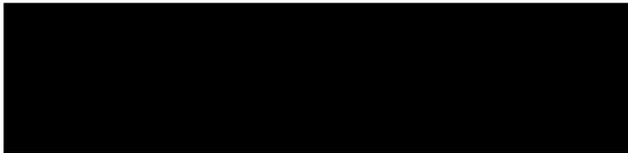




U.S. Citizenship  
and Immigration  
Services



B6

DATE: **NOV - 3 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



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

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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a "Cook-American." As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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 April 22, 2010, denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary has the minimum qualifications for the position offered as required on the labor certification.

#### **Ability to Pay the Proffered Wage**

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 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 October 29, 2007. The proffered wage as stated on the ETA Form 9089 as a range of \$12.52 to \$13.00 per hour (\$26,041.60 to \$27,040.00 per year). The ETA Form 9089 states that the position requires 24 months of experience in the position offered, Cook-American.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ 42 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 19, 2007, the beneficiary did claim to be employed full-time by the petitioner from September 2007 to May 2008.

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 demonstrated that it paid the beneficiary \$6,997.21 in 2007, and \$7,138.89 in 2008, which is \$19,044.39 and \$18,902.61 less than the proffered wage, respectively.<sup>2</sup> Thus, the petitioner must demonstrate that it can pay the

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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> The beneficiary claimed, under penalty of perjury, to be employed full-time by the petitioner on the labor certification. These wages indicate that the beneficiary was in fact employed less than full-time during 2007 and 2008. On appeal, counsel states that the beneficiary's W-2 statements from 2007 and 2008 indicate that the "beneficiary received part-time wages." Counsel does not provide

difference between wages actually paid to the beneficiary and the proffered wage in 2007 and 2008. It must demonstrate that it can pay the full proffered wage from 2009 onward.

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

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any explanation for the discrepancy between the wages paid, and the full-time employment claimed by the beneficiary. This unexplained contradiction, between the beneficiary's attestation on the labor certification, and the wage records provided, casts doubt on the evidence in the record. *Matter of Ho*, 19 I&N Dec. 582, 591 (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.") 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). While the petitioner is not required to employ the beneficiary in the position offered until the beneficiary is granted permanent residence, the beneficiary's prior part-time employment casts doubt on whether the job offered is a *bona fide* job offer for full-time employment.

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 June 9, 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 2007 to 2010, as shown in the table below.

- In 2007, the Form 1120S stated net income<sup>3</sup> of \$8,454.
- In 2008, the Form 1120S stated net income of \$2,197.
- In 2009, the Form 1120S stated net income of \$17,723.
- In 2010, the Form 1120S stated net income of -\$1,984.

Therefore, for the years 2007 and 2008, the petitioner did not have sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage; and for the years 2009 and 2010, the petitioner did not have sufficient net income to pay the full proffered wage.

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<sup>3</sup> 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 October 26, 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 additional deductions shown on its Schedule K for 2007 and 2008, the petitioner’s net income is found on Schedule K of its tax returns for 2007 and 2008 only.

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.<sup>4</sup> 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 to 2010, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of -\$10,640.
- In 2008, the Form 1120S stated net current assets of -\$3,007.
- In 2009, the Form 1120S stated net current assets of \$12,431.
- In 2010, the Form 1120S stated net current assets of -\$5,031.

Therefore, for the years 2007 and 2008, the petitioner did not have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage; and for the years 2009 and 2010, the petitioner did not have sufficient net current assets to pay the full proffered wage.

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.*

Counsel asserts on appeal that the petitioner has only two shareholders, and that the personal income of the petitioner's owners should be considered in analyzing the petitioner's ability to pay the beneficiary's proffered wage. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO will not consider the personal assets of the petitioner's owners, as the petitioner is a corporation. Counsel cites *Ranchito Coletero*, 2002-INA-105 (2004 BALCA), for the premise 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.

overall fiscal circumstances of a sole proprietor may be relevant to its ability to pay the proffered wage. The instant case is distinguishable because [REDACTED] involved a farm owned and operated by a sole proprietor, whereas the instant petitioner is a restaurant owned and operated by a corporation. Counsel incorrectly characterizes the petitioner's shareholders as sole proprietors of the petitioner. Black's Law Dictionary defines "sole proprietorship" as "[a] business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity." *Black's Law Dictionary* 1860 (9th ed. 2009). As noted above, the petitioner is an S corporation with two shareholders, therefore, neither shareholder is a sole proprietor of the petitioner, and [REDACTED] is not directly applicable to the instant petition. Further, counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Consequently, assets of the corporation's shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

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 claims to have been incorporated in 1993, but does not indicate when it actually began operating. Despite its incorporation in 1993, the petitioner did not provide any evidence of its reputation. For the period from 2007 to 2010, the petitioner has reported fluctuating gross receipts and officer compensation, and negative net current assets for three of the four years. The petitioner claims to employ 42 employees, but reported payroll expenses of only \$130,415 in 2007; further, the petitioner's reported payroll expenses decreased each year since 2007.

The beneficiary's W-2 statements provided indicate the beneficiary was only employed part-time, suggesting that the petitioner may not have a full-time cook position available, or the ability to pay for an additional full-time cook. The information provided by the petitioner does not reflect historically increasing sales. The petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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.

### **Beneficiary's Qualifications for the Position Offered**

The director's decision cites an additional ground, indicating that the petitioner had not established that the beneficiary possessed the experience required on the labor certification, 24 months of experience in the position offered, Cook-American, as 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, U.S. Citizenship and Immigration Services (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*, 696 F.2d 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 following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months as a Cook-American.
- H.8. Alternate combination of education and experience: None accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None required.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a "Cook" at [REDACTED] from May 1, 1997, until September 1, 2000. No other prior experience before employment with the petitioner is listed.<sup>5</sup> The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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, dated August 22, 2007, from an unidentified person<sup>6</sup> on [REDACTED] letterhead stating that the company employed the beneficiary as a "cook, specialty, American style" from May 1997 until September 2000. As the director indicated in her decision, this letter fails to meet the regulatory requirements noted above, including that the writer of the letter did not provide their name or title. Further, the letter does not indicate whether the beneficiary's employment was full-time or part-time. Therefore, this letter will not be considered by the AAO as the letter fails to meet the regulatory requirements for an experience letter.

On appeal, the petitioner has provided another experience letter, dated September 15, 2011, and indicated that this letter is written by the same individual as the first. The petitioner provided a copy of the individual's business card as well. The business card is for an executive chef at Tuckers. The letter is on paper which states only [REDACTED] in large print at the top, without an address or other contact information; this letterhead varies markedly from the letterhead utilized in 2007, which used a different font, and provided both an address and telephone number for [REDACTED]. This 2011 letter is hand written, whereas the first letter was type written. On the 2007 letter, the writer signed his name

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<sup>5</sup> 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. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. See 20 C.F.R. § 656.17(h).

<sup>6</sup> The letter provided is signed, however, the writer did not print his or her full name, title, or contact information. Therefore, there is no means by which to accurately identify the writer of the letter.

beginning with [REDACTED] followed by his full first name and what appears to be two letters of the writer's last name. However, the 2011 letter is signed using a shortened version, or nickname, of his first name; in addition, on the second letter, the writer did not include the word [REDACTED] in his signature, and the writer signed with his full last name. Beneath the writer's signature, the restaurant's name and address are handwritten. In this second letter, the writer indicates the beneficiary's title was "Dinner Cook," which is inconsistent with the title previously reported by this writer, "cook, specialty, American style," and the job title claimed by the beneficiary on the labor certification, which was simply "cook." The discrepancies between these two letters, including the manner in which the writer signs his name, and the distinct variance in letterhead between the typed 2007 letter and the handwritten 2011 letter, casts doubt on whether both letters were written by the same individual, and whether either letter is from the purported employer. *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.

For these reasons, the experience letters provided do not appear to be credible. These inconsistencies cast doubt on whether the beneficiary was employed, and if employed, what position the beneficiary held during his purported employment. *Id.* Further, the petitioner has not established that the writer of this letter was the employer; in the 2011 letter, the writer indicates he is an "executive chef" at Tuckers, thus, he appears to be a fellow employee and not the owner or representative of the company. The writer does not provide an explanation of how he is able to attest to the beneficiary's duties, or period of employment. Thus, even if the AAO were to accept the letter as credible, the letter would appear to have been written by fellow employee, and not the employer. Further, the letter does not state whether the beneficiary's employment was full-time or part-time. As noted above, the beneficiary claimed to be employed full-time by the petitioner for a period of time, however, evidence later provided established that the beneficiary was in fact employed only part-time. This casts doubt on whether the beneficiary's claimed employment with Tuckers was part-time or full-time. *Id.* These inconsistencies must be overcome in any further filings. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not provided any other evidence to establish the beneficiary's experience. Therefore, the petitioner has not established that the beneficiary possessed 24 months of experience in the position offered, Cook-American, as required on the labor certification as of the priority date.

The AAO affirms the director's decision that the petitioner 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.

**Conclusion**

In summary, the AAO affirms the director's decision that the petitioner did not demonstrate its *ability to pay the beneficiary's proffered wage from the priority date onward*, and that petitioner 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.

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.