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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



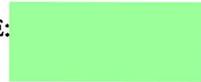
U.S. Citizenship
and Immigration
Services



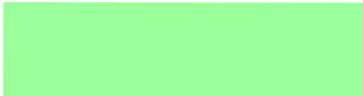
DATE: JAN - 9 2013

OFFICE: NEBRASKA SERVICE CENTER

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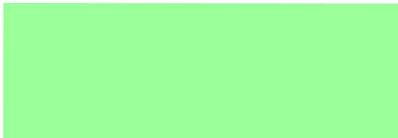


IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

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.¹ The appeal will be dismissed.

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as barn boss. 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, and that the petitioner had not established that the beneficiary has the experience required by the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 30, 2011 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R.

¹The petitioner's attorney, [REDACTED] is currently in inactive status according to the District of Columbia Bar website. See http://www.dcbar.org/find_a_member/results.cfm. (accessed November 26, 2012). If the petitioner has retained new counsel, a new Form G-28 must be submitted.

§ 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,494.00 per month (\$29,928 per year). The Form ETA 750 states that the position requires two years of experience in the proffered job, or in the alternative, three years of experience as a stable attendant.

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.²

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 1998 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner since December 2000.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established

²The 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).

that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.³

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. 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

³ The petitioner submitted a letter dated July 15, 2010 which states that it previously employed the beneficiary as a stable manager. However, no details regarding the employment including specific dates of employment, wages, or duties of the beneficiary were included in the letter. Further, no proof of employment such as Forms W-2, pay stubs, or other corroborating evidence was submitted to confirm the beneficiary's employment.

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 September 29, 2011 with the receipt by the director of the petitioner’s submissions in response to the director’s notice of intent to deny (NOID). As of that date, the petitioner’s 2011 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2010 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001 to 2010, as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of \$66,850.
- In 2002, the Form 1120S stated net income of \$99,551.
- In 2003, the Form 1120S stated net income of \$115,978.
- In 2004, the Form 1120S stated net income of \$65,793.
- In 2005, the Form 1120S stated net income of \$4,293.
- In 2006, the Form 1120S stated net income of \$17,711.
- In 2007, the Form 1120S stated net income of \$33,171.
- In 2008, the Form 1120S stated net income of \$49,678.
- In 2009, the Form 1120S stated net income of \$71,334.
- In 2010, the Form 1120S stated net income of \$8,223.

Therefore, for the years 2005, 2006, and 2010, the petitioner did not have sufficient net income to pay the proffered wage.

⁴ 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 23 (1997-2003), line 17e (2004-2005), line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 20, 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 additional income, deductions, and other adjustments shown on its Schedule K for 2001 to 2010, the petitioner’s net income is found on Schedule K of its tax returns.

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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 to 2010, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$79,909.
- In 2006, the Form 1120S stated net current assets of \$-1,211.
- In 2010, the Form 1120S stated net current assets of \$-44,556.

Therefore, for the years 2006 and 2010, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition, the petitioner filed another Immigrant Petition for Alien Worker (Form I-140) for a separate beneficiary on March 10, 2003. 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 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). From the record, the other petition's priority date and proffered wage is unknown.

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.

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

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.

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 asserts that the director erred in determining that the petitioner did not have the ability to pay the proffered wage of \$29,928 from 2001 to the present because he failed to take into account the overall magnitude of the petitioner's business activities.⁶ The petitioner states that its liquid equine assets valued at \$170,000 in 2006 and \$160,000 in 2010 should be considered as they could have been liquidated to pay the proffered wage. The petitioner also asserts that it had additional large capital expenditures in the relevant years, including the purchase of two expensive sale horses in 2006 and the renovation of the barn in 2010.

The record of proceeding contains a letter signed by [REDACTED] accountant for the petitioner,⁷ and the petitioner's website which "lists several of the expensive sale horses they currently own" as documentary evidence to support its assertion that it had sufficient equine assets in 2006 and 2010 that could have been liquidated to pay the proffered wage. The petitioner also submits a copy of its website as proof of the large capital expenditure in 2010 of the barn renovation.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Nothing in the record of proceeding contains any type of notice from the director or any other USCIS representative that would have misled counsel into his assertion that USCIS requires "convincing" or "persuading" beyond what legal authority

⁶ Form I-290B states that a brief and additional evidence will be submitted to the AAO within 30 days. As of this date, more than one year later, no brief or additional evidence has been received.

⁷ There appears to be a familial relationship between [REDACTED] owner of [REDACTED]. In an article in the [REDACTED] states, "My accountant sister, [REDACTED] who keeps her horse here, handles the billing." See [REDACTED]

guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

In the instant case, the evidence in the record does not support the petitioner's ability to pay the proffered wage by taking into account the overall magnitude of the petitioner's business. In the accountant's letter dated September 23, 2011, she states that in 2006, the petitioner "owned or had an interest in" seventeen sale horses valued at approximately \$170,000. Likewise, in 2010, the accountant states that the petitioner "owned or had an interest in" fourteen sale horses valued at approximately \$160,000. She further states that had it been necessary, the petitioner could have liquidated these equine assets to pay the proffered wage. However, the petitioner, after being given the opportunity by the director and on appeal, has not submitted any objective, independent evidence to corroborate the accountant's statements. 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). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner claims that it has met its burden of proof in *Matter of Treasure Craft of California, Id.*, by going on record with supporting documentary evidence, its website, which it claims corroborates the accountant's statements regarding the value of the horses. However, there is nothing on the website to reflect the sale price or the value of the horses. Even if the prices of the horses were listed on the website, the petitioner created the website and the prices listed would not necessarily be reflective of the actual value of the equine asset. Without objective, independent evidence, the petitioner has not met its burden.

Additionally, the accountant states that the petitioner "owned or *had interest in*" [*emphasis added*] the equine assets, but there is nothing in the record to reflect the value of the equine assets the petitioner actually owns. The petitioner cannot liquidate an asset in which it only has an interest. The petitioner must own the asset to be able to liquidate it.

The petitioner also argues that it built a new indoor arena in 2004, bought two expensive sale horses in 2006, and remodeled one of the barns in 2010, which all resulted in unusually high capital expenditures for those years. As evidence, the petitioner relies on the accountant's letter dated September 23, 2011 and the website with pictures of the arena and the barn. Neither the accountant's letter nor the website states how much any of these expenditures cost. Nor does the website list when the arena was built and when the barn was renovated. Even if it did, it is still not objective, independent evidence since the petitioner controls the content of the website.

Additionally, the petitioner has not shown that the purchase of two horses in 2006 and the barn renovation in 2010 are uncharacteristic business expenses. Unlike in *Sonegawa* where the petitioner had one bad year as a result of moving, paying double rent for five months, and a period where her business was interrupted, the petitioner has not shown that buying horses or renovating a barn is an uncharacteristic business expenditure. The petitioner is in the business of buying and selling horses. The purchase of two horses would be a normal business expense for the petitioner. Likewise, the barn renovation is a normal business expense given that the petitioner owns a horse farm. The petitioner has not demonstrated that either of these expenses are uncharacteristic and unforeseen.

The petitioner further argues that the accountant's statements regarding the equine assets and the capital expenditures should be given greater weight because "accountants operate under a professional code of conduct to tell the truth regarding the finances of their clients, and would face civil and potentially criminal liability if found lying in their written statements." The statement of the accountant, without independent, objective evidence, does not meet the petitioner's burden of proof to show by a preponderance of the evidence that it can liquidate the equine assets to pay the proffered wage. Additionally, no proof was submitted to show that the equine assets referred to by the accountant are not already reflected in the petitioner's federal tax returns.

The petitioner further submits that the owner, [REDACTED], is "nationally renowned" according to its website. However, no further evidence was submitted to corroborate this claim. As the website is written by the petitioner, it is self-serving and is not independent, objective evidence that supports its claim.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

As set forth in the director's October 30, 2011 denial, another issue in this case is whether or not the beneficiary has the required experience as indicated on the ETA 750.

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 (Acting Reg'l Comm'r 1977).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading

and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 8 years

High School: Blank

College: Blank

College Degree Required: Blank

Major Field of Study: Blank

TRAINING: Blank

EXPERIENCE: Two (2) years in the job offered (stable manager) or three (3) in the related occupation of stable attendant.

OTHER SPECIAL REQUIREMENTS: Must be willing to travel 2 to 3 weeks per month during horse show season.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a stable attendant with [redacted] from December 1998 until December 2000. No address is provided for [redacted]. The labor certification also contains experience with [redacted] the petitioner, as a stable attendant from December 2000 until the date the labor certification was signed on April 26, 2001. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter from [redacted] stating that [redacted] employed the beneficiary as a stable manager from January 1998 to March 2000. However, the letter contains a different name, referring to a [redacted] instead of [redacted] the beneficiary. The letter also does not contain the title of the signatory, nor is the letter on company letterhead. Furthermore, the letter does not indicate that the job was full-time. Additionally, the letter is from an employer not listed on the ETA 750, and the time period [redacted] states it employed the beneficiary overlaps with the time period the beneficiary worked at [redacted] as listed on the ETA 750.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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 record also contains an experience letter from [REDACTED] owner, on [REDACTED] letterhead stating that the company previously employed the beneficiary as a stable manager. However, the letter does not state the dates the beneficiary was employed, the duties of the beneficiary in detail, or state that the job was full-time. Furthermore, the letter is inconsistent with the labor certification which states that the beneficiary worked for [REDACTED] as a stable attendant, and not as a stable manager.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

In the instant case, the beneficiary's experience at [REDACTED] is not listed on the ETA 750 and there is no experience letter in the record from [REDACTED] verifying the beneficiary's experience. Furthermore, the letter from [REDACTED] states that [REDACTED] was employed as a stable manager from January 1998 to March 2000 and is signed by [REDACTED] who does not provide her title and authority for writing such a letter. The petitioner states on appeal that the beneficiary worked for [REDACTED] temporarily, but that his full-time employment was with [REDACTED]. It is unclear how the beneficiary could be working temporarily for [REDACTED] while working full-time for [REDACTED]. Furthermore, the ETA 750 and the experience letter from [REDACTED] are for [REDACTED] while the I-140 petition and the I-290B refer to the beneficiary as [REDACTED]. There is no evidence in the record that [REDACTED] are the same person. As the record contains many inconsistencies that have not been resolved through independent objective evidence, the AAO cannot determine whether the beneficiary had the requisite experience as of the priority date.

On appeal, the petitioner states that it overcame the question of [REDACTED] authority to write the experience letter through the submission of a page of [REDACTED] website, which shows a quote from [REDACTED] and states that she is the owner. However, on [REDACTED] website, it states that [REDACTED] and her father, [REDACTED] purchased [REDACTED]

in 2002, thus casting further doubt on [REDACTED] authority to write the experience letter for the period 1998 to 2000.⁸

No evidence was submitted to establish that the beneficiary possessed the required eight years of grade school education. No education is listed for the beneficiary of the ETA 750B.

On appeal, the petitioner argues that its former counsel is “notorious for committing mistakes and entering inaccuracies on her applications,” and blames her for the inaccuracies on the ETA 750 regarding the beneficiary’s employment experience. The petitioner states that former counsel assumed the beneficiary worked for [REDACTED] since they met at a horse show where the beneficiary was working for [REDACTED].

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Furthermore, the beneficiary’s failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application’s contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). The beneficiary signed the ETA 750, under penalty of perjury, on April 26, 2001. To allow the beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a document would have serious negative consequences for USCIS and the administration of the nation’s immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

⁸See [REDACTED] website at [REDACTED] (accessed November 26, 2012).

(b)(6)

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The evidence submitted does not establish that the beneficiary had the required experience listed on the ETA 750 as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.