

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **DEC 19 2013** Office: TEXAS SERVICE CENTER [REDACTED]

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

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center. On March 18, 2013, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the petition. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition. The director revoked the approval of the petition accordingly.

On appeal, counsel for the petitioner contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the petitioner has established its ability to pay the proffered wage to the beneficiary as of the priority date.

As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

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.

Here, in the Notice of Intent to Revoke (NOIR) dated February 6, 2009, the director reviewed the evidence (a letter of employment) of whether the petitioner had complied with all Department of Labor (DOL) advertising and recruiting requirements and whether the evidence submitted sufficiently demonstrated the employment experience claimed by the beneficiary. The director's review specifically requested information that demonstrates it has complied with the DOL requirements and to offer clear evidence validating the beneficiary's work experience. The director also requested that the petitioner reaffirm its intent to employ the beneficiary in the proffered position.

In a second NOIR dated March 18, 2013, the director reviewed the evidence (an affidavit from the beneficiary and two employment letters) of whether the evidence submitted sufficiently demonstrated the employment experience claimed by the beneficiary. The director determined that the employment letters failed to specify the beneficiary's job duties, and requested the petitioner submit a letter from the beneficiary's former employer on official letterhead listing the employer's name and address, the date, the signer's name and title, and a description of the beneficiary's experience, including dates of employment and specific duties. The director also reviewed the evidence and determined that the petitioner had failed to establish its ability to pay the proffered wage to the beneficiary from the priority date and continuing until the beneficiary becomes a lawful permanent resident. The director's review specifically requested that the petitioner provide its federal income tax returns, annual reports, or audited financial statements to demonstrate its ability to pay the proffered wage beginning on April 20, 2001 (the priority date), and continuing until the beneficiary becomes a lawful permanent resident. The director also specifically requested the petitioner provide Wage and Tax Statements (IRS Forms W-2), Miscellaneous Income Statements (IRS Forms 1099), and/or pay statements for 2001 to the present, demonstrating wages it paid to the beneficiary. In addition, the director specifically requested the petitioner submit evidence demonstrating wages paid to other beneficiaries¹, and proof of the petitioner's ability to pay the proffered wage to each of the potential beneficiaries.

¹ USCIS records showed that the petitioner had filed multiple Form I-140 petitions since the priority date.

The director's review specifically requested additional evidence to demonstrate eligibility concerning all points noted above.

The AAO finds that the NOIR contained sufficient notice to the petitioner. Further, the AAO finds that the director had good and sufficient cause to institute revocation proceedings, citing evidence which if uncontested would warrant a denial of the petition.

The approval of the petition cannot be reinstated because the petitioner has not established by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered prior to the priority date and that it has the ability to pay the proffered wage from the priority date onwards.

As set forth in the director's June 7, 2013 revocation, the first issue in this case is whether 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour based upon a 35 hour work week (\$22,877.40 per year).² The Form ETA 750 states that the position requires two years of experience in the job offered.

² The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification,

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.³

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1992. 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 December 26, 2000, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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. Comm. 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. Comm. 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. The petitioner submitted copies of the paystubs that it issued to the beneficiary as shown in the table below:

- In 2003, paystubs issued stated year-to-date (December 21, 2003) wages of \$3,177.00 (a deficiency of \$19,700.40).
- In 2004, paystubs issued stated year-to-date (December 26, 2004) wages of \$9,024.00 (a deficiency of \$13,853.40).
- In 2005, paystubs issued stated year-to-date (November 13, 2005) wages of \$20,262.00 (a deficiency of \$2,615.40).
- In 2006, the petitioner did not submit any wage statements.
- In 2007, paystubs issued stated year-to-date (February 25, 2007) wages of \$3,080.00 (a deficiency of \$19,797.40).

DOL Field Memo No. 48-94 (May 16, 1994). Full-time teachers are considered to be in full-time employment. See *Dearborn Public Schools*, 91-INA-222 (BALCA Dec. 7, 1993).

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 16, 2013 with the receipt by the director of evidence in response to the director’s Notice of Intent to Revoke (NOIR). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in the NOIR, the petitioner declined to provide copies of its tax returns for 2007 through 2010. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner’s tax documents show the following⁴:

- In 2001, the Form 1120 stated net income of \$83,988.00.
- In 2002, the IRS Account Transcript stated net income of \$86,537.00.
- In 2003, the Form 1120 stated net income of \$31,365.00.
- In 2004, the Form 1120 stated net income of \$32,489.00.
- In 2005, the Form 1120 stated net income of \$14,808.00.
- In 2006, the Form 1120 stated net income of \$18,804.00.
- In 2011, the Form 1120 stated net income of \$39,693.00
- In 2012, the Form 1120 stated net income of \$9,077.00.

Therefore, for the years 2006, 2007, 2008, 2009, 2010, and 2012, the petitioner did not establish that it had sufficient net income to pay the proffered wage. Although the net income amount for 2001, 2002, 2003, 2004, 2005, and 2011 exceeds the proffered wage amount, USCIS electronic records indicate that the petitioner has filed multiple immigrant petitions since the petition in the instant matter was filed in April 2001. The AAO notes that the petitioner failed to submit the requested information concerning the other beneficiaries for whom the petitioner has filed Form I-140 petitions, although specifically requested by the director in the NOIR dated March 18, 2013. USCIS must also take into account the petitioner’s ability to pay the beneficiary’s wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977) (petitioner must establish ability to pay as of the date of the Form

⁴ It is noted that the petitioner submitted a copy of its income tax documents for 2001 through 2006 subsequent to filing the appeal in the instant matter. These tax documents were not made available to the director, although specifically requested, prior to the revocation of the petition.

MA 750B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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.⁵ 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. As noted above, although specifically requested by the director in the NOIR to submit its tax returns, annual reports, or audited financial statements for 2001 through 2010, the petitioner failed to do so until after the petition was revoked. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below:

- In 2001, the Form 1120 stated net current assets of \$51,392.00.
- In 2002, the IRS Account Transcript did not indicate a net current assets amount.
- In 2003, the Form 1120 stated net current assets of \$71,662.00.
- In 2004, the Form 1120 stated net current assets of \$139,506.00.
- In 2005, the Form 1120 stated net current assets of \$97,927.00.
- In 2006, the Form 1120 stated net current assets of \$112,194.00.
- In 2011, the Form 1120 stated net current assets of \$33,726.00.
- In 2012, the Form 1120 stated net current assets of \$40,924.00.

Although the net current asset amounts exceed the proffered wage amount in 2001, 2003, 2004, 2005, 2006, 2011, and 2012, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. And as noted above, the petitioner has failed to provide evidence to demonstrate its ability to pay all beneficiaries' wages as of the priority date in April 2001 or in any subsequent years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary of the instant petition the proffered wage as of the priority date while continuing to meet its wage obligations to all sponsored beneficiaries through an examination of wages paid, or its net income or net current assets. The AAO finds that the director had good and sufficient cause to revoke the approval of the petition based on the petitioner's failure to establish the ability to pay.

⁵According 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.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records. Counsel further asserts that the petitioner has the ability to pay the proffered wage and has submitted evidence to establish that fact.

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. The record does not establish that the petitioner could have paid the proffered wage to all of the beneficiaries, assessing the totality of the circumstances.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, the record does not establish that the petition was approvable at the time of its initial approval. The director approved the petition on August 12, 2002. At that time, there was no evidence of record indicating that the petitioner had the ability to pay the proffered wage to all of the sponsored beneficiaries in 2001. As the petitioner did not establish eligibility as of the initial

approval, the director had good and sufficient case to initiate revocation proceedings and to revoke the approval of the petition based on the petitioner's failure to establish its ability to pay the proffered wage.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had two years of experience as a cook as of the priority date as stated on the labor certification. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth his credentials in Section 15 of the Form ETA 750, Part B. On Section 15 of the labor certification eliciting information of the beneficiary's work experience as a cook, he represented that he was employed by [REDACTED] as a cook, from April 1996 to October 1998. The beneficiary stated under penalty of perjury on his Form G-325A, Biographic Information, that he was employed by the petitioner as a cook from April 1999 to the present. The Form G-325A was signed by the beneficiary and accompanied his Form I-485, Application to Register Permanent Residence or Adjust Status dated November 5, 2002. The beneficiary did not indicate any other employment experience on the Form G-325A.

The petitioner submitted the following evidence of the beneficiary's employment:

- A translated letter dated February 27, 2001 from [REDACTED] who stated that the beneficiary worked at his establishment as a cook-chef from April 1996 to October 1998. The declarant also stated that the beneficiary exercised the function of a cook-chef, where he demonstrated his abilities with international dishes such as; Italian dishes, pastas, lasagna, calzones and salads. The letter was not written on company stationery and conflicts with the beneficiary's statement on the Form ETA 750 that he worked as a chef at [REDACTED]

In response to the director's Notice of Intent to Revoke (NOIR) dated February 6, 2009, the petitioner submitted the following evidence of the beneficiary's employment:

- A translated letter dated March 2, 2009 from [REDACTED] who stated that the beneficiary was employed as a cook from April 1996 to October 1998, with specialization in Italian dishes. The letter is written on [REDACTED] stationery and indicates the declarant's title as manager.
- A translated letter dated March 4, 2009 from [REDACTED] who stated that the beneficiary was employed as a cook from April 1996 to October 1998, with specialization in Italian dishes. The declarant also stated that the [REDACTED] are part of the same group. The letter is written on [REDACTED] stationery and does not specify the declarant's title.
- An untranslated brochure that contains a listing of [REDACTED] and seven other restaurants. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).
- An affidavit dated March 2, 2009 from the beneficiary who stated that when he lived in Brazil he worked at a [REDACTED] and that the restaurant is a subsidiary of the parent company, [REDACTED]. The beneficiary further stated that [REDACTED] are the owners of [REDACTED] and several subsidiary restaurants in the [REDACTED] area, which includes C [REDACTED]. He stated that he worked primarily at the [REDACTED] branch, and from April 1996 to October 1998 he worked as a cook at the restaurant. He also stated that his job primarily consisted of "preparing and cooking Italian dishes, including pastas, lasagna, calzones and salads." The beneficiary further stated that although [REDACTED] was the owner of the restaurants, he worked directly for [REDACTED] who was the manager at [REDACTED] at that time, and that the current manager is [REDACTED].

In response to the director's NOIR dated March 18, 2013, the petitioner submitted the following:

- A translated letter dated May 6, 2013 from [REDACTED] a proprietor of [REDACTED] who stated that the beneficiary worked at [REDACTED] from April 1996 to October 1998. The declarant stated in part that the beneficiary held the position of head chef and that he performed the activities related to that position. The declarant further stated that the beneficiary performed duties including interviewing, hiring, training and improvement of the cooks, using the Brazilian Manual of food manipulation and conversion of food from the time of arrival until the final

dish for the customer. The declarant stated that the beneficiary's activities also included stock control, purchases, suppliers, as well as the maintenance of the functionality and protection of the working environment, as well as inspection of the work equipment and hygienic sanitation of the work areas. The declarant noted that [REDACTED] were a part of the restaurant staff, exercising the positions of business manager.

The information provided in each employment statement contradicts the other statements and conflict with the beneficiary's affidavit and his statements on the Form ETA 750. [REDACTED] described the beneficiary's job duties as a head chef although the beneficiary did not state that he held such a position. The description of the beneficiary's duties as a head chef differs from the petitioner's and the beneficiary's description of his duties as a cook. The beneficiary stated on the Form ETA 750 that he was a cook and that he prepared all types of dishes. The beneficiary stated in the affidavit that he worked as a cook at the restaurant and that his job duties "primarily consisted of preparing and cooking Italian dishes, including pastas, lasagna, calzones and salads." The managers, [REDACTED] stated that the beneficiary was employed as a cook, although they failed to specify the beneficiary's job duties. Furthermore, the position requirement stated by the petitioner on the labor certification was that of a cook, not a head chef.

The beneficiary stated on the Form ETA 750 that he was employed by [REDACTED] but stated in his affidavit that he was employed by [REDACTED]. The record does not establish the relationship between [REDACTED] other than that they may have some common ownership. The beneficiary failed to list either [REDACTED] as a prior employer on his Form G-325A.

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. 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, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is August 20, 2008. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. The petitioner has not submitted independent, objective evidence such as the beneficiary's official work book or other contemporaneous evidence of two years full-time employment as a cook. Because of the unresolved inconsistencies, the AAO finds that the record does not establish that the beneficiary has the requisite two years of experience nor that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.