wage in 2007, 2009, and 2010. Furthermore, as noted above, the record does not contain any evidence for the period from January 1, 2009 to February 28, 2009. 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)).

⁶ According 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.

⁷ The Form I-140 was filed on March 29, 2007, and the petitioner submitted a copy of its 2007 tax return with the initial filing. On December 30, 2011, counsel submitted another copy of the petitioner's 2007 tax return in response to the AAO's RFE. The AAO notes that the Schedules L of both tax returns contain different amounts in sections 1, 15, 16, 20, 23, and 27. Therefore, the AAO will not accept the petitioner's 2007 tax return. Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

Since the petitioner has not established that it or the alleged successor had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612.

The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *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.

While the petitioner has been in business since 1997, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Unlike *Sonogawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The tax returns in the record contain material inconsistencies and do not account for the entire time period in question, thus undermining the credibility of all the financial evidence in the record. The original petitioner is out-of-business, and a successor-in-interest relationship has not been established. 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.

Beneficiary Qualifications has not been established

The final issue is whether the petitioner has established that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date.

The petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, section H, items 4 through 14, set forth the minimum education, training, and experience that an applicant must have for the proffered position. Here, section H, items 4 through 14, indicates that the position requires 24 months experience in the job offered. On the ETA Form 9089, the "job duties" for an Indian Specialty Cook are "Prepare and cook Indian style lunches, dinners and desserts."

At sections J, K and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification," the beneficiary stated that he worked for Soaltee Crowne Plaza Kathmandu in the proffered position from January 2003 through April 2006. The beneficiary did not list any other work experience or additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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 initial evidence included an employment letter from the [REDACTED]. The letter was dated April 20, 2006 and was signed by [REDACTED]. The letter states that the beneficiary worked as an "Indian Cook" but failed to provide a detailed description of the duties performed by the beneficiary.

In an RFE dated August 13, 2008, the director requested evidence that the beneficiary obtained the required two years of experience in the job offered before the priority date. The director noted that evidence of experience must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

In response to the director's RFE, the petitioner submitted another letter from the [REDACTED] dated August 24, 2008. Although this letter described the beneficiary's claimed duties as a cook, it was inconsistent with the first letter. First, the name of the author has changed from [REDACTED]. Second, the signature is different, and the title was misspelled as "Personal Manager."

On appeal, the petitioner submitted a third letter from [REDACTED] dated October 21, 2008. This letter indicates that [REDACTED] name, being a Nepalese name, can be spelled either [REDACTED]. The letter also indicates that the title "personal manager" was a typographical error which can be attributed to a clerical employee having limited English skills. Next, the letter claims that the signatures on both previous letters belong to [REDACTED] however, the letter concedes that the signature "changed" in April 2006. The author does not attempt to explain how or why the signatures are different. It is noted that the signature on the October 21, 2008 letter matches the earlier, vague letter from April 20, 2006, and not the later August 24, 2008 letter. If the signatures indeed "changed" in April 2006, the signatures from the October and August 2008 letters should match, but they do not. Accordingly, the August 24, 2008 letter -- the letter containing the description of the beneficiary's job duties -- does not appear to be genuine.

In response to the AAO's RFE, the petitioner submitted a 4th letter from the [REDACTED] dated December 7, 2011, this time by [REDACTED]. This letter indicates that the beneficiary worked first as a steward for the hotel before being promoted to a cook position in January 2003. However, this letter does not describe the beneficiary's duties as a cook for the hotel and does not address the many inconsistencies in the previous letters from the [REDACTED]. Counsel also submitted various letters and awards related to the beneficiary's claimed employment at the [REDACTED]. However, this evidence all predates the period of employment as a cook claimed to qualify the beneficiary for the proffered position and is of scant evidentiary value.

Based on the numerous inconsistencies in the record, the AAO concludes that the beneficiary's work experience letters do not provide independent, objective evidence of his prior claimed 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).

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

In addition to the deficiencies and inconsistencies in the various experience letters in the record, the beneficiary's claimed employment as a cook from January 2003 to April 2006 is inconsistent with other evidence in the record. First, as noted by the director, the beneficiary failed to list his employment with [REDACTED] on the Form G-325A, Biographic Information, signed on July 2, 2007, even though this form directed the beneficiary to list his last occupation abroad. Second, as noted in the AAO's RFE, the beneficiary appears to have claimed to be working as a "steward," and not as a cook, as late as May 2006 when he traveled to work in the United States under an approved Form I-129 petition as a temporary non-agricultural worker. Third, the beneficiary claimed in the Form G-325A to have lived from the year of his birth until May 2006 at [REDACTED]. As noted in the AAO's RFE, it appears that Okhaldhunga is approximately 78 miles flight distance from [REDACTED] and a considerably longer trip by bus or car. See http://www.howmanyhours.com/flight_distance/Kathmandu/Okhaldhunga.php (accessed on November 1, 2011).

Counsel states that the beneficiary worked as an assistant steward and then as a senior steward for several years. However, the beneficiary was given the opportunity to become a cook before 2003. This caused a misunderstanding by the beneficiary's prior attorneys who only indentified his steward position. Moreover, the beneficiary's prior counsel failed to state the beneficiary was employed as a cook on the Form G-325A. Although the petitioner claims that its counsel was incompetent in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the documents or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Finally, counsel's claim that the beneficiary listed his home village, [REDACTED] as his residence on the Form G-325A until May 2006, instead of the "various remote locations" in [REDACTED] at which he allegedly lived while working for the [REDACTED] from 2003 to 2006, has not been resolved by independent, objective evidence. The petitioner submitted an affidavit from the beneficiary. However, the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Based on the above, the record does not establish that it is more likely than not that the beneficiary worked for at least two years as a cook at the [REDACTED]. The various letters in the record are inconsistent with one another, and the one letter which describes the beneficiary's work duties abroad appears not to be genuine. Moreover, the beneficiary's claimed employment in Nepal is inconsistent with residential and employment claims on the Form G-325A and with representations he has made in conjunction with other immigration proceedings.

The record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In addition, the evidence submitted does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

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.