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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

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

The petitioner[1] is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 further concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite experience specified on the labor certification as of the priority date. The petition was denied accordingly.

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 June 10, 2013 denial, 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 or not the beneficiary had the experience in the offered position required by the terms of the labor certification by the priority date.

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 ETA Form 9089, Application for Permanent Employment

[1] The record indicates that the petitioner is incorporated under the name and that the name of the petitioner as listed on the ETA Form 9089 and Form I-140, Immigrant Petition for Alien Worker, is actually its assumed name.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on January 5, 2012. The proffered wage as stated on the ETA Form 9089 is $38,000 to $38,500 per year.[2] The ETA Form 9089 states that the position requires two years of experience in the offered position of specialty cook, or in the alternate occupation of line or station cook.

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.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in June 1975, to have a gross annual income of $1,000,000, and to currently employ 30 workers. According to the 2011 corporate tax return in the record, the petitioner's fiscal year is from July 1, 2011 to June 30, 2012, which includes the January 5, 2012 priority date. On the ETA Form 9089, signed by the beneficiary on an unknown date, the beneficiary claimed to have worked for the petitioner since January 1, 1996, as a specialty cook.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

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[2] Form I-140 and the petitioner's letter, dated April 22, 2013, both indicate that the petitioner intends to pay the beneficiary annual wages of $37,336, which is equal to the prevailing wage indicated in Part F.5 of the ETA Form 9089, but is less than the offered wage range certified on the ETA Form 9089. There is no explanation in the record for this discrepancy in the proffered wage; however, the petitioner must address this issue. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (it is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice). The petitioner must pay the beneficiary the proffered wage as certified. *See* 8 C.F.R. § 204.5(g)(2).

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

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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record contains the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued by the petitioner for the priority date year of 2012,[4] which shows that the beneficiary was paid $15,196.25 in that year.[5] Thus, in the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage of $38,500 from the January 5, 2012, priority date onward.

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

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[4] The record also contains a copy of the beneficiary's 2011 Form W-2, showing wages paid of $16,286.25. However, as the 2011 Form W-2 predates the priority date, it cannot establish the petitioner's ability to pay the proffered wage from the priority date onward.

[5] The position offered on a labor certification must be for full-time employment. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). Based on the wages paid in 2011 and 2012, the record suggests that the beneficiary was not employed with the petitioner in a full-time capacity in 2011 or 2012. Although the petitioner is not obligated to employ the beneficiary on a permanent, full-time basis until after the latter has obtained lawful permanent resident status in the United States, the petitioner does have the burden to show that the position offered on the labor certification will be for a full-time position.

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.
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> 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 IRS Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 7, 2013, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As noted, the petitioner's fiscal year runs from July 1 to June 30 of the following year. Thus, as of the RFE response, the petitioner's 2012 federal income tax return (covering the fiscal year period from July 1, 2012 to June 30, 2013) was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The petitioner's 2011 tax return, which covers the January 5, 2012 priority date, demonstrates its net income, as shown below.

- In 2011, the Form 1120 stated net income (net loss) of ($14,207) (for the period from July 1, 2011 to June 30, 2012).

Therefore, for fiscal year 2011, including the priority date, the petitioner did not have sufficient net income to pay the difference between any wages paid to the beneficiary and the proffered wage. As the petitioner reported negative net income, the record does not establish that the petitioner had sufficient net income available in calendar year 2012 to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2012. Accordingly, for calendar year 2012, the petitioner has not established that it had sufficient net income to pay the beneficiary

the full proffered wage, or the balance of the proffered wage remaining after deducting the wages already paid to the beneficiary in 2012.

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.[6] 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 fiscal year 2011 tax return demonstrates its end-of-year net current assets for that year, as shown below.

- In 2011, the Form 1120 stated net assets (liabilities) of ($19,873) (for the period from July 1, 2011 to June 30, 2012).

As the petitioner reported negative net current assets in fiscal year 2011, in that its current liabilities exceeded its current assets, the record does not establish that the petitioner had sufficient net current assets available in fiscal year 2011 to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2012. Therefore, for fiscal year 2011, including the priority date, the petitioner has not demonstrated that it had sufficient net current assets to pay the full proffered wage, or the balance of the proffered wage remaining after deducting the wages already paid to the beneficiary in 2012.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has 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.

Counsel asserts on appeal that the financial documents in the record together establish the petitioner's ability to pay the beneficiary the proffered wage. In support of this assertion, counsel references the following documents: the petitioner's 2011 corporate tax return; the petitioner's Profit and Loss statement for the period from June 27, 2011, through June 24, 2012; and an August 12, 2013, letter from a certified public accountant (CPA) who reviewed the petitioner's Profit and Loss statement and 2011 corporate tax return. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally

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[6] 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.

accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited Profit and Loss statement submitted with the petition is not persuasive evidence. The CPA's letter that accompanied the Profit and Loss statement here makes clear that it is a reviewed statement, as opposed to an audited statement, and does not make any assurances as to the statement's accuracy. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The CPA letter also references the fact that the petitioner, a corporation, paid officer compensation of $123,600 in fiscal year 2011 to reduce the corporation's taxable income. The letter indicates that the officer compensation was discretionary and could have been used to pay the proffered wage.[7] The petitioner's IRS Form 1120 for fiscal year 2011 shows that the petitioner paid officer compensation of $123,600 in that year, but that amount of compensation was divided between its four shareholders. The petitioner failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise. 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)). In addition, there is no evidence in the record that the shareholders are willing and financially able to forego all or a portion of their officer compensation to pay the beneficiary the balance of the proffered wage remaining after deducting the wages already paid. 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).

In addition, the CPA's letter indicates that the 2011 tax return lists a loan to shareholders that reflects "additional monies ... to satisfy the difference between the $38,000 offer wage for the year and the amount of wages paid to [the beneficiary]." In calculating the ability to pay the proffered wage, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's long-term assets. While the petitioner's tax return does list loans in the amount of $33,529, the petitioner has not provided any evidence to document that these loans are current assets versus long-term assets. Going on record without supporting documentary evidence is not sufficient

[7] The CPA's letter is addressed to counsel of record. Throughout the letter, the CPA's statements indicate that counsel, and not the petitioner, was the source of much of the information reviewed. For example, the CPA indicates that "[counsel] indicated the shareholders were paying back this loan," and that "[counsel] indicated the Officers would be reducing their compensation to have funds available to satisfy [the beneficiary's proffered wage]." 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). While these assertions now appear to be communicated through the CPA, the probative value of the CPA's letter is diminished.

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)). This asset is not listed as a current asset on the petitioner's tax return, and cannot be considered in the analysis above without objective, independent evidence to overcome this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner must resolve any inconsistencies in the record with independent, objective evidence).

A letter from the petitioner's owner, dated April 22, 2013, states that the petitioner "eliminated a position in our kitchen which as well provides additional money to pay the wage difference since 2012." However, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the unnamed kitchen worker involves the same duties as those set forth in the ETA 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Further, as the beneficiary was employed by the petitioner prior to this eliminated position, it is unclear how the elimination of the worker's position after the priority date would document the petitioner's ability to pay the proffered wage from the priority date onward. A petitioner must establish its ability to pay from the time of the priority date onward. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm'r 1971).

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 ETA Form 9089 was accepted for processing by the DOL.

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 (Reg'l Comm'r 1967). 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 the instant case, the record lacks any evidence of the longevity of the petitioner's business or its reputation. Further, the record contains only one tax return, which is insufficient for demonstrating the petitioner's historical financial growth. While the petitioner points to the officer compensation it paid in fiscal year 2011, the AAO observes again that this amount is split between four shareholders. Moreover, the record lacks any evidence that the officer compensation paid is not a contractually fixed amount or that the shareholders are willing and in a position financially to forego such compensation. The CPA's letter appears to indicate the contrary, by noting that the petitioner's 2011 tax return shows that the petitioner has made loans to the shareholders totaling $33,529, which they are now in the process of repaying. The petitioner's owner sent a letter, dated April 22, 2013, in which she states that the petitioner paid wages of $470,000 in 2012. However, the record does not contain evidence of this figure, or the petitioner's 2012 fiscal year tax return, to assess the claim or the relevance of this figure in relation to other factors on the petitioner's tax return. The AAO notes again that the record fails to demonstrate that the petitioner has sufficient net income or net current assets in the priority date of 2012 or after to pay the beneficiary the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Additionally, as noted by the director, the petitioner has also not established that the beneficiary has the requisite employment experience to qualify 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 August 21, 2011 priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *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 two years of experience in the job offered of specialty cook, or two years in the alternate occupations of line or station cook. The beneficiary claims on the ETA Form 9089 to have gained this experience with the petitioner beginning on January 1, 1996,

working as a full-time specialty cook only and does not designate any other position or title held with the employer.[8]

The beneficiary's claimed qualifying training 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). Here, the record contains a letter from the petitioner, dated October 11, 2012, stating that it employed the beneficiary in a full-time capacity from January 1996 to October 1998,[9] but as a line/station cook. The record contains no explanation for the inconsistency in the job position that the beneficiary asserts it held with the petitioner on the labor certification and the position that the petitioner asserts the beneficiary held. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record contains no objective, independent evidence to document that the beneficiary was employed as a line/station cook, as asserted in the petitioner's letter, rather than as a specialty cook, as asserted on the approved labor certification. *Id.* at 591-592 (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).

Furthermore, it is unclear whether the beneficiary's experience with the petitioner can be used to qualify the beneficiary for the offered position. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner, or experience in an alternate occupation, cannot be used to qualify the beneficiary for the certified position. *See* 20 C.F.R. § 656.17(i). Specifically, the petitioner indicates "yes" in response to question J.20, which inquires as to whether the beneficiary possesses experience in an alternate occupation, as permitted in question H.10. The petitioner responded "no" 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?" 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, as defined in 20 C.F.R. § 656.17(i)(5)(ii), and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, although the petitioner's October 11, 2012, letter states it employed the beneficiary in 1996 in the alternate occupation of line/station cook, the labor certification indicates in response to question K.1 that the beneficiary was employed by the petitioner as a specialty cook only, beginning January 1996. The specialty cook position described in K.1 with the petitioner is identical to the offered position. Therefore, it appears that the experience gained with the petitioner was in the position offered, as he 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. *See* 20 C.F.R.

[8] The information in the record indicates that the beneficiary would have commenced this full-time employment as a specialty cook with the petitioner at the age of 16.

[9] The AAO also notes that the labor certification, at J.23, and the beneficiary's Form W-2s for 2011 and 2012 by the petitioner, indicate that the petitioner currently employs the beneficiary.

§ 656.17(i)(2), (3). As noted by the director, the W-2 statements submitted for the beneficiary's employment in 1996 and 1997 appear to represent only part-time wages and employment. The petitioner did not submit a W-2 statement for 1998. The petitioner failed to submit any evidence on appeal to address or resolve this issue. Thus, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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). The petitioner has not met that burden.

ORDER: The appeal is dismissed.