

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **APR 30 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a "Lead Waiter/Floor Manager." As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 May 25, 2012 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, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 8, 2010. The proffered wage as stated on the ETA Form 9089 is \$17.05 per hour (\$35,464 per year). The ETA Form 9089 states that the position requires six months of training in restaurant operations, 36 months of job experience in the proffered position and the following specific skills:

Knowledge of fine dining service required. In-depth knowledge of French & California wines. Knowledge of bar service. The ability and knowledge of managing dining room staff while multi-tasking other duties.

The position does not allow for experience in any alternate occupation.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1983 and to currently employ eleven 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 March 29, 2011, the beneficiary claimed to have worked for the petitioner since November 1, 2010.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

paid the beneficiary \$13,946.57 in 2010 and \$11,095.56 in 2011,<sup>2</sup> both of which are less than the proffered wage. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2010 and 2011. Those sums are as follows:

- 2010 - \$21,517.43
- 2012 - \$24,368.34

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

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<sup>2</sup> The petitioner claims that the beneficiary received cash tips which were not included in the tips and wages reported on the beneficiary's W-2 Form. The petitioner states that it should receive credit for these tips in an ability to pay the proffered wage analysis. The AAO does not agree.

20 C.F.R. § 656.10(c)(2) provides as follows:

(c) *Attestations*. The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

....

(2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage;

....

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 May 9, 2012 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 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 was the most recent return available. The petitioner submitted documentation showing that it had requested an extension for the filing of its 2011 tax return. Thus, the petitioner's 2010 tax return would have been the most recent return available for the purpose of adjudicating this case. The petitioner's tax returns demonstrate its net income for 2009 and 2010, as shown in the table below.

- In 2009, the Form 1120S stated net income<sup>3</sup> of (\$15,699).<sup>4</sup>

<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries

- In 2010, the Form 1120S stated net income of \$5,228.

Therefore, for the years 2009 (as stated above, 2009 precedes the November 8, 2010 priority date) and 2010, the petitioner's tax returns did not state sufficient net income to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2009 and 2010, as shown in the table below.

- In 2009, the Form 1120S stated net current assets of (\$30,026).
- In 2010, the Form 1120S stated net current assets of (\$60,981).

Therefore, for the years 2009 and 2010 (as stated above, 2009 precedes the November 8, 2010 priority date), the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage, or the difference between the proffered wage and any wages paid to the beneficiary in those years.

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.

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for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 3, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedules K for 2009 and 2010, the petitioner's net income is found on Schedule K of its tax returns.

<sup>4</sup> The 2009 tax return is for a year which precedes the 2010 priority date. That return, therefore, will only be considered generally in analyzing the petitioner's ability to pay the proffered wage based on a totality of the circumstances.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel asserts on appeal that the petitioner has established the ability to pay the proffered wage.

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.

The petitioner indicates that the beneficiary earned cash tips which, however, are not reported on his W-2 Form. The petitioner has failed to address why the tips were not reported as income. In support of that assertion the petitioner submitted copies of the beneficiary's personal bank statements and tax returns. Those documents do not, however, identify any specific funds deposited to the beneficiary's bank accounts or reported on his tax returns which were cash tips earned from the petitioner which were not reported on the beneficiary's W-2 Forms. As such, the petitioner's unsupported statements in this regard will not be considered in analyzing the petitioner's ability to pay the 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Again, 20 C.F.R. § 656.10(c)(2) precludes the consideration of these tips in an ability to pay the proffered wage analysis and provides as follows:

(c) *Attestations.* The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

(2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage.

It should further be noted that the beneficiary's personal bank statement from [REDACTED] is in the surname [REDACTED] and it is unclear that this individual and the beneficiary are the same person. The same can be said for the 2010 and 2011 personal tax returns which are said to be those of the beneficiary. The following names are in the record and are purported to relate to the present beneficiary:

- The 2010 and 2011 personal tax returns, which are stated to be the tax returns of the beneficiary, are in the surname [REDACTED]
- A personal bank statement ([REDACTED]) purported to be that of the beneficiary is in the surname [REDACTED]

- A bank statement from [REDACTED] is in the surname of the beneficiary as listed on Form I-140 and different than the two names above.
- A copy of a check from the [REDACTED] bears the printed name of the beneficiary as printed on the [REDACTED] statement.

The petitioner should address the variations of the beneficiary's name in any future filings as it is not clear that the tax returns in the name of [REDACTED] and bank account in the name of [REDACTED] are those of the present beneficiary. 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 petitioner submitted unaudited financial statements (balance sheet) to support its assertion that it has continuously maintained the ability to pay the proffered wage from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The document is not accompanied by an accountant's report stating that the report was audited according to Generally Acceptable Accounting Principles (GAAP). Thus, the representations contained on the unaudited financial statement must be considered to be representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner submitted a statement of the company's Chief Financial Officer which states that the petitioner relocated to a more desirable business location which resulted in an increase in revenues, and that it was expected that revenues would increase by \$100,000 in the first year. That statement, however, is not supported by documentation showing an increase in revenue in the amount claimed or documentation in the form of a business plan which demonstrates a basis for the claimed increase in projected sales or part-year audited financial statement to exhibit any gains in revenue. Again, simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner states that it could use officer compensation paid to its officer(s) to pay the difference between wages paid to the beneficiary and the full proffered wage. The petitioner did not, however, submit a statement from any officer stating that the officer was able or willing to forego any compensation to pay wages owed to the beneficiary. 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. 1998) (citing *Matter of Treasure*

*Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, even if the officer compensation reported on the petitioner's tax returns were considered (\$3,000 in 2010 and \$8,000 in 2009) in an ability to pay analysis, those sums would be insufficient to establish the petitioner's ability to pay the proffered wage even when added to the petitioner's reported net income or net current assets, and partial wages paid.

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 tax returns submitted by the petitioner state insufficient net income and net current assets to pay the proffered wage or the difference between wages paid to the beneficiary and the full proffered wage. The tax returns submitted show a decrease in gross receipts, negative net income and net current assets in 2009 and negative net current assets in 2010. The petitioner's net income in 2010 was only \$5,228. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. Nothing documents any claimed short-term losses based on the petitioner's change in address, or any subsequent gains following the petitioner's move to the new location. 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.

Beyond the decision of the director, the petitioner has also not established 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. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires six months of training in restaurant operations and 36 months of experience in the proffered position as "Lead Waiter/Floor Manager" plus the following required specific skills: knowledge of fine dining service, in-depth knowledge of French and California wines, knowledge of bar service and the ability and knowledge of managing dining room staff while multi-tasking other duties. The beneficiary's claimed qualifying experience/training 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 beneficiary attested to the following work experience on the labor certification:

- [REDACTED], waiter, March 31, 2008 to November 1, 2010;<sup>6</sup>

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<sup>6</sup> This experience appears to be with the petitioner and, therefore, it is unclear that it may be used to establish that the beneficiary qualifies for the position offered. 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

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(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

- [REDACTED], head waiter, September 14, 2006 to November 1, 2010.<sup>7</sup>

In support of its assertion that the beneficiary is qualified for the offered position, the petitioner submitted the following letters:

- The petitioner states that the six months of required training is established by a letter dated October 28, 2011 from [REDACTED] which states that the beneficiary worked at that restaurant from May 2004 to September 2005 and that “[t]hroughout those 15 months, my manager and I trained [the beneficiary] in restaurant operations. First, he obtained excellent experience as a back and front waiter, and then we promoted [the beneficiary] to front server after 6 months of training.” That letter is insufficient to establish the asserted training, however, as the beneficiary failed to list this experience on ETA Form 9089, and it does not state that the beneficiary was employed or trained for six months on a full-time basis. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner submitted no corroborative evidence of this employment or training.
- The petitioner submitted a letter from [REDACTED] owner of [REDACTED] which states that the beneficiary worked for that organization from November 5, 2005 to September

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(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

....

(5) For purposes of this paragraph (i):

(i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>7</sup> It appears unlikely that the experience obtained with these two employers was experience obtained in full-time employment as the dates of employment partially overlap. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

6, 2007. Mr. [REDACTED] states that during the period of the beneficiary's employment he was trained in restaurant operations and management for over one year, was trained to be a manager floor assistant and pastry chef assistant, trained to coordinate dining room operations and table service, and to write new staff schedules and train new employees. The training also included teaching extensive knowledge of fine dining service and bar service which included an in-depth knowledge of French, Italian and California wines. Again, the letter is insufficient to establish the necessary training as it does not state that the training was obtained on a full-time basis. The experience overlaps partially with the beneficiary's claimed experience at [REDACTED] from September 14, 2006 to November 1, 2010, claimed to be full-time. Further, this employment is not listed on the labor certification. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner submitted no corroborative evidence of this employment or training.

- [REDACTED] submitted an experience letter stating that the beneficiary was employed by him at [REDACTED] "from about October 1995 [to] at least January 2001. Mr. [REDACTED] stated that his organization employed about 50 employees with several locations and that the beneficiary "worked as a manager in one of the locations for at least a couple of years." This letter is insufficient to established qualifying experience for the offered position as a "Lead Waiter/Floor Manager" based on the duties set forth in the letter. Additionally, the letter does not give exact dates of employment and does not state that the experience was gained on a full-time basis. Further, this employment is not listed on the labor certification. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. Further, this stated employment was not in the position offered and the labor certification does not permit experience in an alternate occupation.
- The petitioner submitted a second letter signed by [REDACTED], owner of [REDACTED], which states that the beneficiary was employed by that organization from August 2004 to January 2006 as a busboy and server with responsibilities to set up and clean up the dining area on a daily basis and to provide good customer service. The letter is in conflict with the above referenced letter from [REDACTED] dated October 28, 2011 as the October letter states that the beneficiary was employed from May 2004 to September 2005. Further, the duties stated in the two letters are different and neither letter states that the beneficiary's employment was on a full-time basis. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The letter, therefore, does not establish necessary experience.
- The petitioner submitted a letter from [REDACTED], Human Resource Director of [REDACTED]

[REDACTED] which states that the beneficiary was employed by that organization from June 7, 2006 to September 29, 2006 as a server. The letter does not establish the necessary 36 months of work experience or six months of training. Further, the letter does not state that the beneficiary was employed by that organization on a full-time basis. This employment is not listed on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner submitted no corroborative evidence of this employment or training. It is also noted that the dates of this employment conflicts with the dates of employment listed by the beneficiary with the [REDACTED] and the [REDACTED]

The evidence in the record does not establish that the beneficiary possessed the required experience, training or special skills 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.

Accordingly, 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.