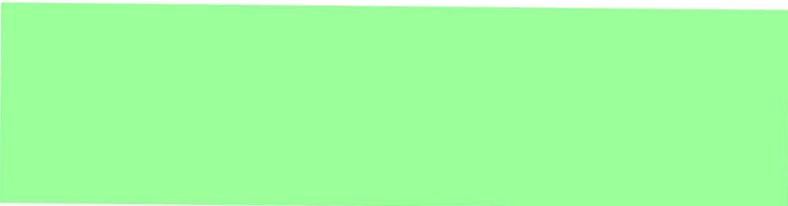


(b)(6)

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

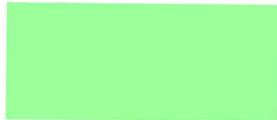


U.S. Citizenship  
and Immigration  
Services

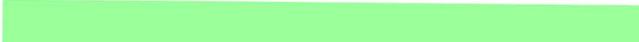


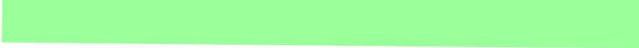
DATE: **MAY 15 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

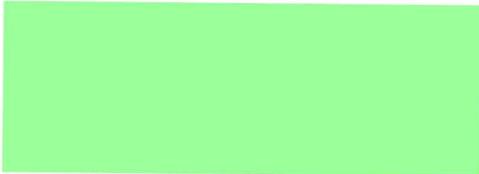
IN RE:

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition, which is on appeal to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a construction company. It seeks to permanently employ the beneficiary in the United States as a warehouse controller.<sup>1</sup> The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>2</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date an office within the DOL's employment service system accepted the labor certification for processing, is April 27, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that the beneficiary possessed, by the petition's priority date, the minimum experience required to perform the offered position.

The record shows that the appeal is properly filed 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.

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>3</sup>

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*

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<sup>1</sup> The petition and the Form ETA 750, Application for Alien Employment Certification (labor certification), identify the offered position as "Controler [*sic*] Warehouse." The U.S. Department of Labor (DOL) classified the position as a "Warehouse Supervisor," an occupation (Code: 929.137-022) in its *Dictionary of Occupational Titles*.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>3</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 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).

*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 the job requirements on the 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.

In the instant case, the labor certification states the following minimum requirements for the offered position of warehouse controller:

EDUCATION: None required.

TRAINING: None Required.

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

OTHER SPECIAL REQUIREMENTS: “None.”

The labor certification states that the beneficiary qualifies for the offered position based on experience as a “Controler-Warehouse” with ( ) in Astoria, New York from September 1997 until December 2000. The labor certification also states that the beneficiary worked for the petitioner in the offered position since January 2001. The beneficiary signed the labor certification on April 24, 2001, declaring that its 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, dated January 10, 2001, from [REDACTED] Owner, on [REDACTED] letterhead, stating that the company employed the beneficiary as a “controller warehouse” from September 1997 until December 2000. The spellings of the company’s name and the job’s title do not match the spellings on the labor certification. The letter describes the beneficiary’s experience and indicates his weekly pay. The letter also states the beneficiary’s job title “may be known by specific are worked as cooler supervisor.” The letter contains numerous misspellings and grammatical errors. The New York State Department of State, Division of Corporations, does not list an active or inactive corporation by the name of “[REDACTED] Corp.” See [REDACTED] (accessed May 8, 2013).

The record also contains copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements, showing that the petitioner employed the beneficiary in 2001, 2002 and 2003.

In response to the director’s December 14, 2007 request for evidence (RFE) seeking certified copies of the beneficiary’s payroll records with [REDACTED] and the petitioner, the petitioner submitted copies of the beneficiary’s W-2 forms for 1997, 1998 and 2000 from [REDACTED] and a notarized letter on [REDACTED]. The letter states that the company employed the beneficiary as a “controler warehouse” from May 1995 to August 1997, describes his duties, and indicates his weekly pay. The letter is dated January 30, 2008 and is signed by an individual identified as a “Co-Worker.”

The W-2 forms from [REDACTED] conflict with the beneficiary’s claimed employment experience with [REDACTED]. The beneficiary states on the labor certification and on his Form G-325A, Biographic Information, which he submitted with his application for adjustment of status and is dated February 15, 2005, that [REDACTED] employed him from September 1997 until December 2000. But the W-2 forms show that the beneficiary was employed in 1997, 1998 and 2000 by [REDACTED] a company that the beneficiary did not identify as a former employer on the labor certification or on the Form G-325A. See *Matter of Leung*, 16 I&N Dec. 12, 14 (BIA 1976) (the testimony of an applicant for adjustment of status regarding his prior employment was found not credible where he did not identify the claimed employment on his labor certification).

The beneficiary also identifies [REDACTED] on the labor certification and the Form G-325A as his previous employer, while the purported letter from the company states its name as [REDACTED]. The inconsistencies in the names of the beneficiary’s former employers on the labor certification, the Form G-325A, the W-2 forms, and the [REDACTED] experience

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<sup>4</sup> The New York State Department of State, Division of Corporations, lists an active corporation by the name of [REDACTED]. See [REDACTED]. The Chief Executive Officer of that corporation, however, is not [REDACTED] and the corporation’s address differs from the address on the beneficiary’s experience letter, according to the online records.

letter cast doubt on the identity of the beneficiary's true employer from September 1997 to December 2000, the validity of the petitioner's evidence, and the beneficiary's qualifications for the offered position. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

In addition, while the labor certification, the petition, the beneficiary's application for adjustment of status, his passport and his birth certificate identify him by a first name, second name, and a hyphenated last name, the W-2 forms from [REDACTED] him by a different first name and an abbreviated last name. Further, the [REDACTED] W-2 forms ascribe to the beneficiary a Social Security Number (SSN) that begins with [REDACTED]. However, Social Security Administration (SSA) records show that SSN was not assigned to him. The W-2 forms from the petitioner ascribe to him a different SSN, which begins with [REDACTED]. Records show that the SSA also did not assign this SSN to the beneficiary. The petition and the beneficiary's application for adjustment of status state that the beneficiary has no SSN.

In addition, copies of the W-2 forms from the petitioner include a 2003 W-2 form in the name of another individual, containing the same SSN, address, and wage and tax deduction amounts as the beneficiary's 2003 W-2 form. The two 2003 W-2 forms are identical, except for the names of the employees. The beneficiary's name on his 2003 form appears to be in a font different from all the other type on the forms. The nearly identical 2003 W-2 forms of the employees suggest that one or both of the forms are false. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence). The inconsistencies in the beneficiary's name and SSN in the other W-2 forms cast additional doubt on the validity and reliability of the remaining evidence regarding the beneficiary's employment experience. *Id.*

Further, the experience letter on [REDACTED] letterhead does not meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). The regulation requires letters from "employers" to support claimed employment experience. But the author of the [REDACTED] letter is identified as a "Co-Worker." The petitioner has not established that [REDACTED] authorized the co-worker to sign the letter on behalf of the company, or that the co-worker was in a position to know the beneficiary's dates of employment and to describe his experience at [REDACTED]. In addition, the letter, which states that the beneficiary worked for [REDACTED] from May 1995 to August 1997, conflicts with the [REDACTED] W-2 forms, which show that the company employed the beneficiary in 1997, 1998 and 2000. The conflicting evidence from [REDACTED] casts additional doubt on the beneficiary's claimed experience. *See Matter of Ho*, 19 I&N Dec. at 591.

Thus, the AAO finds that the record contains inconsistent and possibly false evidence of the beneficiary's employment experience. After careful, *de novo* review of the record, the AAO agrees with the director's conclusion that the petitioner failed to demonstrate that, as of the priority date, the beneficiary possessed two years of employment experience in the offered position as stated on the labor certification. The record lacks independent, objective evidence sufficient to overcome the

inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

On appeal, counsel asserts that the petitioner and the beneficiary are the victims of the fraudulent misrepresentations of their former representative, [REDACTED] a former provider of immigration assistance services in Long Island City, New York. Counsel asserts that the beneficiary worked for [REDACTED], from September 1997 to December 2000. He claims that the copies of the [REDACTED] W-2 forms in the beneficiary's name for 1997, 1998 and 2000 are authentic. According to counsel, both the petitioner and the beneficiary told the representative from [REDACTED] that the beneficiary had worked for [REDACTED]. Counsel claims that the representative from [REDACTED] in response to an April 13, 2005 RFE, submitted a false letter from [REDACTED] without the knowledge of the petitioner and the beneficiary.

Counsel asserts that the petitioner never saw the ETA Form 750B, and, so, the petitioner was unaware that the labor certification did not identify [REDACTED] as the beneficiary's former employer. Because the beneficiary could not read English, counsel claims that the beneficiary also did not know that the ETA Form 750B that he signed did not include [REDACTED] as his former employer.<sup>5</sup>

The petitioner submits a January 13, 2012 notarized letter on the petitioner's letterhead from a past "principle" [sic] of [REDACTED] a corporation that she says merged with the petitioner. The petitioner also submits an online printout from the New York State Department of State, Division of Corporations, showing that [REDACTED] was incorporated on February 18, 1992 and became inactive on January 16, 2001, when it merged with another entity that the records do not identify.<sup>6</sup> The purported "principle" also states that she authorized the "co-worker" of the beneficiary at [REDACTED] to sign the [REDACTED] experience letter for the beneficiary. She claims that the beneficiary never worked for [REDACTED] and was "victimized" by the former representative.

The record also contains an undated letter on the petitioner's letterhead from a [REDACTED]. He states that the petitioner had never heard of [REDACTED] until it received the RFE of December 14, 2007. He states that the petitioner did not understand why USCIS asked it for the payroll records of another company. According to the yard manager, the representative from

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<sup>5</sup> The ETA Form 750B, which the beneficiary signed on April 24, 2001, contains the same employment information submitted to USCIS on Form G-325A, which the beneficiary signed on February 15, 2005.

<sup>6</sup> Statement 24 of the petitioner's IRS Form 1120S in its 2001 federal tax return also refers to an increase in retained earnings "due to merger." The tax return, however, does not provide further details about the "merger." 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).

told the petitioner that USCIS had erred in requesting “ payroll records from the petitioner.

The yard manager also identifies the person listed on the nearly identical W-2 form as an employee of the petitioner. He states that the petitioner “would never participate in the provision of false and misleading information,” but that he has “no explanation” for the identical information on the 2003 W-2s. He states that the petitioner prints its employee W-2 forms in only one font. Therefore, he states that the W-2 forms submitted with the petition “are suspect” because of the different font on the beneficiary’s purported W-2 forms.

The petitioner also submits a copy of an August 17, 2010 “Assurance of Discontinuance” agreement between and the New York State Office of the Attorney General. Under the agreement, agreed to stop offering immigration services and to dissolve its business in exchange for the Attorney General’s promise to forego prosecution of the company and its owner on charges of engaging in unlawful business practices, including the unauthorized practice of law.

Counsel identifies the petitioner’s former representative as the non-attorney owner of . The record, however, shows that an attorney, who appeared to be affiliated with represented the petitioner. On the Form G-28, Entry of Appearance, and in the petition, the attorney stated his address as . The attorney’s signature is also on letters in response to the RFEs of April 13, 2005 and December 14, 2007, which are on letterhead. In October 2010, shortly after agreed to cease operations, USCIS received a letter from the attorney, inquiring about the status of the petition. The letterhead indicates that he formed his own legal firm at the same address of . Included in the correspondence was a Form G-28, Notice of Entry of Appearance, signed on October 5, 2010 by the attorney and the petitioner’s “shop manager.”

Although counsel attributes the inconsistencies and deficiencies in the record to the misrepresentations of the petitioner’s former representative, the petitioner does not properly articulate a claim for ineffective assistance of counsel in accordance with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd.*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988); *see also Zheng v. U.S. Dept. of Justice*, 409 F.3d 43, 47 (2d Cir.2005) (upholding application of *Lozada* requirements to claims of ineffective assistance of counsel in cases arising in the Second Circuit).

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, an explanation as to why not.

*Matter of Lozada*, 19 I&N Dec. at 639.

The petitioner in the instant case has not met the requirements specified in [REDACTED]. The petitioner has not submitted a detailed statement about the legal services its previous representative agreed to provide. Counsel asserts that the beneficiary paid the representative [REDACTED] for legal services. But counsel does not provide details of the services to which the parties agreed. Moreover, the AAO cannot consider the assertions of counsel as evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). If the beneficiary retained and paid the previous representative to represent both him and the petitioner, the petitioner should have provided statements from the beneficiary and itself regarding the scope of the legal representation.

The petitioner has also failed to submit evidence that it informed the previous representative of its allegations. Counsel asserts that the petitioner has been unable to find its previous representative. But records of the New York State Unified Court System show that the attorney continues to legally practice law at the same address he indicated when he was affiliated with [REDACTED]. *See* [REDACTED]. The petitioner and the beneficiary should have known the name of the attorney who represented them, as the record shows that both the petitioner and the beneficiary signed Forms G-28 identifying him as their counsel.<sup>7</sup> Previous counsel's continued practice of law at the same address casts doubt on counsel's claim that the petitioner has been unable to locate its former representative. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

In addition, the petitioner has failed to submit evidence that it filed a disciplinary complaint against its previous representative, nor has it explained why it has not done so. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Without evidence of the representation agreement, the contemplation of a formal disciplinary complaint, and the affordance of an opportunity to the former representative to respond to the allegations, the AAO cannot consider the petitioner's claim of ineffective assistance of counsel as credible. Even if the non-attorney owner of [REDACTED] rather than the attorney who signed the Form G-28 in this matter, was actually the petitioner's representative, the petitioner would still have to comply with [REDACTED]. *See Omar v. Mukasey*, 517 F.3d 647, 650-51 (2d Cir.2008) (although the Second Circuit has yet to rule whether an ineffective assistance of counsel claim can be brought against a non-attorney, the Board of Immigration Appeals did not abuse its discretion in requiring such a claim to meet the [REDACTED] requirements).

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<sup>7</sup> The record shows that the petitioner's previous attorney also represented the beneficiary in his application for adjustment of status.

Further, even assuming the petitioner had established the ineffectiveness and unethical practices of its previous representative, the AAO finds that the record still does not establish that the beneficiary possessed the required experience by the petition's priority date. The petitioner has failed to comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) by supporting the beneficiary's claimed experience with a sufficient letter from [REDACTED]. As discussed previously, the [REDACTED] experience letter from the co-worker is not from an "employer," but rather from a co-worker.<sup>8</sup> It is not clear that the co-worker had knowledge of the beneficiary's job title, dates of employment, and/or job duties. While New York State Department of State records identify the purported "principle" as [REDACTED] chief executive officer, her letter fails to state the beneficiary's dates of employment or to describe his experience with [REDACTED].

The petitioner has also failed to explain other inconsistencies and omissions in the record. The experience letter from the co-worker, which the purported "principle" claims she authorized, indicates that [REDACTED] employed the beneficiary from May 1995 to August 1997. But the W-2 forms, which counsel asserts are authentic, show that the beneficiary worked for [REDACTED] in 1997, 1998 and 2000. If the beneficiary worked for [REDACTED] from 1997 to 2000, or from 1995 to 2000, the petitioner has not explained why the co-worker's letter, which the "principle" says she authorized, states the beneficiary's dates of employment as 1995 to 1997. Because the experience letter states that the beneficiary's employment with [REDACTED] ended in August 1997, just before his purported employment with [REDACTED] began in September 1997, the [REDACTED] letter appears to misrepresent the beneficiary's dates of employment in an attempt to remain consistent with the purported [REDACTED] employment. If the [REDACTED] employment is false and the petitioner was unaware of the misrepresentation, however, as the petitioner claims, the petitioner has not explained why the [REDACTED] letter did not include the beneficiary's true dates of employment with [REDACTED].

In addition, although the yard manager states that the petitioner would never submit false evidence, the petitioner has not submitted copies of the actual, valid 2003 W-2 forms that it issued to the beneficiary, or explained why it has not provided this W-2 form. Nor has the petitioner submitted a statement from the beneficiary regarding the contents and validity of the 2003 W-2 form submitted in his name. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165, *citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

For the foregoing reasons, the AAO cannot consider the petitioner's claim of ineffective assistance of counsel and finds that the petitioner has not established that the beneficiary, as of the petition's priority date, possessed the experience required to perform the duties of the offered position.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. 8 C.F.R. § 204.5(g)(2). The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing

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<sup>8</sup> The AAO also notes that the January 30, 2008 letter is on the purported letterhead of a company that New York state records show has not legally existed since January 16, 2001.

until the beneficiary obtains lawful permanent residence. *Id.* Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* The labor certification states the proffered wage as \$26.13 per hour for a 35-hour work week, or \$47,556.60 per year.

The record contains copies of pages from the petitioner’s federal tax returns for 2001, 2002, and 2003, along with a copy of its request for an extension of time in which to file its 2004 return. The petitioner’s returns indicate that it is an S corporation for federal tax purposes and that its returns follow a calendar year. The record also contains IRS tax transcripts of the petitioner’s federal tax returns from 2000 through 2006.

The tax transcripts, while appearing consistent with the petitioner’s federal tax returns and confirming the IRS’s receipt of the returns, provide only a limited amount of financial information about the petitioner. The tax transcripts do not include each line item that would be normally reflected on a filer’s return and associated schedules.

The copies of the petitioner’s tax returns appear to show it may have sufficient net income to pay the beneficiary’s proffered wage. Because a false W-2 form(s) is apparently in the record, however, it is important for USCIS to receive complete copies of the petitioner’s tax returns to ensure the consistency and validity of its claimed financial information. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence). In addition, the petitioner’s tax returns for 2001, 2002, and 2003 do not include all of their pages. The 2001 return contains pages 1, and 27 to 29. The 2002 return contains page 1 and 17 to 19, while the 2003 returns contains pages 1 to 10 and 18 to 19. The copies of the 2001 and 2003 returns are also unsigned, casting further doubt on their reliability.

Significantly, the petitioner’s 2001 and 2002 tax returns lack the pages containing the Schedules K to its IRS Forms 1120S. 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 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) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 18, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

Because the copies of the petitioner’s 2001 and 2002 federal tax returns do not include its Schedules K, the AAO cannot determine whether the net income amounts on lines 21 of the petitioner’s Forms 1120S are accurate reflections of the petitioner’s net income in those years, or whether the petitioner adjusted the net income amounts on its Schedules K. The petitioner’s 2001 and 2002 tax returns also lack Schedules L, which would allow USCIS to compute and analyze the petitioner’s annual net current assets. Again, the existence of an apparently false W-2 form in the record casts doubt on the reliability and sufficiency of the petitioner’s financial documentation, and incomplete tax returns

without an explanation are insufficient to overcome the doubts. *See Matter of Ho*, 19 I.&N. Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Moreover, according to USCIS records, the petitioner has filed at least 18 visa petitions, including 13 I-129 nonimmigrant work visa petitions and four other I-140 petitions on behalf of other beneficiaries since 2006. The petitioner must demonstrate its ability to simultaneously pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The evidence in the record does not establish the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the AAO concludes that the petitioner has not established its continuing ability to simultaneously pay the proffered wage to the beneficiary and the proffered and prevailing wages to the beneficiaries of its other petitions.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In summary, 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 addition, the AAO finds that the petitioner failed to demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.