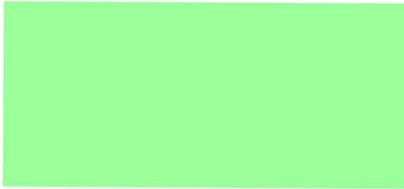




U.S. Citizenship
and Immigration
Services

(b)(6)

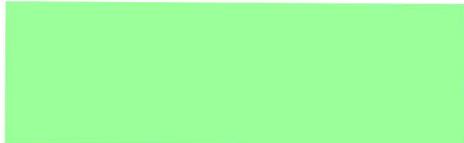


DATE: NOV 14 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner submitted a Motion to Reopen. The director granted the motion and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a home health care provider. It seeks to permanently employ the beneficiary in the United States as a caregiver. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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. Upon reconsideration on motion, the director affirmed his finding that the petitioner did not establish the ability to pay the proffered wage.

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's May 3, 2013 and July 11, 2013 decisions, the primary issue in this case is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on March 31, 2010. The proffered wage as stated on the ETA Form 9089 is \$8.90 per hour (\$18,512.00 per year). The ETA Form 9089 states that the position requires a high school diploma and 3 months of experience in the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claims to have been established in 1997, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 30, 2010, the beneficiary claims to have been employed by the petitioner from February 1, 2006 to March 31, 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is \$18,512.00. The record of proceeding contains copies of IRS Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary as shown in the table below:

- In 2010, the IRS Form W-2 stated total wages of \$8,000.00 (a deficiency of \$10,512.00).²

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).

- In 2012, the IRS Form W-2 stated total wages of \$7,056.00 (a deficiency of \$11,456.00).

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 showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

² The petitioner also submitted the beneficiary's IRS Form W-2 from 2009. As the priority date is in March, 2010, the 2009 IRS Form W-2 is not directly relevant.

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).

The petitioner submitted copies of its tax returns for 2009, 2010, and 2011.³ The priority date is March 31, 2010. The proffered wage is \$18,512.00. The petitioner's 1120S⁴ tax returns demonstrate its net income as shown in the table below:

- In 2009, the Form 1120S stated net income of \$55,846.00.
- In 2010, the Form 1120S stated net income of \$48,961.00.
- In 2011, the Form 1120S stated net income of -\$3,119.00.

Therefore, for the year 2011, 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18.

³ The tax returns for 2009 precede the priority date and will be only generally considered in determining whether, under the totality of the circumstances, the petitioner has the ability to pay the proffered wage.

⁴ 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 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

⁵ According 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.

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 net current assets as shown in the table below:

- In 2009, the Form 1120S stated net current assets of \$21.00.
- In 2010, the Form 1120S stated net current assets of \$492.00.
- In 2011, the Form 1120S stated net current assets of \$1,639.00.

Therefore, for the year 2011, the petitioner failed to establish its ability to pay the proffered wage.

Accordingly, from the date the labor certification 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 appeal, counsel asserts that the petitioner's financial records submitted as evidence demonstrate that it has the ability to pay the proffered wage. Counsel further asserts that the director failed to consider the totality of the circumstances in order to obtain an accurate account of the petitioner's financial ability to pay the proffered wage. Counsel asserts that an analysis of the totality of the evidence in the instant matter under *Matter of Sonogawa* establishes that the petitioner has the financial ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

The petitioner submitted as evidence a letter dated June 4, 2013, from Mr. [REDACTED] the petitioner's president, a copy of IRS Form 7004, Application for Automatic Extension of Time to File for 2012, notice of social security benefits to be issued to Mr. [REDACTED] a copy of a tax assessment for the property at [REDACTED] a copy of a [REDACTED] license for the facility known as [REDACTED] California (effective date February 6, 2006), a copy of a [REDACTED] license for the facility known as [REDACTED] California (effective date June 13, 1997), and evidence of the sale of the property located at [REDACTED] California (sale date December 10, 2010).

The petitioner's president stated in the letter dated June 4, 2013 that he personally decided to increase the rent paid by the petitioner and reduce the company's profits proportionately in 2011. The declarant stated that he paid the company's profits to himself in the form of rent as opposed to company profits. The petitioner also submitted a copy of the petitioner's owner's notice of social security benefits to be disbursed beginning January 9, 2013, inferring additional income to the owner individually. The petitioner's owner's personal income may not be utilized to determine whether the petitioner has the ability to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court stated in a similar case: *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) that "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."

On appeal, counsel asserts that the petitioner's case is similar to that of *Matter of Sonogawa*, in that the petitioner has been in business for 16 years; it has maintained moderate business success; it had similar gross and net incomes for 2009 and 2010; and that it had an uncharacteristically negative income due to the sale of one of its care home facilities in 2011 and a \$37,000.00 rent increase in that year. Counsel asserts that due to a miscalculation in anticipated income for 2011 the rental increase was set too high, resulting in the company showing a negative net income.⁶ Counsel asserts that nevertheless the petitioner had gross annual income of \$318,260.00 and paid \$96,996.00 in salaries and wages in 2011. Counsel asserts that there is therefore a reasonable expectation that the petitioner will have continue business success with only one home care facility in operation; and that the owner has control over the rent increase which is fluid and which can be reset or changed depending upon the petitioner's other future expenses.

⁶ The declarant further stated that an adjustment has been made and that the petitioning company is again showing a profit.

The record does not establish an uncharacteristic loss similar to that claimed in *Matter of Sonogawa*. The record reflects that the petitioner's rent has increased since 2009, not just in 2011, thus calling into question the uncharacteristic nature of its loss in 2011.⁷ The record does not establish that the sale of one home in 2011 caused an uncharacteristic loss in that year. The evidence shows that the petitioner's gross income decreased from \$399,476.00 in 2009 to \$318,260.00 in 2011; its net income decreased from \$56,775.00 in 2009 to \$49,961.00 in 2010 and to -\$3,119.00 in 2011; its payroll payout amounts decreased from \$167,512.00 in 2009 to \$147,248.00 in 2010 and to \$96,996.00 in 2011. Further, the record does not contain the petitioner's 2012 income tax return, annual report, or audited financial statements to demonstrate that since 2011 it could pay the proffered wage.⁸ In addition, unlike in *Matter of Sonogawa*, there is no evidence in the record of proceeding to demonstrate the petitioner's reputation within the business community or its future business prospects.

Considering the totality of the circumstances, counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

Counsel asserts that the petitioner has been in business since 1997, has experienced past growth, and has a reasonable expectation of continued growth based upon its financial history. The petitioner submitted a statement signed by its owner explaining its company background and historical performances, its 2011 performance, and its business outlook. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. at 45. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Similarly, the reliance on the petitioner's future receipts and wage expense is misplaced. Furthermore, the petitioner has not shown through independent financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. The petitioner cannot rely upon uncertain future cash flows to establish its current ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts

⁷ The petitioner's rent increased by 66% in 2010 and by 69% in 2011 (68%).

⁸ The petitioner submitted a copy of an Internal Revenue Service (IRS) Form 7004 indicating its request for an automatic extension six month extension to file its tax return for 2012. The most recent tax return of record is 2011.

hinged upon probability and projections, even beyond the information presented on appeal.

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

Beyond the decision of the director, the petitioner has failed to establish 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 a high school diploma and three months of experience in the job offered.

On the labor certification, the beneficiary claims to qualify for the offered position based on a high school diploma from [REDACTED] located in [REDACTED] Philippines, received in 1967, and more than three months of work experience. The record contains a copy of the beneficiary's claimed high school diploma from [REDACTED] and university transcripts. However, the university transcripts, which reflect that the beneficiary attended [REDACTED] high school indicates that the beneficiary's date of birth is April 29, 1950. The beneficiary lists her date of birth as April 29, 1949 on the Form I-140 and Form ETA Form 9089. No evidence of record resolves this inconsistency. *See Matter of Ho* at 591. The AAO questions the authenticity of the educational credentials of the beneficiary.

Furthermore, the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's three months of work experience in the job offered, she represented that she was employed by the petitioner as a caregiver from February 1, 2006 to March 31, 2010. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested," the petitioner answered "no." The petitioner specifically indicates in response

to question H.6 that three months of experience in the job offered is required. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable.⁹ Here, the beneficiary indicates in response to question K.1. that her position with the petitioner was as a caregiver, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

The beneficiary also stated that she was employed by [REDACTED] as a caregiver from June 1, 2002 to August 28, 2005. However, the beneficiary stated on the Form ETA 9089 labor certification, that she was employed by [REDACTED] as a caregiver from June 1, 2002 to September 6, 2006. The record contains a letter from [REDACTED] who stated that he employed the beneficiary as a caregiver from June 2002 to August 2005. As noted above, evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. 8 C.F.R. § 204.5(g)(1). Here, the letter does not include an address and it fails to specify a description of the beneficiary's job duties. Furthermore, the letter is inconsistent with the statement of the beneficiary on the labor certification that her employment with Mr. [REDACTED] lasted through September 6, 2006.

The record of proceeding also contains a copy of a letter dated July 14, 2010 from [REDACTED] who stated that the beneficiary worked for her as a caregiver from December 2005 to the present, the date the letter was signed. The declarant specifies the beneficiary's job duties. However, the declarant fails to specify whether the beneficiary worked full-time. Further, the beneficiary appears to have worked both for Ms. [REDACTED] and for the petitioner from February 2006 through March 2010. 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

⁹ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

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* at 591. Furthermore, the beneficiary did not indicate on either labor certification that she was employed by [REDACTED]. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. As the evidence of the beneficiary's work experience with Ms. [REDACTED] contradicts other evidence of record, and the evidence was not reported by the beneficiary on the labor certification application, the evidence will not be considered.

There is no independent, objective evidence resolving the inconsistencies found in the record pertaining to the beneficiary's employment experience. Accordingly, it has not been established that the beneficiary has the requisite education and experience in the job offered or that she is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.