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



U.S. Citizenship
and Immigration
Services

DATE: MAY 23 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen, which the director dismissed. The petitioner appealed to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion will be granted, and the previous decision of the AAO, dated August 28, 2012, will be affirmed.

The petitioner is a furniture manufacturing company. It seeks to employ the beneficiary permanently in the United States as a cabinet/furniture manufacturer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and that it further had failed to show that the beneficiary satisfied the minimum work experience requirements for the proffered position as set forth in the labor certification. Accordingly, the AAO, in a decision dated August 28, 2012, dismissed the petitioner's appeal.

On September 27, 2012, the petitioner filed a motion to reconsider the AAO's decision. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner contends that the AAO erred in its determination that the petitioner had not established its ability to pay the beneficiary the proffered wage and submits additional evidence in support of this contention. Further, counsel states that the petitioner has demonstrated that the beneficiary meets the minimum qualifications of the proffered job as set forth in the labor certification, and that any inconsistencies in the record as to the beneficiary's work experience are due to errors committed by prior counsel that should not adversely impact the beneficiary. The record shows that the motion to reopen is properly filed and timely. The motion provides new facts and is supported by documentary evidence. The motion to reopen is granted. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of August 28, 2012 is affirmed. The remaining 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 AAO's previous decision, the issues in this case are: (1) 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; and (2) whether the beneficiary satisfies the minimum requirements for the proffered job stated in the labor certification.

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

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

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

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour (\$27,040 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The petitioner failed to disclose on the Form I-140, Immigrant Petition for Alien Worker, the year it was established, its gross annual income, or the number of employees it currently employs, as required on the form. However, the petitioner's tax returns in the record indicate that it was incorporated in 1983, as corroborated by a search of the New York State Department of State website. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner from October 2000 to present. In a letter submitted on motion, dated September 26, 2012, the sole shareholder of the petitioning business states that the beneficiary "was not on [his] payroll from 2002," because the latter was not authorized to work.

As the AAO noted in our August 2012 decision, 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 its prior decision, the AAO set forth in detail, which will not be replicated here, its analysis of the petitioner's ability to pay the beneficiary the proffered wage for the years 2001 through 2007, and ultimately determined that the petitioner had failed to demonstrate its ability to pay. On motion, counsel has now proffered the petitioner's tax returns for the years 2008 through 2010. Thus, to complete the record, the AAO will review those tax returns to address the petitioner's ability to pay the proffered wage for those years as well.

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 record shows that the petitioner has not submitted any evidence of wages paid to the beneficiary from 2002 through 2010. The record does contain an Internal Revenue Service (IRS) Form W-2, Wage and Statement, purportedly issued by the petitioner to the beneficiary for 2001. The AAO observes, however, that the social security number on the W-2 Form is inconsistent with the beneficiary's tax identification number on his 2001 tax transcript, issued in 2008. Moreover, the Form I-140 does not show any social security number for the beneficiary. This petitioner must resolve these inconsistencies before the W-2 Form can be accepted to show that the beneficiary was paid the proffered wage in 2001. *See Matter of Ho*, 19 I&N Dec. 582, 591 (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 offered in support of the visa petition).

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

profits 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 the Service 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, 558 F.3d 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*, 719 F. Supp. 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. As of the date of the filing of the instant motion, the petitioner's 2011 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2010 is the most recent return available. The petitioner's tax returns demonstrate its net income for the years 2008 through 2010, as shown in the table below.

- In 2008, the Form 1120 stated net income (net loss) of (\$82,297) (for the period from October 2008 to September 30, 2009).
- In 2009, the Form 1120 stated net income (net loss) of (\$17,897) (for the period from October 2009 to September 30, 2010).

- In 2010, the Form 1120 stated net income (net loss) of (\$16,288) (for the period from October 2010 to September 30, 2011).

Therefore, for the years 2008 through 2010, the petitioner did not have sufficient net income to pay the proffered wage of \$27,040. Furthermore, based on the AAO's previous analysis, the petitioner also did not have sufficient income to pay the beneficiary the full proffered wage from the 2001 priority date through 2007, except in 2001 and 2003. However, as noted above, the petitioner must resolve the issue in the beneficiary's social security number and tax identification number used, before the AAO can accept the 2001 IRS Form W-2 statement as demonstrating the petitioner's ability to pay the beneficiary the proffered wage in 2001. Therefore, based on the record, the petitioner can only establish its ability to pay in 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2008 through 2010, as shown in the table below.

- In 2008, the Form 1120 stated net current assets (liabilities) of (\$142,411) (for the period from October 2008 to September 30, 2009).
- In 2009, the Form 1120 stated net current assets (liabilities) of (\$152,816) (for the period from October 2009 to September 30, 2010).
- In 2010, the Form 1120 stated net current assets (liabilities) of (\$156,734) (for the period from October 2010 to September 30, 2011).

Therefore, for the years 2008 through 2010, the petitioner did not have sufficient net current assets to pay the proffered wage. Likewise, the AAO's previous analysis demonstrated that the petitioner did not have sufficient net current assets to pay the beneficiary the full proffered wage for the years 2001 through 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of

¹According 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 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel asserts that the AAO erred in not utilizing the petitioner's retained earnings, as reported on the business' tax returns, in determining its ability to pay the proffered wage. Retained earnings are a company's accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

Counsel also asserts that the AAO acted contrary to acceptable accounting principles and IRS regulations in not considering depreciation when determining the petitioner's ability to pay the proffered wage. However, counsel has not provided any authority or precedent decisions to support the use of adding back depreciation to net income when determining the petitioner's ability to pay the proffered wage. As noted herein, the use of tax returns and the net income figures in determining petitioner's ability to pay, *without* adding back depreciation, is supported by USCIS and judicial precedent. *Chi-Feng Chang*, 719 F. Supp. at 537. As the court in *River Street Donut* found, "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*, 558 F.3d at 118.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

In its prior decision, the AAO alternatively considered the overall magnitude of the petitioner's business activities to determine its ability to pay the beneficiary the proffered wage, once we determined that the petitioner's net income and net assets were insufficient for that purpose. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Pursuant to *Sonogawa*, USCIS may, at its discretion, consider evidence, outside of a petitioner's net income and net current assets, that are relevant to the petitioner's financial ability. Factors that may be considered include 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 applying *Sonegawa*, the AAO found that the petitioner had not demonstrated the petitioner's reputation and historical growth in the industry since its inception in 1983. Instead, a review of the petitioner's tax returns in the record from 2001 through 2010 show that its gross receipts and the total wages it paid out annually in more recent years have declined or remained stagnant, and that the officer compensation paid to the sole shareholder has declined substantially from prior years. In addition, the AAO observes that, except for 2003, the petitioner's net income and net assets were insufficient to pay the beneficiary the proffered wage for every year from 2001 through 2010. In more recent years, the petitioner has reported a net loss of income in its tax returns for three years consecutively, while also reporting significantly high negative figures for its net current assets for that same time period. While the AAO recognizes the longevity of the business, and even counsel's claim that the business has generated sufficient income in order to keep running, this is not sufficient to demonstrate its *continuing* ability to pay the proffered wage. Moreover, as pointed out in our prior decision, the record contains no objective evidence of the petitioner's reputation in its industry, and none have been submitted on motion. Further, while the petitioner asserts that it has paid significant labor costs, the petitioner failed to indicate on the Form I-140 how many employees it has. Therefore, whether the total wages paid in comparison to the petitioner's total number of employees is low or high is unclear.

Additionally, in response to the petitioner's contention that it sought to employ the beneficiary to reduce the expenses it incurred for outside labor costs, the AAO noted in its earlier decision that the petitioner had failed to provide the names of the outsourced workers the beneficiary may replace, their wages, verification of their full-time employment, evidence that the position held by these workers involved the same duties as those set forth in the Form ETA 750, and evidence that the petitioner has replaced or will replace them with the beneficiary. On motion, counsel again raises the identical argument, asserting that the petitioner could have employed the beneficiary in the relevant years to replace any number of employees, who individually or combined were paid at least the amount of the prevailing wage. However, the petitioner has not submitted any of the evidence or information identified by the AAO in its prior decision that would enable it to conclude that the beneficiary would be replacing other full-time outsourced workers or employees, performing the same duties set forth in the labor certification.

Lastly, counsel also asserts that the "employer" was paid a yearly "salary" from the petitioning business, which he would have willingly reduced in order to pay the beneficiary the proffered wage if necessary for any of the relevant years. The AAO notes that the term "employer," as used by counsel, is not in fact the petitioning business, but rather the sole shareholder of the business. The petitioning business is the actual employer for purposes of the petition. Generally speaking, USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Thus, in

the instant case, the petitioner may not use the income or assets of its sole shareholder to pay the proffered wage.

However, the AAO observes that counsel's reference to the figures on the tax returns as the "salary" paid to the "employer" or sole shareholder is actually a reference to the officer compensation paid to the shareholders in Schedule E of the tax returns. As noted previously, the tax returns in the record indicate that the petitioner has a single shareholder who receives 100% of the shareholder compensation. Thus, it appears counsel is asserting that this officer compensation is discretionary and could have been used to pay the proffered wage. The sole shareholder asserts in his September 26, 2012 letter that he would have reduced his salary (officer compensation) in any year from 2002 onward to meet the proffered wage, if the beneficiary had been in the petitioner's employ. However, the record does not contain evidence to show that the sole shareholder could sustain himself and any dependents if he attributed officer compensation toward the beneficiary's salary. Such evidence includes the sole shareholder's federal income tax returns for each of the relevant years from the priority date onward and an estimate of his personal expenses. Additionally, the record does not contain the shareholder's IRS W-2 forms for those years to show that he in fact received the officer compensation. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, as the petitioner's tax returns reflect either very low or negative net income in each year, or substantially negative net current assets in each year, the sole shareholder would need to pay the beneficiary's entire salary from officer compensation. We cannot conclude that this is realistic, especially in later years where officer compensation is substantially lower. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Thus, again assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Finally, in its August 2012 decision, the AAO noted that beyond the decision of the director, the petitioner had failed to meet its burden of proof to show that the beneficiary satisfied the minimum requirements of the proffered job as of the April 30, 2001 priority date. As the AAO stated then, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. at 159; see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *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).

The labor certification in this case requires a minimum of two years of work experience as a cabinet/furniture manufacturer to qualify for the proffered position. The beneficiary claims on the Form ETA 750 to have gained this experience while employed with [REDACTED] in Portugal from 1995 to 1999. However, the employment letter from [REDACTED] dated August 4, 2008, states that the beneficiary was employed as a cabinet and furniture maker from June 1, 1994 through September 30, 1999. The employment letter not only fails to state whether the employment was full-time, but furthermore, indicates dates of employment for the beneficiary that are inconsistent with the dates provided in the labor certification, for which there was no explanation provided in the record. In our previous decision, the AAO noted that it was incumbent upon the petitioner to resolve any inconsistencies in the record such as this by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). However, on motion, counsel merely states that the beneficiary was indeed employed by [REDACTED] full-time for the dates indicated in the employer's letter. He states that the dates of employment set forth in the labor certification are due to attorney error by former counsel for which the beneficiary should not be penalized. The record, however, does not contain independent objective evidence of counsel's claim, such as records of pay or government records to confirm employment as independent verification. As noted previously, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 53; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Accordingly, the AAO concludes that the petitioner had failed to establish that the beneficiary was qualified for the proffered position.

Thus, even if the petitioner had established its ability to pay the proffered wage to the beneficiary, the petition must still be denied as the petitioner has not demonstrated that the beneficiary meets the minimum requirements of the proffered job.

In summary, the petitioner has not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; and (2) that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date.

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. The petitioner has not met that burden. The motion will be granted and the petition reopened. However, the AAO's decision of August 28, 2012 is affirmed, and the underlying petition remains denied.

ORDER: The motion is granted; the previous decision of the AAO dismissing the appeal, dated August 28, 2012, is affirmed, and the underlying petition remains denied.