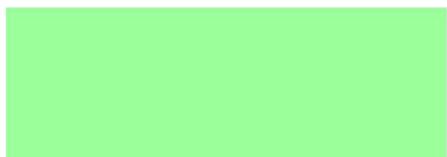




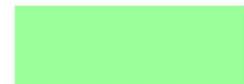
U.S. Citizenship  
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Services

(b)(6)

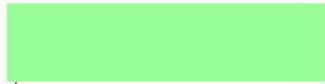


DATE: NOV 30 2012 OFFICE: TEXAS SERVICE CENTER

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 is an interior furnishing supply company. It seeks to employ the beneficiary permanently in the United States as a fixture designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition. 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 also concluded that the beneficiary was not qualified for the offered position. 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 October 29, 2009 denial, the two 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 or not the beneficiary is qualified for the offered position of fixture designer.

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 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 Form ETA 750 was accepted on December 12, 2003. The proffered wage as stated on the Form ETA 750 is \$533.60 per week (\$27,747 per year). The Form ETA 750 states that the position requires three years of experience in the job offered of fixture designer.

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 record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>2</sup> On the petition, the petitioner claimed to have been established in 2001 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on July 11, 2007, the beneficiary did not claim to work for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750 ETA, 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, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *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).

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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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a two member LLC, is treated as a partnership for federal tax purposes.

(b)(6)

In this case, the petitioner has filed one other Immigrant Petition for Alien Worker (Form I-140) for another worker, with a priority date of November 21, 2003 and a proffered wage of \$36,296 per year. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*; *see also* 8 C.F.R. § 204.5(g)(2).

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, there is no evidence that the beneficiary has worked for the petitioner.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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).

The record before the director closed on July 29, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s Notice of Intent to Deny (NOID). As of that date, the petitioner’s 2008 federal income tax return was the most recent return available. The petitioner’s tax returns stated its net income as detailed in the table below.

- In 2003, the petitioner’s Form 1065 stated net income of \$11,600.<sup>3</sup>
- In 2004, the petitioner’s Form 1065 stated net income of \$6,577.
- In 2005, the petitioner’s Form 1065 stated net income of \$13,711.
- In 2006, the petitioner’s Form 1065 stated net income of \$64,762.
- In 2007, the petitioner’s Form 1065 stated net income of \$55,726.
- In 2008, the petitioner’s Form 1065 stated net income of \$66,437.

Therefore, for the years 2003, 2004, 2005 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$27,747, plus the proffered wage of \$36,296 for the additional Form I-140, which totals \$64,043.

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<sup>3</sup> For an LLC taxed as a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner’s Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed October 5, 2012) (indicating that Schedule K is a summary schedule of all partners’ shares of the partnership’s income, deductions, credits, etc.). In the instant case, the petitioner’s Schedule K for the years 2003 through 2008 has relevant entries for additional income credits, deductions and/or other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2003 through 2008 tax returns.

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>4</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

- In 2003, the petitioner's Form 1065 stated net current assets of \$41,213.
- In 2004, the petitioner's Form 1065 stated net current assets of \$40,978.
- In 2005, the petitioner's Form 1065 stated net current assets of \$31,927.
- In 2007, the petitioner's Form 1065 stated net current assets of \$41,578.

Therefore, for the years 2003, 2004, 2005 and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage for both beneficiaries.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, when the petitioner's additional I-140 is considered.

On appeal, counsel asserts that nothing in the regulations stipulates that, if the petitioner has filed more than one petition, the additional petition must be factored into the ability to pay analysis. Counsel also asserts that the beneficiary will be replacing subcontractors whose wages should be considered. Counsel also asserts that the beneficiary's employment will generate additional income for the petitioner. Finally, counsel states that the ability to pay analysis should place more weight on the petitioner's ability in later years because they more accurately reflect the company's financial strength.

As explained above, a petitioner must demonstrate that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. In this case, the one other petition filed by the

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<sup>4</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.

petitioner was filed before the instant petition and has an earlier priority date. It was approved, and USCIS records show that its approval has not been revoked. USCIS records also show that the beneficiary of the other petition has not yet become a lawful permanent resident. The petitioner's prior obligation to pay the beneficiary of the other petition is a relevant factor in determining whether the petitioner's job offer in this case is realistic.

Counsel advises that the beneficiary will replace subcontractors. The record does not, however, name these workers, state their wages, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the subcontractors involved the same duties as those set forth in the Form ETA 750. If the subcontractors performed other kinds of work, then the beneficiary could not have replaced the subcontractors.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of his assertion the AAO should consider that the beneficiary's proposed employment will increase the petitioner's income. Although part of this decision in *Masonry Masters, Inc.* mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.<sup>5</sup> Further, in this case, no detail or documentation has been provided to explain how the beneficiary's employment as a fixture designer will significantly increase profits for an interior furnishing supplier. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel's assertion that the petitioner's tax returns from more recent years should be given more weight than its earlier returns is not persuasive. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner establish its ability to pay at the time the priority date is established. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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.

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

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<sup>5</sup> Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner had been in business for just over two years when it filed the Form ETA 750. At the time the petition was filed, the petitioner claimed to have only one worker. The tax returns in the record show that the petitioner's gross sales have increased over the years, however, that fact alone does not outweigh the number of years where the petitioner's net income and net current assets were less than the proffered wages offered to the beneficiaries of the two petitions filed by the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director's decision also concluded that the beneficiary was not qualified for the position of fixture designer at the time of the priority date. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany* at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden*

*Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the minimum requirement of three years of experience as a fixture designer. The labor certification also states that the beneficiary qualifies for the offered position based on her experience as a fixture designer with [REDACTED] in Argentina from May 1996 until March 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.<sup>6</sup>

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains an experience letter (and English translation) from [REDACTED], President, on [REDACTED] letterhead stating that the company employed the beneficiary as an interior fixture designer from May 1996 until June 1999.<sup>7</sup>

In the NOID, the director questioned the discrepancy in the dates of employment listed on the labor certification and the dates of employment stated in the letter from [REDACTED]. The director also noted that the dates of employment stated on the labor certification result in less than three years of experience. The NOID informed the petitioner that a previous labor certification filed on with the DOL on October 16, 2002 on behalf of the beneficiary did not list the employer [REDACTED].<sup>8</sup>

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<sup>6</sup> This petition involves the substitution of the labor certification beneficiary. For this reason, the petitioner submitted a Form ETA 750B with the instant beneficiary's information to USCIS in support of the petition. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>7</sup> The AAO notes that the original Spanish language letter specifies that the beneficiary worked from May 1, 1996 until June 1, 1999. The English translation omits the day of month.

<sup>8</sup> The same attorney filed both the previous and the instant Form ETA 750 with the DOL.

(b)(6)

Instead, the previous labor certification stated that the beneficiary worked for [REDACTED]'s Argentina from November 1991 to May 1997 and this time period overlaps the time when the beneficiary claims to have worked for [REDACTED]. A letter from [REDACTED]'s Argentina stating that the beneficiary worked full-time from November 25, 1991 until May 10, 1997 is also in the record for the previously filed petition. Finally, the NOID pointed out numerous statements in the petitioner's cover letter that conflicted with the evidence of the beneficiary's experience.<sup>9</sup>

The NOID informed the petitioner that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

In response to the NOID, the petitioner explained the discrepancies in the cover letter were due to counsel's use of a template and his failure to update all areas with the instant petitioner and beneficiary's information. Additionally, the discrepancies in the dates of employment listed on the Form ETA 750B were due to as a typographical error and the correct dates were stated in the letter from [REDACTED]. Finally, the petitioner stated there was not a conflict in the beneficiary's employment with [REDACTED]'s Argentina and [REDACTED]. The petitioner submitted an affidavit from the beneficiary which explained that her position with [REDACTED]'s necessitated her working at night because she visited stores that were open either until midnight or 24 hours. At the same time she worked for [REDACTED]'s, the beneficiary was studying interior design. Once she finished her interior design studies, she commenced working with [REDACTED] in May 1996 during "normal" business hours. At that time, she began to only work part-time for [REDACTED]'s until May 10, 2007.

The director was not persuaded by the claim that the dates listed on the Form ETA 750B were a typographical error because the petitioner did not submit independent objective evidence of the beneficiary's dates of employment with [REDACTED]. The director was also not persuaded by the affidavit from the beneficiary regarding her part-time employment with [REDACTED]'s because it was not consistent with the information stated in the previous labor certification and the previous letter of experience from [REDACTED]'s Argentina.

On appeal, the petitioner reiterates the explanations provided to the director in response to the NOIR. In support of the petitioner's explanation of the beneficiary's part-time employment with [REDACTED]'s Argentina, the petitioner submitted a letter dated July 27, 2009 from [REDACTED], Director of Purchasing and Distribution, [REDACTED] and an English translation. In the letter, Mr. [REDACTED] states that the beneficiary worked for [REDACTED]'s Argentina from November 25, 1991 to May 10, 1997, and that "[u]ntil April 1996 she was employed full time and in the last

<sup>9</sup> For example, the cover letter referred to the female beneficiary stating that "he worked as a Ventilated Wall Tiles installation supervisor from January 7, 2002 to January 15, 2005 for [REDACTED] in Italy."

year in the company, she worked part-time covering 20 hours per week . . . without salary.” The letter from Mr. [REDACTED] is on letterhead with the [REDACTED]’s logo, and an address in [REDACTED] Uruguay. In the letter, Mr. [REDACTED] does not state how he, as the Director of Purchasing and Distribution in [REDACTED] Uruguay, has knowledge of the beneficiary’s dates of employment in the marketing department in [REDACTED] Argentina. In contrast, the previous letter of employment is from [REDACTED], Director of Human Resources for [REDACTED] Argentina. The letter from [REDACTED] states that the beneficiary “worked full time for me in this company’s marketing department . . . from 11/25/19 to 5/10/97.”

The petitioner’s letter from [REDACTED] submitted on appeal does not clarify the inconsistencies in the beneficiary’s employment history with [REDACTED] and [REDACTED]’s of Argentina stated by the director. Rather, it conflicts the previous letter submitted regarding the beneficiary’s employment with [REDACTED]’s Argentina regarding the length of the beneficiary’s full-time employment. The director correctly noted that any attempt to explain or reconcile inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho* at 591-92.

The petitioner has failed to submit objective evidence to explain the inconsistencies in the record regarding the beneficiary’s employment with [REDACTED] and its overlap with her employment with [REDACTED]’s Argentina. For this reason, it is not clear that the beneficiary possessed the required three years of experience as a fixture designer at the time of the priority date.

The petitioner has failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.