

(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 23 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:

INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is an Italian restaurant. The petitioner seeks to employ the beneficiary permanently in the United States as a cook. 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. The director denied the petition accordingly.

As set forth in the director's May 22, 2009 denial, and the AAO's April 8, 2011 decision, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date is April 30, 2001. The AAO determined that neither the petitioner's gross income nor the petitioner's owner's personal assets could be considered in determining the petitioning corporation's ability to pay the proffered wage. The AAO determined that the petitioner had submitted evidence to establish its ability to pay the proffered wage in 2003, 2006, 2007, and 2008, but had not submitted sufficient evidence to demonstrate its ability to pay the proffered wage for 2001, 2002, 2004, and 2005.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issue. Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage for 2001, 2002, 2004, and 2005.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$3,000.00 monthly based upon a 40 hour work week (\$36,000.00 per year). The Form ETA 750 states that the position requires six years of grade school and two years of experience in the job offered. At Part 15 of the labor certification the petitioner stated as special requirements that the beneficiary possess “knowledge to cook Italian cuisine” and “knowledge to select foodstuffs and to estimate food consumption quantities.”

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 that is properly submitted upon appeal and on motion.¹

The evidence in the record of proceeding shows that the petitioner was established as a C corporation in 2001 and as an S corporation from 2002 onwards. The petitioner indicates on its petition that it was established in April 1995, and that it currently employs 30 workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary does not indicate that he has been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The petitioner submitted copies of its state wage and withholding reports for 2002, 2004, and 2005. However, these reports are not persuasive evidence of any wages having been paid to the beneficiary because information

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

contained in the forms are inconsistent with claims made by the petitioner and the beneficiary in the Form I-140 and Form I-485. The state quarterly reports indicated that the wages were paid to [REDACTED] with social security number [REDACTED]. The petitioner did not list a social security number for the beneficiary in response to the query in the Form I-140, which requests the beneficiary's social security number. In addition, the beneficiary did not claim that he had a social security number in the Form I-485 and Form G-325A. It is incumbent upon the petitioner to resolve any inconsistencies in the record 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). Absent clarification of these inconsistencies in the record, the AAO will not accept the petitioner's state wage and withholding reports as persuasive evidence of wages paid to the beneficiary.

Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

Assuming the petitioner's statement of wage and withholding reports are persuasive evidence, the quarterly wage statements indicate that the petitioner paid the beneficiary total wages of \$450.00 in 2002, \$13,200.00 in 2004, and \$15,600.00 in 2005. These amounts are less than the proffered wage amount.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at

881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s 2001 tax return demonstrates its net income as shown below.

- In 2001, the Form 1120 stated net income of \$12,979.00.

Therefore, for the year 2001 the petitioner did not have sufficient net income to pay the proffered wage.

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

²According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses

shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return for 2001 demonstrates its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$14,904.00.

The evidence demonstrates that for the year 2001 the petitioner did not have sufficient net current assets to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will next examine whether the petitioner, as an S corporation beginning in 2002, employed and paid the beneficiary during that period. As noted above, the petitioner's quarterly wage and withholding reports are not persuasive evidence of wages paid to the beneficiary.

Where 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. *See Taco Especial v. Napolitano, supra.* The petitioner's tax return demonstrates its net income as an S corporation as shown in the table below.³

- In 2002, the Form 1120S stated net income of \$14,724.00.
- In 2004, the Form 1120S stated net income of \$32,768.00.
- In 2005, the Form 1120S stated net income of \$27,365.00.

Therefore, for the years 2002, 2004, and 2005, the petitioner did not have sufficient net income to pay the proffered wage.⁴ It is noted that on motion the petitioner submitted a copy of its Form 1120S for 2009 and 2010 which show net income amounts, \$77,075.00 and \$83,609.00,

(such as taxes and salaries). *Id.* at 118.

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁴ If the AAO were to consider amounts paid under the unidentified social security number, the 2002 net income would not be sufficient to cover the deficiency between the wages paid (\$450.00) and the proffered wage (\$36,000.00). In 2004 and 2005 the petitioner's net income would be sufficient to pay the difference between the proffered wage and the wage already paid.

respectively, in excess of the proffered wage. Therefore for 2009 and 2010, the petitioner has established its ability to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. However, any suggestion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is misplaced. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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

- In 2002, the Form 1120S stated net current assets of \$17,773.00.
- In 2004, the Form 1120S stated net current assets of \$7,280.00.
- In 2005, the Form 1120S stated net current assets of \$6,609.00.

The evidence demonstrates that for the years 2002, 2004, and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel asserts that based upon the totality of the circumstances, the petitioner has established its ability to pay the proffered wage in the relevant years. Counsel infers that the petitioner's gross income should be used as an alternative in determining the petitioner's ability to pay the proffered wage. Counsel submitted a statement dated April 29, 2010 from the petitioner's owner who stated that the petitioner earns high annual income and that he maintains sufficient savings and is willing to personally guarantee the beneficiary's wages. However, as noted above, 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 also Chi-Feng Chang, supra*. USCIS also rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, as

noted above, USCIS considers net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Counsel further asserts on motion that the petitioner's owners have income and assets sufficient to pay the proffered wage for the relevant years and refers to the owner's statement dated April 29, 2010. Counsel submits a copy of the shareholders' IRS Forms 1040, joint income tax returns for 2002, 2004, and 2005. Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

Counsel infers that the petitioner's officers' compensation should be taken into consideration in determining its ability to pay the proffered wage. The petitioner's IRS Forms for 2002, 2004, and 2005 show that the petitioner paid officer compensation in the amount of \$80,000.00 in 2002, \$71,307.00 in 2004, and \$40,000.00 in 2005. The petitioner's tax returns for 2002, 2004, and 2005 show that [redacted] owns fifty percent of the company's shares of stock and that [redacted] owns fifty percent of its shares of stock. Although the petitioner submitted a declaration that was signed by [redacted] and dated April 29, 2010, and copies of the shareholder's IRS Forms 1040, the Forms 1120S show that [redacted] only owns fifty percent of the company stock. Furthermore, the declaration submitted is not in the form of a sworn affidavit and the record does not contain a listing of the shareholder's average monthly household expenses for the relevant years. There is no evidence in the record of proceeding, e.g., sworn affidavits by the other shareholder to show that she agrees to forego her compensation in an amount sufficient to pay the beneficiary from the priority date until the beneficiary obtains lawful permanent residence status. Without such proof, the AAO may not consider the officers' compensation to determine the petitioner's ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s),

such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The record is devoid of evidence pertaining to the petitioner's business reputation. The petitioner has not demonstrated any uncharacteristic business expenses or losses which made 2001, 2002, 2004, or 2005 unusually difficult or unprofitable years. Counsel asserts that the petitioner has submitted evidence to demonstrate that its business size has increased, that there are reasonable expectations of continued increase in the petitioner's business and profits, and that the petitioner has the present ability to pay the proffered wage amount. Counsel further asserts that the petitioner has a reasonable expectation of continued growth based upon a comparison of its increased income of more than 99 percent within 8 years of operation; from \$14,724.00 in 2002 to \$1,147,688.00 in 2010.⁵ Reliance on the petitioner's future receipts and wage expense is misplaced. The petitioner's expected growth is not the only circumstance to consider. The petitioner has not submitted evidence that under the totality of circumstances, the petitioner has the sufficient income to pay the beneficiary the required wage. Although the petitioner claims that its income has increased by more than 99 percent within 8 years of operation, it has yet to

⁵ The petitioner submitted as evidence a copy of its tax returns for 2009 and 2010.

pay the beneficiary even half of the proffered wage amount in salary. Without independent objective evidence that the petitioner is paying the beneficiary under an unidentified social security number, the petitioner has not established sufficient net income or net current assets in 2001 - 2002 and 2004 - 2005. Even were the AAO to consider the amounts paid under the unidentified social security number, the petitioner has not established sufficient net income or net current assets to pay the difference between the proffered wage and the wages paid in 2001. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage.

Another issue raised by the AAO and addressed by the petitioner on motion is whether the petitioner established that the beneficiary is qualified for the offered position. 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. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered and "knowledge to cook Italian cuisine" and "knowledge to select foodstuffs and to estimate food consumption quantities." On the labor certification, the beneficiary claims to qualify for the offered position based on his experience as a cook. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A). On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary, and the beneficiary described his work experience with [REDACTED] in Mexico City.

The petitioner must establish that the beneficiary had the two years of experience as a cook prior to the priority date, April 30, 2001. The beneficiary indicated on the labor certification that he was employed by [REDACTED] in Mexico City from 1992 to 1995 as a cook, and that he prepared Italian dishes. The beneficiary indicated on his Form G-325A that he has been employed by the petitioner since March 1995. The petitioner submitted an employment letter dated March 16, 2009 from the general manager of [REDACTED], formally known as [REDACTED] in Mexico City, who stated that the beneficiary was employed by the restaurant from January 1992 through December 1995 as a dishwasher, and that he was promoted to a second chef in command. The AAO determined that the employment letter was inconsistent with the statements made by the beneficiary on the Form G-325A, Biographic Information, and was insufficient to demonstrate that the beneficiary was qualified to perform the duties of the offered position. The AAO also determined that the employment letter did not

include a specific description of the duties performed by the beneficiary, list specific dates of the beneficiary's employment, or explain when the beneficiary ceased being a dishwasher and began working as a chef. See 8 C.F.R. § 204.5(g)(1) and (I)(3)(ii)(A).

On motion, counsel asserts that a typographical error was made by his law firm on the Form G-325A and that the statement made by the beneficiary on the labor certification, that he was employed by [REDACTED] from 1992 to 1995 should be considered as the best evidence in determining the beneficiary's employment experience. The petitioner submitted an employment letter dated May 4, 2011 from the general manager of [REDACTED] formally known as [REDACTED] who stated that the beneficiary was employed by the restaurant from January 1992 to May 1992 as a dishwasher; as a second chef from June 1992 to January 1993; and as a chef from February 1993 to February 1995. The declarant's statements are inconsistent in that in the first letter she stated that the beneficiary was employed by the restaurant until December 1995 and in the letter submitted on motion she states that the beneficiary was employed by the restaurant until February 1995. The beneficiary stated, under penalty of perjury, on the labor certification that he was employed by [REDACTED] as a cook; not as a dishwasher, second chef, or chef as claimed by the general manager in her letters.

The inconsistencies in the employment statements cast doubt on the petitioner's proof. 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. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In addition, the declarant has failed to provide a specific description of the beneficiary's job duties. See 8 C.F.R. § 204.5(g)(1) and (I)(3)(ii)(A).

Finally, the record is devoid of evidence sufficient to establish that the beneficiary has the special skills outlined in Part 15 of the labor certification; such as knowledge to cook Italian cuisine and knowledge to select foodstuffs and to estimate food consumption quantities, as of the priority date. 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)). Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 AAO's prior decision, dated April 8, 2011, is affirmed. The petition remains denied.