

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

[REDACTED]

by

Date: **MAY 10 2012** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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 with the field office or service center that originally decided your case by filing a 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 on May 24, 2011. On June 27, 2011 the petitioner filed a motion to reopen and reconsider the director's decision. That motion was denied on February 3, 2012. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a ceramic tile setter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's February 3, 2012 and May 24, 2011 denials, 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 beneficiary had the required two years of experience as a ceramic tile setter as of the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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 the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on February 6, 2008. The proffered wage as stated on the ETA Form 9089 is \$44,000 per year. The ETA Form 9089 states that the position requires two years of experience in the proffered position.

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 1996 and to currently employ no workers.² According to the tax returns in the record, the petitioner's fiscal year is based on a

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).

²The fact that the petitioner states that it employs no workers calls into question that the petitioner has full-time bona fide employment available for the beneficiary from the priority date onward, or that the petitioner will be the beneficiary's actual employer. The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo. Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity

calendar year. On the ETA Form 9089, signed by the beneficiary on December 13, 2007, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2008 or subsequently. The petitioner, however, submitted copies of Forms 1099 showing nonemployee compensation³ paid to the beneficiary as follows:

- 2008 - \$1,865⁴
- 2009 - \$21,505
- 2010 - \$22,886

Thus, it will be necessary for the petitioner to establish the ability to pay the difference between the proffered wage (\$44,000) and the nonemployee compensation paid to the beneficiary in those years. Those sums are:

Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

³ The director's RFE requested that the petitioner submit any W-2 Forms for the beneficiary. From the record, it is unclear why the petitioner did not submit the Forms 1099 earlier.

⁴ The petitioner submitted copies of Forms 1099 from other payers with different tax identification numbers showing nonemployee compensation paid to the beneficiary in 2008, 2009 and 2010. The compensation paid to the beneficiary from other payers with different tax identification numbers is unrelated to these proceedings and will not be considered in an analysis of the petitioner's ability to pay the proffered wage.

- 2008 - \$42,135
- 2009 - \$22,495
- 2010 - \$21,114

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

tangible asset is a "real" expense.

River Street Donuts 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 April 22, 2011 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 2011 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2010 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2007⁵ through 2010, as shown in the table below.

- In 2007, the Form 1120S stated net income⁶ of (\$11,394).
- In 2008, the Form 1120S stated net income of \$1,549.
- In 2009, the Form 1120S stated net income of \$53,365.
- In a March 22, 2011 Request for Evidence (RFE), the director specifically asked the petitioner to provide a copy of its 2010 tax return. In response to the RFE, the petitioner stated that the 2010 tax return was not available as an extension of time to file the return had been requested from the Internal Revenue Service (IRS). The petitioner did not subsequently submit a copy of the return with its motion to reopen and reconsider or on appeal from the denial of that motion when the return should have been available.

Therefore, for the years 2007 and 2008, the petitioner’s tax returns did not state sufficient net income to pay the proffered wage or the difference between the proffered wage and nonemployee compensation paid to the beneficiary. The petitioner’s 2009 tax return does state sufficient net income alone to pay the full proffered wage. Since the petitioner did not submit a copy of its 2010 tax return, the ability to pay based on the petitioner’s net income in 2010 has not been established.

⁵ The 2007 tax return predates the priority date. Thus, the information provided on that tax return will be considered only generally in analyzing the petitioner’s ability to pay the proffered wage under the totality of circumstances.

⁶ 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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 8, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its Schedules K, the petitioner’s net income is found on page one line 21 of its tax returns.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007 through 2009, as shown in the table below.

- In 2007 (before the 2008 priority date), the Form 1120S stated net current assets of \$2,932.
- In 2008, the Form 1120S stated net current assets of (\$130,706).
- In 2009, the Form 1120S stated net current assets of (\$107,376).
- As noted above, the petitioner's 2010 tax return was not provided.

Therefore, for the years 2007, 2008 and 2009, the petitioner's tax returns did not state sufficient net current assets to pay the proffered wage or the difference between the proffered wage and nonemployee compensation paid to the beneficiary.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary 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 except for the year 2009.

Counsel asserts on appeal that the petitioner has the ability to pay the proffered wage and that the record establishes that the beneficiary had two years of experience in the proffered position as of the priority date.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL continuing onward.

Counsel submitted copies of unaudited financial statements in support of the petitioner's ability to pay the proffered wage for the year ending December 2007; January through May 2008; January through December 2010; and a "Balance Sheet" as of April 13, 2011. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage,

⁷According 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.

those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.⁸

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 showed the inability to pay the proffered wage, or difference between compensation paid to the beneficiary and the full proffered wage in all relevant years except for 2009. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date onward. The record does not show that the petitioner suffered any unusual occurrences which adversely affected its financial position during relevant periods. Nor does the record show that the petitioner has a history of sustained growth and profitability. The petitioner's president stated in a letter dated April 6, 2009 that the petitioner had gross revenues in excess of \$2,000,000. None of the tax returns submitted verify this number. The tax returns submitted for years 2007 through 2009 show that the petitioner's highest gross revenue was less than one-half that amount in 2008. Gross revenues then dropped to \$628,013 in 2009. The petitioner states that it employs "0" workers on Form I-140. The petitioner's 2008 tax return shows no wages or cost of labor paid. It is incumbent on the petitioner to resolve any inconsistencies in the record by

⁸ As the petitioner submitted its 2007 and 2008 tax returns, the petitioner's financial information contained in its tax returns has been considered above.

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).⁹ 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.¹⁰

The petitioner has also failed to establish that the beneficiary had two years of experience in the proffered position as of the priority date.

The regulation at 8 C.F.R. § 204.5(I)(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 beneficiary attested to the following employment on the ETA Form 9089:

- [REDACTED] - October 19, 2007 – February 22, 2008; 20 hours per week.
- [REDACTED] - October 5, 2006 – February 22, 2008; 20 hours per week.
- [REDACTED] - January 10, 2003 – May 16, 2007; 40 hours per week.

The experience letters submitted by the petitioner did not provide detailed employment dates showing that the beneficiary had accumulated two years of full-time experience in the proffered position by the priority date. The letters, in fact, offered conflicting information about the beneficiary's employment. For example, the petitioner submitted a letter stating that the beneficiary had been employed by it from

⁹ 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)).

¹⁰ On appeal, counsel states in Part 2 section B of the Form I-290B that he will submit an additional brief to the AAO within 30 days. However, as of the date of this decision, the AAO has not received counsel's brief or any additional evidence.

February 2004 until the date of the letter (April 1, 2009). On the ETA Form 9089, however, signed by the beneficiary on December 13, 2007 under penalty of perjury, the beneficiary did not claim to have been previously employed by the petitioner.¹¹ The petitioner did not submit any W-2 Forms showing that the beneficiary had ever been employed by it as an employee or before the priority date. The Forms 1099 submitted by the petitioner do not show that the beneficiary even earned nonemployee compensation prior to 2008. The following experience letters were submitted by the petitioner in support of the present petition:

- A letter from [REDACTED] signed by its president and dated March 27, 2009 which states that the beneficiary was contracted to complete flooring installation on about 20 projects

¹¹ Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records. See 20 C.F.R. § 656.17(5)(ii). Here, the petitioner submitted a letter from the petitioner's president dated April 6, 2009 which states that the beneficiary has over five years of experience in the proffered position. In support of that assertion, the petitioner submitted an experience letter dated April 1, 2009 and signed by the petitioner's president which states that the beneficiary was employed by the petitioner as a tile setter from February 2004 to the present (letter date of April 1, 2009). Again, a "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records. 20 C.F.R. § 656.17(5)(ii). Therefore, the experience gained with the petitioner was in the position offered and appears to be substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

“over the past four years” with payment averaging between \$3,000 and \$4,000. The employment period stated in the letter (over the past four years preceding March 27, 2009) are inconsistent with the employment dates attested to by the beneficiary on the ETA Form 9089 (October 5, 2006 through February 22, 2008). The beneficiary also states on the ETA Form 9089 that this experience was part-time.

A second letter from [REDACTED] dated April 18, 2000 states that the beneficiary has been employed as a subcontractor since “August of 2006 to the present.” These dates conflict with the first letter, as well as the dates stated on the ETA Form 9089. 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).

- A letter from [REDACTED] signed by its president and dated April 1, 2009 which states that the beneficiary was employed as a tile setter from February 2004 to the date of signature. This experience may not be considered in establishing that the beneficiary fulfills the experience requirements of the ETA Form 9089 as experience with this employer was not listed on the ETA Form 9089. 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.
- A letter from [REDACTED] dated March 16, 2009 and signed by its operations manager stated that the beneficiary was the lead tile contractor on large projects. The letter does not state whether the experience was full-time or part-time and was not listed on ETA Form 9089. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).
- A letter from [REDACTED], signed by its owner and dated April 1, 2009 which states that the beneficiary had worked for that organization as a contract laborer of flooring systems from February 12, 2004. The dates of employment with this employer conflict with the dates of employment listed for [REDACTED] on the ETA Form 9089 which states that the beneficiary was employed by that organization from January 10, 2003 through May 16, 2007 on a full-time basis. Further, experience with this employer was not listed on the ETA Form 9089. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). A second letter from [REDACTED] dated April 14, 2011 states that the beneficiary “has been an employee since February 12, 2006.” This information conflicts with the first letter, and, again, was not listed on the ETA Form 9089.
- A letter from [REDACTED], signed by its Executive Vice President and dated June 27, 2003 which states that the beneficiary had been employed by it as ceramic tile subcontractor since April 2000. Experience with that employer was not listed on the ETA Form 9089. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976).

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.