

(b)(6)

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

[Redacted]

DATE: **MAY 08 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a manager. 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 possessed the minimum experience required for the offered job as listed on the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact.<sup>1</sup> 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 September 11, 2009 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 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.

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<sup>1</sup> The AAO notes that the petitioner's counsel requested a thirty-day extension of time to file a brief and additional evidence on appeal. The request was granted by the AAO on January 13, 2010, and the petitioner was given until January 29, 2010 to file the brief and requested evidence. The brief and additional evidence were not received by the AAO until April 9, 2010, which is more than two months after the extension deadline.

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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$16.74 per hour (\$34,819.20 per year based on a forty-hour week). The Form ETA 750 states that the position requires two years experience in the job offered of manager.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2000 and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary claimed to work for the petitioner since April 1999.

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 submitted Forms W-2 it issued for 2001 through 2007.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Research conducted in all available databases reveals that the beneficiary's Social Security Number (SSN) belongs to another individual. The AAO also notes that the SSN on the beneficiary's Forms W-2 is different than the beneficiary's SSN as listed on the Forms 1040 Individual Income Tax returns submitted in support of the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status.<sup>3</sup>

The Forms W-2 demonstrate the wages paid for 2001, 2002, 2003, 2004, 2005, 2006, 2007 as shown in the table below.

- In 2001, the Form W-2 shows wages of \$16,747.04
- In 2002, the Form W-2 shows wages of \$16,078.46

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<sup>3</sup> Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at [http://www.ssa.gov/OP\\_Home/ssact/title02/0208.htm](http://www.ssa.gov/OP_Home/ssact/title02/0208.htm) (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

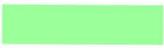
- In 2003, the Form W-2 shows wages of \$16,017.36
- In 2004, the Form W-2 shows wages of \$5,042.64
- In 2005, the Form W-2 shows wages of \$13,648.94
- In 2006, the Form W-2 shows wages of \$18,852.35
- In 2007, the Form W-2 shows wages of \$22,469.00

The wages paid by the petitioner in 2001 through 2007 are less than the proffered wage of \$34,819.20.

The inconsistency in the beneficiary's SSN raises doubts that the beneficiary is the actual recipient of the wages listed on the Forms W-2. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 692. Without independent, objective evidence that the wages were paid to the instant beneficiary, the AAO cannot consider the Forms W-2 as evidence of the petitioner's ability to pay the proffered wage. This issue must be resolved with any further filings.

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

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can



sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor claims household expenses of \$61,000 for 2001 through 2008. In 2001, the sole proprietor supported seven family members, and in 2002 through 2007, the sole proprietor supported four family members, as shown on the sole proprietor's Forms 1040, U.S. Individual Tax Returns for those years. The proprietor's tax returns reflect the following information for the following years:

Proprietor's adjusted gross income (Form 1040):

Proprietor's adjusted gross income (Form 1040):	<u>2001</u>	<u>2002</u>	
	-\$70,965.00 <sup>4</sup>	-\$184,760.00 <sup>5</sup>	
Proprietor's adjusted gross income (Form 1040):	<u>2003</u>	<u>2004</u>	
	-\$267,470.00 <sup>6</sup>	-\$303,897.00 <sup>7</sup>	
Proprietor's adjusted gross income (Form 1040):	<u>2005</u>	<u>2006</u>	<u>2007</u>
	-\$15,222.00 <sup>8</sup>	-\$90,794.00	-\$49,040.00

For 2001 to 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$34,819.20. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel asserts that the director erred in determining the sole proprietor's adjusted gross income. In his brief, counsel argues:

“The Director's computations were incorrectly based upon [redacted] s adjusted gross income (“AGI”) modified to reflect actual cash flow, thus rendering a result inconsistent with an AGI determined by the Internal Revenue Code. When using an

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<sup>4</sup> The proprietor's adjusted gross income for 2001 is found on line 33 of the Form 1040.  
<sup>5</sup> The proprietor's adjusted gross income for 2002 is found on line 35 of the Form 1040.  
<sup>6</sup> The proprietor's adjusted gross income for 2003 is found on line 34 of the Form 1040.  
<sup>7</sup> The proprietor's adjusted gross income for 2004 is found on line 36 of the Form 1040.  
<sup>8</sup> The proprietor's adjusted gross income for 2005-2007 is found on line 37 of the Form 1040.

AGI reflecting actual cash flow, the cumulative total is greater than the total of the Petitioner's recurring monthly expenses plus the certified wage."

The petitioner submits a letter from its accountant, [REDACTED], in which Mr. [REDACTED] states:

"The petitioner's AGI from the [d]ecision is used as the starting point but is modified to reflect actual cash flow. The result is a meaningful 'cash' AGI rather than an AGI determined by the Internal Revenue Code."

The accountant, in his letter dated March 16, 2010, believes that the tax-loss carryforward deduction; the deduction for depreciation; the interest deduction; and the adjustments of rent operations due to the passive activity loss rules should all be eliminated from the calculation of AGI. He attached a worksheet for the years 2001 to 2008 that adjusts the sole proprietor's AGI so that "only actual cash is reflected."

If an individual taxpayer's deductions for the year are more than its income for the year, the taxpayer may have a net operating loss (NOL). When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. If a taxpayer is carrying forward a NOL, it shows the carryforward amount as a negative figure on the "Other Income" line of IRS Form 1040. However, because a petitioner's NOL is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. For example, the petitioner's NOL carryforward of \$189,633 in 2003 represents a loss of \$82,728 and \$106,905 incurred in 2001 and 2002, respectively. Therefore, this office rejects counsel's argument regarding the petitioner's NOL carryovers.

The petitioner's accountant argues that depreciation expenses do not result in any cash outlay, and therefore, depreciation should be added back to the sole proprietor's AGI. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

The sole proprietor’s AGI contains a deduction for mortgage interest expenses relating to certain rental properties owned by the proprietor. The petitioner’s accountant asserts that the interest expense on the loan relating to the petitioner’s business location resulted from the lender adding the mortgage interest to the note principal, and that the interest was not paid out of cash flow. Thus, the petitioner’s accountant suggests adding the interest expense back to the sole proprietor’s AGI in 2001, 2002, 2003, 2007, and 2008. The petitioner has not submitted any evidence to establish that the mortgage interest was capitalized and not paid out of cash flow. 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)). Further, capitalization generally increases the total amount the proprietor must repay on the loan. Thus, the proprietor’s total debt increases when interest on the loan is capitalized. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977). The petitioner has not established that increasing its debt will improve its overall financial position. Therefore, this office rejects the accountant’s assertion that the interest expense should be added back to the sole proprietor’s AGI.

The sole proprietor’s AGI contains adjustments of rent operations due to the passive activity loss limitation rules. The accountant suggests eliminating the loss limitation rules in calculating the proprietor’s AGI. However, even if the AAO accepted the accountant’s adjustments, they would not establish the petitioner’s ability to pay the proffered wage and cover the sole proprietor’s household expenses in each relevant year. The adjustments for rent operations would only demonstrate the petitioner’s ability to pay the proffered wage in 2006.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The

petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *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 has not demonstrated sufficient adjusted gross income (AGI) of its sole proprietor to pay the proffered wage. In all relevant years, the sole proprietor's AGI was insufficient to even cover its household expenses, let alone the proffered wage. The petitioner also failed to include any evidence of historical growth of its business, its reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. 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.

As set forth in the director's September 11, 2009 denial, another issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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).

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: N/A.

High School: Blank.

College: Blank.

College Degree Required: Blank.

Major Field of Study: Blank.

TRAINING: N/A.

EXPERIENCE: Two (2) years in the job offered.

OTHER SPECIAL REQUIREMENTS: Blank.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a manager at [REDACTED] California from June 1995 until April 1998 for forty hours per week, and working twenty hours per week from April 1998 to May 2001. The beneficiary signed the labor certification on April 9, 2001 under a declaration that the contents are true and correct under penalty of perjury.<sup>9</sup>

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 dated January 27, 2003, from [REDACTED] whose title is not specified, on [REDACTED] letterhead stating that the company employed the beneficiary as a full-time location manager from June 1995 until April 1998, and as a part-time location manager from April 1998 to May 2001. However, the letter does not describe the beneficiary's duties, nor does it provide a title or a signature.

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<sup>9</sup> The AAO notes that the beneficiary signed the labor certification on April 9, 2001, but he states that he left Del Taco in May 2001, which is subsequent to the date that he signed the labor certification.

On appeal, the petitioner submits two additional letters in support of the beneficiary's employment experience at [REDACTED]. The first letter is a re-submission of the experience letter dated January 27, 2003. However, the letter is signed and bears a stamp next to the signature of the [REDACTED] store, whereas the previous letter submitted was not signed nor did it bear the stamp of the store. The letter does not list the title of the signatory or list any job duties. The petitioner does not provide any explanation regarding the discrepancies in the two letters.

The second letter dated April 1, 2010, is also signed by [REDACTED] who lists her title as "general manager." The letter is not on [REDACTED] letterhead, it does not state the dates the beneficiary worked for [REDACTED] and it does not list whether the beneficiary worked full-time. The duties as listed in the experience letter are the following:

"Recruit, hire and oversee training to staff, schedule staff work hours, prepare payroll; take care of maintenance and repair of equipment, direct cleaning of kitchen and dining areas; identify and estimate quantities of foods, beverages and supplies to be ordered."

The record also contains two letters from [REDACTED] owner of the petitioner, [REDACTED]. He states that the beneficiary has worked at [REDACTED] as a manager since 1999. The letters, dated April 26, 2009 and March 31, 2010, both describe the beneficiary's duties as follows:

"Recruit, hire and oversee training of staff, schedule staff work hours and activities, prepare payroll, arrange for maintenance and repair of equipment, direct cleaning of kitchen and dining areas, identify and estimate quantities of foods, beverages and supplies to be ordered."

The language contained in both of the [REDACTED] experience letters describing the beneficiary's duties matches the description of the beneficiary's duties in the [REDACTED] letter. Additionally, the petitioner cannot rely on experience gained with the petitioner in the offered position for the beneficiary to qualify for the proffered position.<sup>10</sup>

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<sup>10</sup> When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Department of Labor's Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment

The AAO also notes that the beneficiary filed for adjustment of status on April 3, 2008. On the beneficiary's G-325A, he lists his employment with [REDACTED] as beginning in January 2003, while on the labor certification, the beneficiary lists his experience with [REDACTED] as beginning in April 1999. On the G-325A, the beneficiary lists his position at [REDACTED] as "administrator," while the two experience letters and the labor certification state that he is a "manager." Moreover, the beneficiary's only employment listed on the G-325A is as an "administrator" at [REDACTED]. However, the record contains Forms W-2 for 2004, 2005, 2006, and 2007, from [REDACTED] and a Form W-2 for 2004 from [REDACTED].

Based on the numerous inconsistencies in the record regarding the beneficiary's employment experience, the AAO cannot find that the beneficiary met the requirements for the proffered position as of the priority date. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 591-2.

Therefore, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.

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practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. As the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.