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

U.S. Citizenship and Immigration Services

B6

[redacted]

FEB 17 2011

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
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:

SELF-REPRESENTED

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 is a restaurant. It seeks to employ the beneficiary permanently in the United States as a kitchen helper. 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 also noted, but did not make a determination, that the petitioner had not demonstrated that the beneficiary met all of the minimum requirements for the position as of the date the Form ETA 750 was filed. The director denied the petition 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 July 22, 2009 denial, the issues in this case are 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 whether the beneficiary meets the minimum requirements for the proffered position as set forth on Form ETA 750.

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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 17, 2001. The proffered wage as stated on the Form ETA 750 is $7.64 per hour ($15,493.00 per year) based on a 39 hour work week. The Form ETA 750 states that the position requires six years of grade school, two years of high school and two 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 a C corporation. On the petition, the petitioner claimed to have been established in 1977, to have a gross annual income of $920,000, and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year runs from December 1 to November 30. On the Form ETA 750B, signed by the beneficiary on June 29, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. A letter in the record of proceedings from the petitioner's owner, [redacted] indicates that the beneficiary worked for the petitioner prior to the filing of the instant petition; however, no additional evidence has been submitted to support this statement, such as IRS W-2 statements. Going on record without

[1] 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).

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)). The petitioner had not provided evidence that it employed and paid the beneficiary at any period from the priority date to the present.

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). 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.[2]

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

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

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

[2] The AAO notes that the petitioner provided copies of U.S. Tax Form 940, Employer's Annual Federal Unemployment Tax Return for 2007 and 2008 that reflect that the petitioner paid total wages of $188,411.94 and $200,325.77 respectively. These wages represent funds already expended by the petitioner, thus they are no longer available to pay the proffered wage. Moreover, no evidence has been provided to establish that any portion these funds have been used to cover the proffered wage for the instant position.

> 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 record before the director closed on May 4, 2009 with the receipt by the director of the petitioner's submissions in response to the director's second request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2000 through 2008, as shown in the table below.

- The petitioner did not provide copies of Form 1120 for 2000[3].
- In 2001, the Form 1120 stated net income of $3,981.
- In 2002, the Form 1120 stated net income of -18,310.
- In 2003, the Form 1120 stated net income of $24,056.
- In 2004, the Form 1120 stated net income of -12,703.
- The petitioner did not provide Form 1120 for 2005[4].

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[3] The petitioner's tax year runs December 1 – November 30; therefore, the petitioner's tax return for 2001 covers the period December 1, 2001 – November 30, 2002 and does not cover the priority date of July 17, 2001. The regulation at 8 C.F.R. §204.5(g)(2) requires evidence of ability to pay beginning on the priority date. The petitioner must provide Form 1120 for 2000 to demonstrate ability to pay the proffered wage from the priority date forward if it wishes to pursue this matter further.

[4] The petitioner, in response to two requests for evidence issued by the director and on appeal to the AAO, claims that its tax returns for 2005 – 2007 are unavailable because they were damaged in a flood and burglary of their storage facility. The director requested, as alternative evidence, copies of IRS transcripts for 2005 – 2007. The petitioner failed to provide the requested evidence, and on appeal states that the company is reconstructing the returns in question and will provide them when

- The petitioner did not provide Form 1120 for 2006.
- The petitioner did not provide Form 1120 for 2008.

Therefore, for the years 2000 – 2002 and 2004 - 2008, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner did have sufficient net income to pay the proffered wage in 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. 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.

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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2000 - 2008, as shown in the table below.

- The petitioner did not provide copies of Form 1120 for 2000.
- In 2001, the Form 1120 stated net current assets of -102,290.
- In 2002, the Form 1120 stated net current assets of -102,261.
- In 2003, the Form 1120 stated net current assets of -119,060.
- In 2004, the Form 1120 stated net current assets of -148,479.
- The petitioner did not provide Form 1120 for 2005.
- The petitioner did not provide Form 1120 for 2006.
- The petitioner did not provide Form 1120 for 2007.
- The petitioner did not provide Form 1120 for 2008.

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they are available. The appeal in this matter was filed on August 24, 2009. To date, no additional information regarding the tax years in question has been provided to the AAO.

[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.

Therefore, for the years 2000 - 2008, 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.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

> *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

On appeal, petitioner asserts that tax returns for 2005 through 2007 were destroyed in a flood and that some of the documents were stolen. The petitioner states that the returns will be provided once they become available. The petitioner also states that it has obtained an extension on its 2008 tax filing; however, a copy of the extension is not available. The AAO notes that the petitioner failed to provide the required evidence to demonstrate ability to pay for 2004 through 2008 as set forth in 8 C.F.R. § 103.2(b)(8)(ii) and that it made identical arguments with respect to the missing materials in response to two requests for evidence issued by the director, in January and May 2009. The AAO also notes that the director requested copies of IRS transcripts of the tax returns for the missing years and that the petitioner failed to provide this information.[6]

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

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 (BIA 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

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[6] The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return transcripts for the years in question. The tax transcripts would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 petitioner claims to have suffered significant hardships that have resulted in the loss of documents evidencing ability to pay. However, the petitioner has failed to provide any substantive, independent evidence of these hardships or of specific steps undertaken to obtain the required information. The petitioner has been in business for over 30 years and claims to be the oldest restaurant in its area. Again, however, the petitioner fails to provide any substantive evidence to support its statements. In addition, the petitioner failed to provide evidence of ability to pay or even of its financial viability for 2000, and 2005 through 2008. 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.

In addition, the director noted, though did not directly address, the fact that the petitioner did not demonstrate the beneficiary's eligibility for the certified position. The AAO will directly address this issue as an additional basis for dismissal of the appeal. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Thus, the AAO finds that the instant petition must be dismissed because the petitioner has not demonstrated that the beneficiary possesses the requisite education and experience for the position.

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 July 17, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the certified Form

ETA 750 requires six years of grade school, two years of high school, and two months of experience in the job offered. The evidence in the record demonstrates that the beneficiary completed education through the 7th grade [redacted]. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).The evidence in the record demonstrates the beneficiary completed a 7th grade education.

Moreover, the evidence does not establish that the beneficiary completed the required two years of high school as stated on the labor certification application. The petitioner states that only two years of junior high school are required for the position and that it did not understand how to properly reflect this on the labor certification application; however, 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, Mandany 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 AAO finds that the petitioner has failed to demonstrate that the beneficiary has the required education for the proffered position.

In order to meet the regulatory requirements set forth in 8 C.F.R. § 204.5(l)(3)(ii)(A), any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The petitioner has not demonstrated that the beneficiary has the required two months of experience in the job offered. The record of proceeding contains a letter from the petitioner stating that the beneficiary has been employed by the petitioner; however, this evidence does not meet the regulatory requirements set forth in 8 C.F.R. §204.5(l)(3)(iii)(A) because it does not describe the duties performed by the beneficiary or the position held. Moreover, as the petitioner's statement fails to specify the specific timeframe in which this experience was obtained, and considering the priority date of July 17, 2001, much of the beneficiary's experience working for the petitioner was obtained after the priority date and could therefore not be considered in assessing whether the beneficiary possesses the requisite experience for the proffered position. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Furthermore, the beneficiary, who signed the application on June 29, 2001, notes that an experience letter is attached in question 12 of the Form ETA 750B. The beneficiary does not list any current or past experience on the Form ETA 750B, which specifically asks for the employer names, dates, and job descriptions of any prior employment. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where 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. Thus, the petitioner has failed to establish that the beneficiary possesses the requisite two years of experience for the position.

A second letter provided by [redacted], signed by [redacted] states that the beneficiary worked for [redacted] establishment for one year, from 1980 – 1981. This letter states that the beneficiary worked for the previous owner who is now deceased and describes her duties as maintaining the kitchen work areas and equipment, preparing vegetables and fruit for the salad bar, and preparing other foods as necessary. The AAO notes that the beneficiary's date of birth is April 23, 1969; thus, she was approximately 11 – 12 years old and a minor when she obtained this experience. Under the California Labor Code, "minor" means any person under the age of 18 years who is required to attend school under the provisions of the Education Code. Nonresidents of the state who would be subject to California's compulsory education laws if they were residents are also considered minors and are subject to all the requirements and protections of the Labor Code [LC 1286(c). See http://www.dir.ca.gov/dlse/ChildLaborPamphlet2000.html#2 (accessed February 4, 2011). Therefore, this evidence cannot be considered in evaluating whether the beneficiary meets the minimum requirements for the proffered position because the beneficiary was a legal minor and therefore unable to accept legal employment.

Moreover, because the letter in support of this employment was issued by the new owners of the establishment who do not have direct knowledge of the beneficiary's employment, the evidence does not conform to the regulatory requirements and cannot be accepted.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.