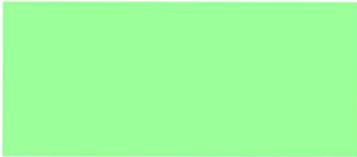


(b)(6)

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: APR 24 2013

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,

Ron Rosenberg
Acting 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 masonry business. It seeks to employ the beneficiary permanently in the United States as a masonry supervisor. 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 December 9, 2011 denial, the 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 ETA Form 9089 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 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 3, 2008. The proffered wage as stated on the ETA Form 9089 is \$25.89 per hour (\$53,851.20 per year). The ETA Form 9089 states that the position requires 24 months 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 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 2001 and to currently employ five 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 December 16, 2010, the beneficiary claimed to have worked for the petitioner from July 1, 2002 to January 2, 2006 as a masonry supervisor.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage or any wages during any relevant timeframe including the period from the priority date on October 3, 2008 or subsequently.

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

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).

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 June 21, 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 2008, 2009, and 2010, as shown in the table below.

- In 2008, the Form 1120S stated net income² of (\$26,150.00).
- In 2009, the Form 1120S stated net income of (\$21,374.00).
- In 2010, the Form 1120S stated net income of (\$16,561.00).

Therefore, for the years 2008, 2009, and 2010, the petitioner did not have sufficient net income to pay the 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 2008, 2009, and 2010, as shown in the table below.

- In 2008, the Form 1120S stated net current assets of \$18,114.00.
- In 2009, the Form 1120S stated net current assets of \$11,464.00.
- In 2010, the Form 1120S stated net current assets of \$8,307.00.

Therefore, for the years 2008, 2009, and 2010, the petitioner did not have sufficient net current assets to pay the 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.

Additionally, it is unclear from the evidence in the record whether a *bona fide* job offer exists and if the job opportunity is open to qualified U.S. workers. A labor certification for a specific job offer, as stated on the labor certification, is valid only for (1) the particular job opportunity, (2) the alien for whom the certification was granted, and (3) the area of intended employment. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner may intend to employ the beneficiary in an executive or similar position outside the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). Intended employment of the beneficiary in a position that falls

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.

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.

outside the scope of the “particular job opportunity” defined on the labor certification is one basis necessitating invalidation of the labor certification and denial of the immigrant visa petition. *Id.* USCIS has long held that a petitioner must establish its intent to employ the beneficiary in accordance with the terms and conditions on the labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966) (upholding denial of an employment-based immigrant visa where evidence did not establish the petitioner actually desired and intended to employ the beneficiary pursuant to the terms of the labor certification); *see also Matter of Semerjian*, 11 I&N Dec. 751, 752 (reg. Comm. 1966) (immigrant with approved professional worker petition must show *bona fide* intent to engage in his profession in the U.S.).

First, the record contains an affidavit by the owner of the petitioner, dated February 2, 2012, stating that “[he] knew that [the beneficiary] had already established a certain high level of masonry business of which he was supervising and managing and which would become business (with all its referrals and customers) to [the] petitioner.” The record contains W-2 Forms for 2008 and 2009 issued by [REDACTED] and an affidavit by the beneficiary which demonstrate that the beneficiary is the president and sole shareholder of [REDACTED] a masonry company which generated gross receipts of \$442,101 in 2008, \$296,275.00 in 2009, and \$351,691 in 2010.⁴ Thus, it appears that the petitioner is alleging that in order to demonstrate its ability to pay the proffered wage and in order for the beneficiary to accept the position offered, masonry supervisor, he would have to merge his own profitable masonry company with the petitioner’s masonry company. Because the beneficiary is the sole shareholder of this competing masonry business, which would become part of the petitioner’s business, it is unclear whether there is a *bona fide* job offer from the petitioner for a masonry supervisor, unless the beneficiary merges his company with the petitioner’s company. This suggests that there is no job opportunity available to qualified U.S. workers unless and until the merger occurs. The position offered cannot be contingent on the beneficiary merging his business with the petitioner. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.*

Second, it appears unlikely that the beneficiary would forgo the ownership and control of his profitable business if his company were to “become the business (with all its referrals and customers)” of the petitioner. The evidence in the record does not indicate the terms of this potential merger or whether the beneficiary would have a degree of ownership in the petitioner’s business. Where the beneficiary named in an alien labor certification application would be in a position to have an inherent ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, and clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). The record contains an affidavit from the beneficiary in which he states that he “would have brought work to [the] petitioner that would have generated enough monies to have paid

⁴ The amount of gross receipts for [REDACTED] is listed on line 1c of the IRS Forms 1120 in the record for these years.

my compensation, as proven by the fact that the business that I generated and managed, paid for my compensation.” See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 405 (Comm’r 1986) (“Requiring the job opportunity to be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment”). The record does not indicate whether the petitioner’s intent to bring the beneficiary’s company into its business was discussed with DOL. In any further filings, the petitioner must provide independent, objective evidence to overcome these discrepancies and document that a *bona fide* job opening existed as of the priority date. See *Matter of Ho*, 19 I&N Dec. at 591-592.

Counsel asserts on appeal that the beneficiary would replace the owner of the petitioner in his role as masonry supervisor and would be able to receive the petitioner’s owner’s income to meet the amount of the proffered wage. The record contains the W-2 Forms for 2008 and 2009 from the owner of the petitioner and an affidavit from the owner stating he would be willing to step down from his supervisory role and use that income to pay the beneficiary’s proffered wage. The record contains an opinion from a tax attorney, stating that the beneficiary would replace the petitioner’s owner, which would in turn enable the owner to focus on “enhancing profits” in other ways. The record does not contain any evidence to substantiate how the petitioner’s owner would generate additional income to increase the profits of the business. Additionally, wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, the amounts the petitioner’s owner received in compensation for 2008, 2009, and 2010 were \$37,800.00, \$44,800.00, and \$26,600.00, respectively. Even if these wages could be used toward establishing the petitioner’s ability to pay the proffered wage, these amounts would be insufficient to demonstrate the petitioner’s ability to pay the beneficiary the proffered wage of \$53,851.20 in 2010.

Further, it is unclear whether the amount paid to the petitioner’s owner is for the same duties as the position offered as described on the labor certification. It would appear that these amounts would potentially include compensation for duties outside the terms of the labor certification, as the petitioner’s owner functions in an executive capacity for his company, and not just as a masonry supervisor.

As stated above, the affidavits of the petitioner’s owner and the beneficiary demonstrate that the petitioner intends on having the beneficiary bring his masonry business into the petitioner’s business, which tends to show that the job offered is not a *bona fide* job offer that is clearly open to U.S. workers. See 20 C.F.R. § 656.17(l). The record contains an opinion from a tax attorney who asserts that the petitioner will see an increase in its sales and profits due to the additional revenue the beneficiary will bring in through the merger of his separate and independent company. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner is relying on its future merger with the beneficiary's business to generate sufficient income to pay the proffered wage; however, this prospective analysis cannot be relied upon to demonstrate the petitioner's ability to pay the proffered wage as of the priority date. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, future earnings by the beneficiary are too speculative and do not establish the petitioner's ability to pay the proffered wage.

The record also contains a letter from the petitioner's accountant which cites many errors that were made in the petitioner's tax returns. This accountant states that the amounts shown on the petitioner's tax returns, Schedule L, line 19 (Loan from Shareholders), should not be considered a real liability as this constituted amounts set up as a discretionary fund available to the petitioner if additional funds were needed. As stated above, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6, and its year-end current liabilities are shown on lines 16 through 18. This letter does not demonstrate these amounts are in error; the petitioner has not provided any evidence, such as amended tax returns or correspondence with the Internal Revenue Service, documenting these purported errors. The accountant's letter, alone, does not establish these tax returns are erroneous. The preponderance of the evidence indicates the returns were filed with the IRS and accepted by the IRS as accurate representations of the petitioner's financial position.

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

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 states on the Form I-140 that it has been in business since 2001 and that it employs five workers. The tax returns in the record demonstrate negative net income for 2008, 2009, and 2010. The tax returns reflect low and declining amounts of net current assets for these years that are not sufficient to pay the beneficiary's proffered wage. The record does not contain any objective evidence of the petitioner's reputation in the industry or any evidence of its historic growth. The petitioner has not demonstrated any uncharacteristic losses or business expenses for any of the years in question. Further, the petitioner is alleging that it will only be able to demonstrate its ability to pay the proffered wage prospectively, after the merger of its business with the beneficiary's corporation. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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.

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. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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 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 states that the offered position requires 24 months of experience in the job offered as a Masonry Supervisor. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a "Manager/Owner" of [REDACTED] from February 1, 2006 to December 16, 2010, the date the labor certification was signed, and as a "Masonry Supervisor" for the petitioner from July 1, 2002 through January 2, 2006.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an affidavit from the beneficiary regarding his experience as owner of [REDACTED] but this does not constitute an experience letter as

required under 8 C.F.R. § 204.5(l)(3)(ii)(A) (experience must be supported by letters from “trainers or employers”). The record contains 5 letters and several invoices documenting that [REDACTED] provided masonry services to its clients. However, these documents do not meet the regulatory requirements for evidence of the beneficiary’s experience. *Id.* These letters do not document whether the beneficiary was employed full-time in the position offered, as they do not indicate whether he worked full-time or part-time, or provide a complete description of his duties.⁵ Further, as discussed above, the beneficiary owned and operated his own masonry business. Therefore, by necessity, his position with that company would include other duties not encompassed within the terms of the labor certification.

The beneficiary’s only other experience listed on the labor certification is with the petitioner, but Part J, Item 21, of the labor certification states the beneficiary generally cannot use experience gained with the petitioner in the position offered to qualify for the position offered. Therefore, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, indicate that the beneficiary’s experience with the petitioner cannot be used to qualify the beneficiary for the certified position. *See* 20 C.F.R. § 656.17(i)(5).

Further, the Form G-325A, signed on September 10, 2003, states that the beneficiary was employed by the petitioner only as a stonemason beginning in July 2002, whereas the labor certification states that the beneficiary was employed as a masonry supervisor from July 2002 to January 2006. The letter from the petitioner, dated May 30, 2011, states that the beneficiary worked for the petitioner from July 2002 to January 2006 and that he was hired as a Mason and became a supervisor for his last two years of working there, which also conflicts with the labor certification. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.*

The evidence in the record does not establish that the beneficiary possessed the required experience 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.

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.

⁵ Three of the letters appear to provide a summary of the beneficiary’s duties for projects for which he was contracted. As noted, these letters are not from employers or trainers, and therefore do not meet the regulatory requirements in 8 C.F.R. 204.5(g)(2). As the writers of these letters would not have personal knowledge of the beneficiary’s job duties beyond those short-term limited projects, they cannot be construed to stand in the place of regulatory required evidence.

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).

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.