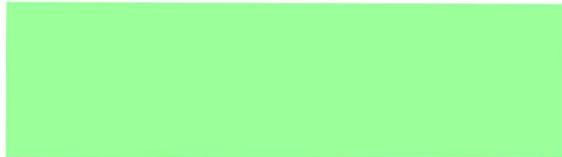




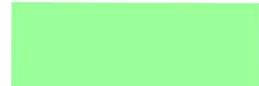
U.S. Citizenship
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Services

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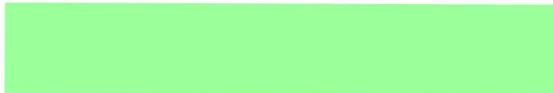
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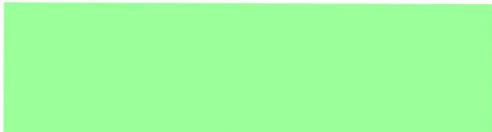
Petitioner:

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:



INSTRUCTIONS:

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

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

Thank you.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel for the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motions will be granted, and the appeal will be dismissed on its merits.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as a hand carver. 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).

On motion, counsel submits a brief, affidavits, quarterly wage reports, corporate tax returns, and statements on behalf of the petitioner. This constitutes new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motions are granted.

Upon reviewing the petition, the director determined that the petitioner had failed to establish its ability to pay the proffered wage. On appeal, the AAO agreed with the director's determination. Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage beginning on the priority date of the visa petition onwards. Another issue to be addressed on motion which was raised by the AAO in its Notice of Intent to Dismiss (NOID) and Notice of Derogatory Information (NODI) and Request for Evidence (RFE) issued on December 4, 2012 is whether the petitioner provided evidence to establish that the beneficiary is qualified to perform the duties of the proffered position.

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 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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$30.10 per hour based upon a 40 hour work week or \$62,608.00 per year. The Form ETA 750 states that the position requires three years of experience in the job offered.

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

¹ 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).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner indicates that it employed four workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have been employed by the petitioner.

On motion, counsel asserts that the AAO's decision was in error, and that the totality of the circumstances demonstrates the petitioner's ability to pay the proffered wage. Specifically, counsel states that the petitioner's ability to pay the proffered wage is demonstrated by its gross receipts, bank balances, wages paid by the petitioner to other employees, officer compensation, continued company growth, future profits, and the beneficiary's ability to generate income.

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 general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

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 proffered wage is \$62,608.00. The petitioner submitted a copy of an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, that was issued to the beneficiary in 2001 in the amount of \$25,816.00. Therefore, the petitioner must establish the ability to pay the difference between the proffered wage and the actual wages paid, or \$36,816.00 in 2001.

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). 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. In the 2012 NOID/NODI/RFE, the AAO specifically asked the petitioner to submit its tax returns, annual reports or audited financial statements for 2008 to 2011 and any IRS Forms W-2 and/or 1099 issued to the beneficiary.

However, the petitioner did not provide any of this requested evidence, so the petitioner's 2007 tax return is the most recent tax return in the record. The petitioner's tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120 stated net income of \$5,756.00.
- In 2002, the Form 1120 stated net income of \$9,510.00.
- In 2003, the Form 1120 stated net income of \$643.00.
- In 2004, the Form 1120 stated net income of -\$82.00.
- In 2005, the Form 1120 stated net income of \$0.00.
- In 2006, the Form 1120 stated net income of \$13,548.00.
- In 2007, the Form 1120 stated net income of \$0.00.

Therefore, for the year 2001, the petitioner failed to establish that it had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage, and for years 2002 to 2007 the petitioner did not establish that it had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² 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.

USCIS will not consider the petitioner's total assets in evaluating its ability to pay the proffered wage. These total assets include items such as equipment and real estate which the petitioner needs to do business. It is unlikely that such assets would be sold in order to pay the beneficiary the proffered wage. Rather, USCIS will review current assets and liabilities in assessing the petitioner's likely capabilities. 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 -\$7,353.00.
- In 2002, the Form 1120 stated net current assets of \$2,635.00.
- In 2003, the Form 1120 stated net current assets of -\$34,920.00.
- In 2004, the Form 1120 stated net current assets of -\$5,437.00.
- In 2005, the Form 1120 stated net current assets of -\$6,953.00.
- In 2006, the Form 1120 stated net current assets of \$1,448.00.
- In 2007, the Form 1120 stated net current assets of -\$152.00.

²According 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.

The petitioner did not establish that it had sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage in 2001, and the proffered wage in 2002 to 2007. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, other than in 2011, 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.

Counsel asserts on motion that a statement from the petitioner's Certified Public Accountant (CPA) should suffice to demonstrate its ability to pay the proffered wage since 2001. The petitioner submitted a letter dated May 2, 2008 from [REDACTED] who stated that his firm has been the accountants for the petitioner for approximately 10 years and that the petitioner's current financial status indicates that the company is solvent and that it is capable of paying the proffered wage. As noted above, the petitioner's income tax returns were also submitted and they present a more accurate statement of the petitioner's financial status since 2001. Furthermore, there is no other evidence in the record to substantiate [REDACTED] statement because the petitioner has not provided any of the regulatory prescribed evidence for 2008 onwards. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

Counsel asserts that the beneficiary will be replacing subcontractors formally employed by the petitioner. Counsel further asserts that as is evident from the petitioner's tax returns "Cost of Goods Sold (Schedule A, line 8)" it has taken a substantial annual deduction for subcontractors that is in excess of the proffered wage of \$62,680.00 which could be used to pay the beneficiary who will be replacing the subcontractors. Counsel submitted an attestation from the petitioner's president who stated that the petitioner retained the services of subcontractors while awaiting the acceptance of the beneficiary's petition, and that the wages paid to the subcontractors will be used to pay the beneficiary once he begins work for the petitioner.

Although the petitioner asserts that the amount of money paid to subcontractors reflects money to be paid to the beneficiary, the petitioner has failed to provide evidence that the petitioner has replaced or will replace the other subcontractors with the beneficiary. The petitioner's representative does not name these workers, state their wages, or verify their full-time or part-time employment with the petitioner. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the subcontractors involves the same duties as those set forth in the Form ETA 750. The petitioner submitted copies of its quarterly wage reports. Although the reports may be evidence of the number of workers employed by the petitioner at any given time, the reports are insufficient to demonstrate that the petitioner employed subcontractors or temporary workers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that the beneficiary, as an employee, will play a major role in the growth of the petitioner's business. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a hand carver will significantly increase the petitioner's profits or cause the business to grow. This hypothesis cannot be concluded to outweigh the evidence presented in the petitioner's Form 1040 tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

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

On motion, counsel asserts that according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date, taking into consideration that the petitioner has an historical track record of profits, officer compensation (\$129,800.00 for 2001), cash on hand sufficient to pay the wage, and a reasonable expectation of sustained or increasing profits in the future. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, the petitioner's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as the petitioner urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 16, 2001. Although the officer's compensation amount for 2001 exceeds the proffered wage amount for that year, the petitioner has failed to demonstrate its ability to pay the proffered wage from 2002 onwards. Furthermore, although the petitioner elected to pay \$129,800.00 in officer compensation in 2001, there is no evidence in the record of proceeding e.g. sworn affidavits, personal tax returns and IRS Forms W-2, and a list of average monthly household expenses incurred by the shareholders, to show that they agree to forego their compensation in 2001 and until the beneficiary obtains lawful permanent residence status. Without such proof, the AAO may not consider the officer's compensation to determine the

petitioner's ability to pay the proffered wage.³

Counsel asserts that the petitioner's monthly ending bank balances should be taken into consideration in determining the petitioner's ability to pay the proffered wage. The petitioner submits a list of its monthly bank balances for 2001 through 2008. The petitioner also submits a copy of its bank statements for 2001 through 2008, and the letter from [REDACTED], which states that the petitioning company is solvent and capable of paying the proffered wage. Reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In addition, counsel states that the petitioner has been in business since 1997 that its income has steadily increased that its gross receipts near or exceeding \$1 million per year and that the petitioner has paid several substantial full-time salaries over the last seven years which have been in excess of the salary proffered to the beneficiary, along with several part-time salaries having been paid. Reliance on the petitioner's gross receipts and wages paid to other workers is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient. Furthermore, the petitioner has not shown through audited financial documents that the increase in income has been significant enough to allow it to pay the beneficiary's wage. *See Sonogawa, supra*. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165. Therefore, the AAO concludes that the petitioner has failed to demonstrate its ability to pay the proffered wage from the priority date in 2001 onwards.

Another issue raised by the AAO is whether the petitioner had established that the beneficiary had three years of experience in the job offered of hand carver as required in the labor certification. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is April 16, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).⁴ In evaluating the beneficiary's qualifications, USCIS must look to the job offer

³ It is noted that the petitioner did not list any officer compensation in its tax returns for 2002 to 2007.

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of

portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as hand carver. On the labor certification, the beneficiary claims to qualify for the offered position based on his experience as a hand carver. 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). On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a hand carver.

The petitioner must establish that the beneficiary had the three years of experience as a hand carver prior to the priority date of April 16, 2001. The beneficiary indicated on the labor certification signed on March 29, 2001, that he was employed by [REDACTED] in New City, New York, from October 1995 to March 1999 as a wood, hand carver. The beneficiary did not list any other work experience on the labor certification.

In response to the AAO's NOID/NODI/RFE, the petitioner submitted an affidavit from the beneficiary dated January 17, 2013 stating that he was employed by [REDACTED] from 1998 to 2001 and 2002. He states that he was not aware of the company's dissolution while he worked on construction projects for the company. He also stated that he attempted, but was unable to, contact the company and that he did not retain or cannot find paystubs or IRS Forms W-2 that show he was employed by [REDACTED]. Although the beneficiary stated that he was not able to contact the company or to locate his paystubs or IRS Forms W-2, he has not demonstrated any efforts made to contact the IRS or the Social Security Administration to ascertain his employment records for the time period at issue. However, this experience with [REDACTED] was not listed on the ETA 750B. 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.

In an affidavit dated May 7, 2008, the beneficiary stated that he was employed by [REDACTED] from October 1995 until March 1999; and that in 1998 he worked part-time due to a business slow down. The beneficiary also stated that he was employed by [REDACTED] as a hand carver part-time from January 1998 to March 1999; and full-time from March 1999 to March 2001. The beneficiary stated that he was employed by the petitioner as a hand carver from March 2001 to December 2001; and that from 2002 through 2006 he began working for

status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

[REDACTED] of New York as a hand carver. The petitioner submitted copies of the beneficiary's IRS Forms W-2 issued to him by [REDACTED] in 2002 through 2006. Although the IRS Forms W-2 may be evidence of the beneficiary's employment with [REDACTED] the dates of employment are after the priority date; and therefore, cannot be used to demonstrate the beneficiary's work experience prior to the priority date.

The petitioner submitted a letter dated May 1, 2008 from the president of [REDACTED] who stated that the company employed the beneficiary as a hand carver from January 1998 to March 2001. The declarant stated that the beneficiary was employed 40 hours per week at a rate of pay of \$800.00 per week. The declarant's description of the beneficiary's job duties mimic the duties described by the petitioner in the labor certification. This letter is inconsistent with the beneficiary's statement on his affidavit in that the beneficiary stated that he was employed part-time by [REDACTED] from January 1998 to March 1999. Furthermore, the beneficiary stated under penalty of perjury on his Form G-325A, signed August 10, 2007 that he was employed by [REDACTED] as a wood carver from January 2002 to December 2002, which is subsequent to the priority date. As noted above, the beneficiary did not list his employment with [REDACTED] on the labor certification. *Matter of Leung*, 16 I&N Dec. at 2530. Moreover, as is noted by the AAO in the NOID/NODI/RFE, the New York State Department of Corporations indicates that [REDACTED] was dissolved by proclamation on September 23, 1998. This information contradicts the beneficiary's statements and the information he provided on the Form G-325A.

In response to the AAO's NOID/NODI/RFE, counsel asserts that there are no contradictions "only differences in the information" provided by [REDACTED] and the beneficiary's statements. Counsel further asserts that although the New York State Department of Corporations indicated that [REDACTED] was dissolved by proclamation on September 23, 1998, the beneficiary had no knowledge of this while he was employed by the company, and that the beneficiary cannot locate paychecks, stubs and/or IRS Forms W-2 issued by [REDACTED] because they were not retained after so many years. The petitioner has failed to provide evidence to demonstrate that [REDACTED] was in business after the dissolution date of September 23, 1998 or that the beneficiary was employed by the company thereafter. Furthermore, while [REDACTED] president stated that the company employed the beneficiary full-time as a hand carver from January 1998 to March 2001, the beneficiary stated on the labor certification that he was employed by [REDACTED] from October 1995 until March 1999.

There has been no independent objective evidence submitted to resolve the multiple inconsistencies and contradictions found in the record. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. To be eligible for approval, a beneficiary must have the three years of experience specified on the labor certification as of the petition's filing date, which as noted above, is April 16, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act.

Reg. Comm. 1977). The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 motions to reopen and reconsider are granted. The AAO's prior decision, dated January 2, 2009, is affirmed. The petition remains denied.