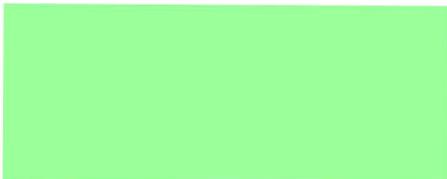


(b)(6)

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

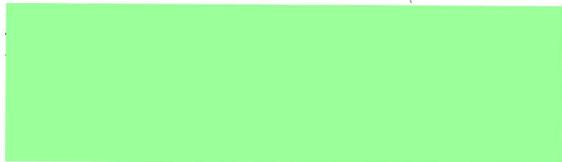


DATE: **SEP 20 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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:



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

The petitioner is a French restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, French style. 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 failed to demonstrate that: 1) the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and 2) the beneficiary met the minimum requirements as set forth on the labor certification. 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, 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 \$11.55 per hour (\$24,024.00 per year based on forty hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered.

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

The record indicates the petitioner is structured as a general partnership and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 1986 and to currently employ 24 workers. 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 April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application 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. 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

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).

² A general partnership consists of two or more partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. The record of proceeding establishes that [REDACTED] are general partners. No information regarding the general partner's personal expenses was submitted. As such, the petitioner has not demonstrated that either of its general partners' assets may be utilized to pay the proffered wage.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided a letter dated January 16, 2009, stating that it has employed the beneficiary as a cook since May 2001, but the petitioner submitted only one Form W-2, Wage and Tax Statement, from 2007 indicating it paid the beneficiary \$4,672.08. Therefore, as the proffered wage was \$24,024.00 per year, the petitioner did not demonstrate that it paid the beneficiary the proffered wage in 2007 or any other year, but would be obligated to demonstrate its ability to pay the difference between wages it actually paid in 2007 and the proffered wage, which is \$19,351.92. In addition, the petitioner must demonstrate its ability to pay the full proffered wage in every other year under review.

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 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 January 23, 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 2007 federal income tax return is the most recent return available. The petitioner submitted copies of its federal income tax returns for 2004, 2006, and 2007. No federal tax returns or other regulatory-prescribed evidence of the petitioner's ability to pay the proffered wage was submitted for 2001, 2002, 2003, and 2005. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2004, the petitioner's Form 1065 stated net income of -\$11,234.00.³
- In 2006, the petitioner's Form 1065 stated net income of \$141.00
- In 2007, the petitioner's Form 1065 stated net income of -\$519.00

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

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.⁴ A partnership's year-end

³ 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 August 16, 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 Schedules K for 2004, 2006, and 2007 have relevant entries for additional income, credits, deductions, 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 tax returns.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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. As previously noted, the petitioner provided federal income tax returns for 2004, 2006, and 2007 only. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2004, the petitioner's Form 1065 stated net current assets of -\$82,001.00.
- In 2006, the petitioner's Form 1065 stated net current assets of -\$46,300.00.
- In 2007, the petitioner's Form 1065 stated net current assets of -\$46,819.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

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.

On appeal, counsel asserts that the petitioner's tax documentation submitted is sufficient evidence of its ability to pay the proffered wage. Counsel states that the petitioner had earnings in excess of \$404,300.00.

The AAO notes that counsel's statement is inaccurate in that none of the tax returns reviewed reflected net income near that amount. Further, the petitioner failed to submit tax returns or other regulatory-prescribed evidence of its ability to pay the proffered wage in each year beginning on the priority date. The record contains copies of the petitioner's California state tax returns (Forms 565) for 2003 and 2005, but state tax returns are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

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 failed to include copies of its federal income tax returns for 2001, 2002, 2003, and 2005. Therefore, USCIS has not been provided sufficient evidence of the overall magnitude of the petitioner's business activities in those years. The petitioner's gross receipts during 2004, 2006, and 2007 varied, as did its cost of labor. The petitioner indicated on the Form I-140 that it employs 24 people. The petitioner stated on the petition that it has been in business since June 12, 1986, but the tax returns submitted indicate the business started on January 1, 1987. While the petitioner has been in business over twenty years, it does not appear to pay substantial compensation to its owners. Further, the petitioner did not submit evidence sufficient to demonstrate that the owners were willing and able to forego compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's 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.

As set forth in the director's April 22, 2009 denial, another issue in this case is whether or not the beneficiary met the minimum requirements as set forth on the labor certification as of the priority date.

The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *See* 8 C.F.R. § 204.5(d). 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:

EDUCATION

Grade School: Not required

High School: Not required

College: Not required

College Degree Required: None

Major Field of Study: None

TRAINING: None Required

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: None

The labor certification does not include a listing of any work experience. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list any claimed work experience. A handwritten notation which states, "see amend dated 11/13/2006" is included, but the record does not contain any additional amendments, attachments, or

continuation pages to the Form ETA 750. 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 from [REDACTED] letterhead dated January 16, 2009, stating that the company has employed the beneficiary as a cook since May 2001. The AAO notes that the priority date of the petition is April 30, 2001, thus the letter refers to experience gained after the priority date. In addition, the AAO notes that the record contains a Form G-325A, Biographic Information signed by the beneficiary under penalty of perjury on March 5, 2009, which states that the beneficiary began his employment with the petitioner in January 2007. Further, the record contains copies of the beneficiary's personal tax returns (Forms 1040) for 2001 through 2007 along with Forms W-2 and 1099 for 2002 through 2007 which conflict with the beneficiary's claims that he was employed by the petitioner during this period. The beneficiary's Forms W-2 and 1099 for 2002, 2003, 2004, 2005, and 2006, the amounts of which are reflected on the Forms 1040, do not reflect any wages earned from the petitioner.

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."

The record also contains an experience letter from [REDACTED], Chef de Cuisine, on [REDACTED] letterhead dated January 21, 2009, stating that the company located in [REDACTED] has employed the beneficiary as a cook from 1999 to the present. In addition, the record contains an undated letter from [REDACTED] has employed the beneficiary as a cook since 1999 and that his current position is as a pantry/line cook and that he does stewarding on occasion. The letter further states that the beneficiary's job involves all facets of food preparation in the kitchen and the overall cleanliness of the facility when he is stewarding. In addition, neither letter states that the beneficiary's experience involved cooking in the French style. The Form ETA 750 specifically states that, "[t]he occupant of this position will be required to cook, season and prepare a variety of Traditional and Regional French style dishes according to prescribed French recipes." Neither of the above letters states that the beneficiary gained two years of experience cooking these specific types of French dishes.

The AAO also notes that both letters from [REDACTED] fail to provide a specific date for when the beneficiary's employment began, and neither letter states whether the employment was full-time. The record also does not contain an explanation or evidence to establish how the beneficiary was able to work for both the petitioner and [REDACTED] during the years of 2001,

2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009, which are the years in which the claimed employment overlaps at both businesses.

Further, the copies of the beneficiary's personal tax returns Forms 1040 along with Forms W-2 and 1099 for 2002 through 2007 do not reflect employment with [REDACTED] in all of the years in which the employment was claimed to have taken place. The beneficiary's Forms W-2 and 1099 for 2002, 2005, 2006, and 2007, the amounts of which are reflected on the Forms 1040, do not reflect any wages earned from [REDACTED]. The record contains Forms W-2 issued by [REDACTED] only in 2003 and 2004, for \$693.25 and \$604.00, respectively, which does not indicate that the beneficiary was employed on a full-time basis. As previously mentioned, the record contains a Form G-325A, Biographic Information. On this form, the beneficiary set forth his employment for the previous five years and signed the form under penalty of perjury on March 5, 2009. This form, on which the beneficiary lists employment as far back as 2002, does not include any of the claimed employment with [REDACTED] even though the letters of experience in the record claim that the beneficiary was employed there from 1999 to 2009.

Matter of Ho states: "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." *Supra.* at 591-92.

On appeal, counsel asserts that the letter from the prior employer is sufficient to meet the experience requirement of the labor certification. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, the evidence fails to demonstrate that the beneficiary met the minimum requirements as set forth in the labor certification for classification as a skilled worker under section 203(b)(3)(A) of the Act as of the priority date.

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.