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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: FEB 2 8 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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,

Kurt Porbes for

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 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 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. As set forth in the director's September 3, 2009 denial, at 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.

On September 13, 2012, the AAO sent the petitioner a request for evidence (RFE) with a copy to counsel. In the RFE, the petitioner was requested to submit regulatory-prescribed evidence of the petitioner's ability to pay for 2007 through 2011. The petitioner was also requested to submit detailed, specific information regarding additional beneficiaries on whose behalf the petitioner had filed immigrant visa petitions. Beyond the director's decision, the petitioner was also requested to submit additional evidence of the beneficiary's work experience abroad, or alternatively, work experience with the petitioner prior to the priority date of the petition. The RFE informed the petitioner that 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 responded to the AAO's RFE on October 31, 2012.

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.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

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

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

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

Here, the Form ETA 750 was accepted on March 3, 2005. The proffered wage as stated on the Form ETA 750 is $12.55 per hour ($26,104 per year). The Form ETA 750 states that the position requires two years of experience as a cook.

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 1991 and to currently employ 23 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 22, 2005, the beneficiary claimed to have worked for the petitioner since September 1995.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

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

petitioner's ability to pay the proffered wage. The wages that the petitioner paid to the beneficiary as reflected on Form W-2 are summarized in the table below.

Tax Year	Wage Paid	Difference Between Wages Paid and Proffered Wage
2005	$23,197.38	$2,906.62
2006	$24,521.64	$1,582.36
2007	$26,175.53	$0.00[2]
2008	$26,229.39	$0.00
2009	$25,841.34	$262.66
2010	$25,302.13	$801.87
2011	$25,225.55	$878.45

Therefore, the petitioner must establish that it can pay the beneficiary the difference between the wages paid and the proffered wage in 2005, 2006, 2009, 2010 and 2011.

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

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

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[2] For tax year 2007, the record does not contain a federal tax return, annual report or audited financial statement required by 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the proffered wage. In the AAO's September 13, 2012 RFE, the petitioner was requested to submit any one of the three regulatory-prescribed forms of evidence for 2007. It failed to do so. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

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 petitioner's tax returns demonstrate its net income[3] as shown in the table below.

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed December 17, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had adjustments shown on its Schedule K for 2005, 2006, 2008, and 2009, and additional income and deductions in 2010 and 2011, the petitioner's net income is found on Schedule K of its tax return for each of those years. It is noted that in his September 3, 2009 decision, the director used the incorrect figures from line 21, page one for 2005 and 2006.

Tax Year	Net Income
2005	-$538.00
2006	-$578.00
2007	Not submitted.
2008	-$34,528.00
2009	-$10,531.00
2010	-$20,570.00
2011	-$28,882.00

Therefore, for the years 2005, 2006, 2009, 2010, and 2011 the petitioner did not have sufficient net income to pay the difference between the proffered wage and what the beneficiary was paid.

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.[4] 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 as shown in the table below.

Tax Year	Current Assets	Current Liabilities	Calculation of Net Current Assets
2005	$35,711.00	$64,403.00	-$28,692.00
2006	$55,866.00	$56,403.00	-$537.00
2007			Not submitted.
2008	$58,102.00	$82,388.00	-$24,286.00
2009	$45,512.00	$66,637.00	-$21,125.00
2010	$19,630.00	$63,364.00	-$43,734.00
2011	$17,608.00	$66,348.00	-$48,740.00

[4] 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.

Therefore, for the years 2005, 2006, 2009, 2010, and 2011, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and what the beneficiary was paid.

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

On appeal, counsel submits a "Real Estate Tax Bill 2009" issued by the [redacted] to [redacted] Counsel argues that the assessed value of the [redacted] personal property, $602,700, should be considered as evidence of the petitioner's ability to pay the proffered wage. Counsel also submits a bank statement from Union Savings Bank showing the [redacted] personal bank account balance in September 2012. However, because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel is correct in her assertion made on appeal that 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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted printouts from its website that indicate that the petitioning restaurant is located in a historical building and that it is a long-standing, successful restaurant. However, the petitioner failed to establish the historical growth of its business and the occurrence of any uncharacteristic business expenditures or losses.

In addition, the petitioner has filed Forms I-140, Immigrant Petition for Alien Worker, on behalf of three other individuals. 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 MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the above-referenced RFE, the petitioner was requested to provide detailed information about the other beneficiaries and to provide IRS Forms W-2 or 1099 that were issued by the petitioner to those beneficiaries. In response, counsel indicates that none of the other petitions are relevant in this matter. However, the Form I-140 filed on behalf of on August 19, 2004 is relevant. That petition carries a priority date of April 30, 2001 and Mr. Guaillazaca Fajardo adjusted status to that of a lawful permanent resident on March 31, 2006. Therefore, for the period between the instant beneficiary's March 3, 2005 priority date and March 31, 2006, the petitioner must demonstrate that it had the ability to pay both salaries. Counsel failed to provide information regarding the amount of proffered wage and evidence establishing whether the petitioner paid all or part of that 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).

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 beginning on the priority date.

Evidence of the Beneficiary's Qualifications

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

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In the instant case, the labor certification states that the offered position requires two years of experience as a cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook at from May 1979 to May 1983, and also as a cook with the petitioner beginning in September 1995.

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 a template document completed by the beneficiary's friend and former co-worker, The document, written in English and dated January 10, 2001, describes the beneficiary's experience abroad at and indicates that the beneficiary worked full-time as a cook at from May 1979 to May 1983; however, it is not written by the beneficiary's former employer. indicated that had closed. The regulation at 8 C.F.R. § 204.5(g)(1) allows the petitioner to submit other evidence if a letter from the former employer cannot be obtained.

In the AAO's RFE, the petitioner was requested to submit evidence to establish that it is not possible to obtain a letter from as well as any corroborating evidence of the beneficiary's employment there, such as evidence of wages paid to the beneficiary. The petitioner was also requested to submit a letter from the petitioner describing the beneficiary's work experience with the petitioner prior to the priority date.

In response, counsel submitted an October 8, 2012 affidavit in Spanish, accompanied by an English translation, from indicating that he and the beneficiary worked together as cooks at from 1982 until 1983; thus, the letter does not establish the beneficiary's two years of full-time employment as a cook.[5] indicated that the business currently operates as a pharmacy.

Counsel also submitted an October 23, 2012 English-language affidavit from who states that she is the beneficiary's mother. indicates that the beneficiary began his employment at as a dishwasher at "about sixteen years of age."[6] Two weeks after his hire, the affiant states, the owner and head chef offered to teach the beneficiary how to cook and he became a prep cook and worked his way up to the position of cook. The affidavit does not specify when the beneficiary eventually became a cook at the restaurant or whether his employment was full- or part-time; thus, the letter does not establish the beneficiary's two years of full-time employment as a cook. states that the restaurant closed when the husband and wife owners were involved in a car accident and could no longer operate the restaurant. She states that the business has been a pharmacy since that time and that the former owners died over ten years ago.

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[5] The beneficiary indicated on Form ETA 750B that he worked at until May 1983.

[6] The beneficiary was born in May 1965. Therefore, he would have been 14 years of age in May 1979, when he claims to have started work at

Also submitted is an October 26, 2012 affidavit from the beneficiary in which he states that he began working at ' ' in 1979 as a dishwasher but after a few weeks requested to learn how to cook. The beneficiary indicates that he was a prep cook before eventually becoming a cook.[7] He does not mention when he changed positions from prep cook to cook or whether his employment was full- or part-time; thus, the affidavit does not establish the beneficiary's two years of full-time employment as a cook. The affidavit indicates that the restaurant closed in 1983 and the former owners are now deceased.

Also in response to the RFE, counsel submitted a photograph of a pharmacy with the following caption, "The former now a pharmacy - ." While the evidence in the record establishes that a letter from cannot be obtained, the submitted evidence does not establish the beneficiary's two years of full-time employment as a cook at Although the Form ETA 750 and affidavit indicate that the beneficiary worked full-time at as a cook from May 1979 to May 1983, the other affidavits indicate that the beneficiary began his employment with as a dishwasher, and was also a prep cook before becoming a cook at an unknown date. 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 did not submit evidence of wages paid to the beneficiary by Gillian's. The inconsistencies in the record regarding the beneficiary's employment at Gillian's have not been resolved with independent, objective evidence of his two years of full-time employment as a cook.

Further, the petitioner did not submit evidence of the beneficiary's experience with the petitioner prior to the priority date as requested by the AAO's RFE. However, USCIS records contain an October 1, 2001, affidavit signed by submitted with a previously filed petition that indicates that the beneficiary began working for the petitioner as a cook in September of 1995. However, the beneficiary's October 26, 2012 affidavit states that his first position with the petitioner was that of dishwasher, rather than as a cook. The affidavit states:

> Although I had several years of experience as a cook while working in Ecuador, I did not speak any English when I came to this country so I was limited to the position of dishwasher when I began working for the

Given the many inconsistencies in the record regarding the beneficiary's claimed employment abroad and his employment with the petitioner, the petitioner has failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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[7] The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

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. 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.