(b)(6)

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

DATE: SEP 0 6 2012 OFFICE: NEBRASKA 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:

SELF REPRESENTED

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, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company which engages in garment cutting and production. It seeks to employ the beneficiary permanently in the United States as a general manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's April 20, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $1,079.60 per week ($56,139.20 per year).

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]

On appeal, the petitioner submits a brief; copies of IRS Form W-2 which were issued to the beneficiary by Pour Le Bebe, Inc. for 1992, 1993, 1994, 1995, 1996, 1997 and 1998; copies of IRS Form W-2 which the petitioner issued to the beneficiary for 1999, 2000 and 2001; a letter dated June 12, 2009 from [redacted] former owner of [redacted] Recruitment Instructions dated February 14, 2007 from the DOL; Recruitment Report Instructions dated April 3, 2007 from the DOL; a Prevailing Wage Request filed by the petitioner with the State of California Employment Development Department; and the certified Prevailing Wage Determination dated March 13, 2007 from the State of California Employment Development Department.

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 currently to employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since April 1998.

On appeal, the petitioner disputes that the proffered wage was $56,139 for all of the years from 2001 through 2008 since it did not receive any correspondence and recruitment directions from the DOL until March 13, 2007. The petitioner also asserts that, as a production company, some years are more productive than others. The petitioner also asserts that it made the argument in response to the director's RFE that it had "the ability to reimburse the beneficiary for the amount that he was short" in the years that the petitioner did not pay the full proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

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[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).

affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 provided copies of IRS Form W-2 which it issued to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The AAO cannot accept the Forms W-2 as evidence of wages paid to the beneficiary. The beneficiary's social security number (SSN) listed on Forms W-2 issued in 2001 through 2006 does not match the SSN listed on Forms W-2 issued in 2007 and 2008. 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). No evidence was submitted to explain this inconsistency.

Therefore, for 2001, through 2007, the petitioner has not demonstrated that it employed and paid the beneficiary an amount equal to or greater than the proffered wage.

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 February 26, 2009 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2001, the Form 1120S stated a net loss[2] of $15,160.00.
- In 2002, the Form 1120S stated net income of $2,379.00.
- In 2003, the Form 1120S stated a net loss of $37,073.00.

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[2] 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 20, 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 Schedule K for any year, the petitioner's net income is found on Line 21 of the first page of it tax returns for all years.

- In 2004, the Form 1120S stated net income of $21,764.00.
- In 2005, the Form 1120S stated net income of $19,307.00.
- In 2006, the Form 1120S stated net income of $8,750.00.
- In 2007, the Form 1120S stated a net loss of $17,439.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the difference between wages already paid and the full proffered wage.

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.[3] 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 2001, 2002, 2003, 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120S, Schedule L stated net current assets of $2,848.00.
- In 2002, the Form 1120S, Schedule L stated net current assets of $23,260.00.
- In 2003, the Form 1120S, Schedule L stated net current liabilities of $32,298.00.
- In 2004, the Form 1120S, Schedule L stated net current liabilities of $0.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of $545.00.
- In 2006, the Form 1120S, Schedule L stated net current assets of $5,406.00.
- In 2007, the Form 1120S, Schedule L stated net current liabilities of $11,801.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the petitioner disputes that the proffered wage was $56,139 for all of the years from 2001 through 2008 since it did not receive any correspondence and recruitment directions from the DOL until March 13, 2007. According to the petitioner, it filed for labor certification on April 30, 2001 with

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[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

a proffered wage of $800 per week, or $41,600 per year, and that it was only notified of the DOL's recruitment requirements on March 13, 2007.

The record of proceeding contains the Recruitment Instructions which the DOL issued to the petitioner on February 14, 2007. In its instructions, the DOL states, in pertinent part:

> Federal regulations require an employer to make a good faith effort to recruit U.S. workers before an application for alien labor certification can be approved. Your application is ready for the required 30-day recruitment effort. The required minimum recruitment period will begin on March 1, 2007 and will end on April 2, 2007.
>
> Your original wage offer of $800.00 per week is below the current prevailing wage of $1,610.00 per week for the position and is therefore insufficient.
>
> According to the Occupational Employment Statistics (OES), the prevailing wage for the occupation of General Manager, as described by you on the 750A form, is $1,610.00 per week per hour. If you choose to modify your rate of pay of $800.00 per week per hour to at least the current prevailing wage of $1,610.00 per week per hour, you must submit a letter from the employer authorizing this office to amend the wage offer on Form ETA 750, Part A.
>
> If you recruit at a rate of pay less than the prevailing wage specified above, you must provide documentation of an alternative prevailing wage source that supports your offered wage.

In its Recruitment Instructions, the DOL notifies the petitioner that its proffered wage of $800.00 was below the current prevailing wage and, therefore, insufficient. In other words, DOL explains to the petitioner that the wage which it initially offered was incorrect and not eligible for certification.

8 C.F.R. § 204.5(g)(2) states:

> 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.

20 C.F.R. § 656.20(c) (April 1, 2004 edition) addresses the requirement of including a prevailing wage on the application for labor certification, stating in pertinent part:

> Job offers filed on behalf of aliens on Application for Alien Employment Certification form must clearly show that:

> (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;

In considering the merits of the application for alien labor certification, the DOL makes the determination regarding whether the wage identified on the application equals or exceeds the prevailing wage and will require the petitioner to adjust the wage if it does not. The adjustment is required for certification. In the instant case, upon a review of the petitioner's application for labor certification, the DOL found that the wage which the petitioner was offering was deficient, falling far below the prevailing wage. However, the DOL afforded the petitioner an opportunity to obtain an alternate prevailing wage. The petitioner obtained the alternate prevailing wage from the State of California Employment Development Department, that alternate wage being $1,079.60 per week rather than the $1,610.00 per week which the DOL required. The DOL accepted the alternate wage and amended the labor certification on June 7, 2007. In so doing, the DOL set the proffered wage at $1,079.60 as that is the only wage which the DOL ever certified. According to 8 C.F.R. § 204.5(g)(2), the petitioner is required to demonstrate the ability to pay the certified proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

The petitioner also asserts that it made the argument in response to the director's RFE that it had "the ability to reimburse the beneficiary for the amount that he was short" in the years that the petitioner did not pay the full proffered wage. 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)).

As discussed above, the AAO will consider the wages which the petitioner paid to the beneficiary in each of the years from 2001 through 2008. In those years in which the petitioner paid the beneficiary less than the proffered wage, the AAO will consider whether the petitioner demonstrated either sufficient net income or sufficient net current assets to pay the difference between the wages already paid and the full proffered wage. As noted above, however, in the instant case the evidence submitted to demonstrate wages paid by the petitioner to the beneficiary contain inconsistencies with respect to the SSN. Therefore, this evidence will not be considered to demonstrate wages paid by the petitioner to the beneficiary. While 8 C.F.R. § 204.5(g)(2) allows additional material "in appropriate cases," the petitioner in this case has not provided any additional evidence to support its assertion that it could pay the difference between the proffered wage and wages already paid to the beneficiary. Nor has the petitioner demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Although, the petitioner also notes that, as a production company, some years are more productive than others, no evidence in support of this assertion was submitted.

As with all businesses, 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 to ascertain whether the petitioner is making a realistic offer of employment in spite of anomalous shortfalls in

profitability. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *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 provided financial documentation for seven years of business operations. From 2001 through 2007, the petitioner reported either marginal net income or net losses. During the same period, gross sales decreased steadily with the figure for 2007 being only 52 percent of the total for 2001. The petitioner ceased paying officer compensation in 2003 and salaries declined at almost the same rate as sales. Thus, the petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

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

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8

C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification makes no specific requirements regarding grade school or high school. However, the petitioner marked the block for college. Then, though indicating that a college degree is not required, the petitioner identified Business Administration as the major field of study. Further, the petitioner did not identify the specific amount of college required. Nor did the petitioner include a formula according to which it would consider alternatives to college education. Thus, the labor certification requires some indeterminate amount of college without actually requiring the attainment of a degree. Additionally, Section 14 of Form ETA 750 stipulates that the proffered position requires one year of training in "all areas of the job title." Further, the proffered position requires five (5) years of experience in the job offered: general manager.

On the labor certification, the beneficiary claims to qualify for the offered position based on a certificate from the in Santo Tomas, Hidalgo, Mexico completed in June 1981 and a certificate in English as a Second Language (ESL) from the in La Puente, California which the beneficiary was in the process of completing at the time the labor certification was signed on April 25, 2001. Additionally, the beneficiary claims to have worked for the petitioner since April 1998 as a supervisor. Further, the beneficiary claims to have worked for as a supervisor in Los Angeles, California from December 1989 until March 1998.

As evidence of the beneficiary's qualifications, the record of proceeding contains a single letter dated June 12, 2009 from former owner of According to the beneficiary worked for as a supervisor from December 1989 until March 1998. identified the duties performed by the beneficiary, those duties closely corresponding to the duties associated with the proffered position. notes that due to a significant decrease in production, his company was forced to close in 1998. The petitioner has also provided copies of the IRS Form W-2 which were issued to the beneficiary by in 1992, 1993, 1994, 1995, 1996, 1997 and 1998. Thus, based upon this evidence, the petitioner has substantiated the beneficiary's qualifying experience.

However, the petitioner has provided no documentary evidence to demonstrate that the beneficiary completed one year of training which is required by Form ETA 750 or that he completed any formal tertiary education which is also required by Form ETA 750.

In response to the director's RFE, in which he requested evidence demonstrating that the beneficiary had the required five years of experience and one year of training, the petitioner stated:

> As for the one year training before April 30, 2001, [the beneficiary] has several different training [sic] in the Garment field such as: cutting service, marking and grading materials, inspection of materials, fixed and service of cutting machines, how to operate fused machines, knowledge of the complete structure of garment, and how to cut tickets in computers. All of these trainings were provided to him by Pour Le Bebe, these were all in house trainings provided by outside contractors specialized in the garment industry, the company paid for these trainings, but unfortunately, there are no certificates of completion available to be submitted with this request.

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.

On appeal, the petitioner provided a letter from the former employer, articulating the beneficiary's experience with his organization. however, said nothing of training which the beneficiary purportedly received while working for his company.

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)).

Further, the petitioner's assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

With respect to the beneficiary's education, the petitioner provided no evidence, either of the primary, secondary or other education claimed on Form ETA 750B and no evidence of the education which is required by the Form ETA 750.

Further, the only education which the beneficiary actually claims to have completed is Tele Secunda.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed July 20, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed July 20, 2012). Authors

for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[4] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[5]

According to EDGE, a *Certificado de Educacion Secundaria* "represents attainment of a level of education comparable to less than completion of senior high school in the United States." EDGE indicates that this level of education allows the individual to be placed in Grade 10.

The beneficiary does not claim to have completed any tertiary education and provides no evidence of having done so.

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).

The evidence in the record does not establish that the beneficiary possessed the required education and training set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

If the petitioner intends to pursue this matter further, and intends to demonstrate that the labor certification did not actually require any formal tertiary education, it would have to submit evidence of your claimed intent. Such evidence would be of your organization's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.

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[4] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[5] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

Specifically, the petitioner would have to provide a copy of the documentation prepared in accordance with the prior DOL labor certifications regulations at 20 C.F.R. § 656 (2004), including a signed recruitment report, the prevailing wage determination, all online and print recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. Additionally, the petitioner would have to include any other communications with the DOL that may be probative of your intent, such as correspondences or documents generated in response to an audit.

Such evidence might help establish your intent regarding the minimum requirements of the offered position and show that U.S. workers without four-year bachelor's degrees were in fact put on notice that they were eligible to apply for the position.

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.