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

[redacted]

DATE: JUL 25 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

(b)(6)

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

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 March 27, 2009 denial, the single issue in this case is 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.

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

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

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

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $14.00 per hour ($29,120.00 per year). The Form ETA 750 states that the position requires two years 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 did not state when it was established or how many workers it currently employs. According to the tax returns in the record, the petitioner was established in 1982, and its fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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,

[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).

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.
>
> 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 record before the director closed on March 11, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax

return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income[2] of $20,596.00.
- In 2002, the Form 1120S stated net income of $11,975.00.
- In 2003, the Form 1120S stated net income of $17,210.00.
- In 2004, the Form 1120S stated net income of $15,392.00.
- In 2005, the Form 1120S stated net income of $17,743.00.
- In 2006, the Form 1120S stated net income of $12,812.00.
- In 2007, the Form 1120S stated net income of $7,203.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, 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.[3] 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. 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 2001, 2002, 2003, 2004, 2005, 2006, and 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $4,110.00.
- In 2002, the Form 1120S stated net current assets of $1,765.00.

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed June 26, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2001, 2002, and 2003, the petitioner's net income is found on Schedule K of its tax returns in those years.

[3] 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.

- In 2003, the Form 1120S stated net current assets of $282.00.
- In 2004, the Form 1120S stated net current assets of $1,250.00.
- In 2005, the Form 1120S stated net current assets of -$2,462.00.
- In 2006, the Form 1120S stated net current assets of -$1,241.00.
- In 2007, the Form 1120S stated net current assets of -$3,210.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

On appeal, counsel asserts that the petitioner has a contractual relationship with , a separate business entity, under which the petitioner employs workers while pays the workers' salaries. Counsel asserts that the petitioner, rather than has the authority to hire, fire supervise, and train the employees. Counsel also states that the petitioner, has been employing the beneficiary since 1996 and that the beneficiary has been paid a salary which is equal or greater than the prevailing wage since April 30, 2001. On appeal, the petitioner submits a letter from Club Business Manager of dated June 15, 2009, which states that the petitioner has contracted with to provide catering, and that the employees of the petitioner are paid directly by The letter also states that the petitioner hires, fires, trains, and directs the workers, while has responsibility for the bookkeeping and payroll. The record also contains copies of advertisements, a menu, and website pages describing the dining at provided by the petitioner.

The petitioner also submitted copies of Forms W-2 indicating payments from to the beneficiary according to the table below.

- In 2001, the Form W-2 stated wages paid to the beneficiary of $24,335.00.
- In 2002, the Form W-2 stated wages paid to the beneficiary of $25,950.00.
- In 2003, the Form W-2 stated wages paid to the beneficiary of $27,620.00.
- In 2004, the Form W-2 stated wages paid to the beneficiary of $27,825.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of $27,335.00.
- In 2007, the Form W-2 stated wages paid to the beneficiary of $30,600.00.
- In 2008, the Form W-2 stated wages paid to the beneficiary of $31,650.00.

No Form W-2 from 2006 was submitted. If the petitioner paid the beneficiary the above wages, then it would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance

2001	$29,120.00	$24,332.00	$4,788.00
2002	$29,120.00	$25,950.00	$3,170.00
2003	$29,120.00	$27,620.00	$1,500.00
2004	$29,120.00	$27,825.00	$1,295.00
2005	$29,120.00	$27,335.00	$1,785.00
2006	$29,120.00	$0	$29,120.00
2007	$29,120.00	$30,600.00	$0
2008	$29,120.00	$31,650.00	$0

However, the AAO notes that is a separate corporation with an Employer Identification Number (EIN) listed on the Form W-2 of while the petitioner is an S corporation with EIN It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The AAO also notes that the record does not contain copies of any contracts or other agreements between the petitioner and to demonstrate the relationship between the two entities and establish that the beneficiary was the employee of the petitioner or that it paid his wages through another entity. Moreover, the tax returns submitted fail to reflect payments made to or other parties to cover the costs of the beneficiary's wages. No salaries and wages deductions are reflected on any of the returns. The 2006 and 2007 Forms 1120S at Schedule A, Other Costs include an itemized listing which includes "outside labor" of $6,100 in 2005 and $7,405 in 2006, but no expense figures on the returns appear large enough to include the amount of the beneficiary's claimed wages listed on the Forms W-2 from

In addition, the AAO notes that the beneficiary set forth his credentials on the labor certification and both the owner of the petitioner and the beneficiary signed their names on April 26, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list employment experience with the petitioner. Rather, the beneficiary claimed that he was employed solely by from June 1994 to the present as a sous chef working 40 hours per week. Additionally, the petitioner's letter dated February 10, 2009, states that the beneficiary "was employed by as a from November 1996 to 2001." On appeal, counsel's statement and letter on behalf of Cloister Inn both claim that the beneficiary worked for the petitioner, since 1996.

If the petitioner and the beneficiary claimed that the beneficiary worked for an entity which did not employ the beneficiary but was merely a business which performed bookkeeping and payroll duties, then the petitioner and the beneficiary misrepresented the beneficiary's credentials on the labor certification.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position. The beneficiary signed the labor certification application under penalty of perjury. Misrepresenting the beneficiary's actual qualifications would be deemed a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.").

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In addition, 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.

Therefore, the record does not sufficiently demonstrate that the petitioner employed the beneficiary and paid the beneficiary the wages listed on the Forms W-2 from Thus, the AAO cannot rely on the petitioner's claims, and must instead rely primarily on the tax returns as analyzed above which show that the petitioner did not have sufficient net income or net current assets to pay the proffered wage.

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

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 petitioner's gross receipts during the relevant years varied. No salaries and wages were paid, and only $6,100 and $7,405 were paid as outside labor costs in 2005 and 2006, respectively. While the petitioner has been in business over twenty years, it does not pay substantial compensation to its owner. The petitioner did not submit evidence sufficient to demonstrate that the owner was willing and able to forego officer compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. The petitioner's website page printouts submitted state that it has been acclaimed by the [redacted] and [redacted] but the record does not contain evidence of such. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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).

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)(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 Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a sous chef working 40 hours per week with the [redacted] in [redacted] New Jersey from June 1994 to the present.

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 record contains a letter on [redacted] letterhead dated February 10, 2009, from [redacted] the president of the petitioner, stating that the beneficiary worked for [redacted] as a sous chef from November 1996 to 2001. The AAO notes that: 1) this claim is in conflict with the petitioner's other claims that it employed the beneficiary, while [redacted] was responsible for bookkeeping and payroll for the petitioner's employees; 2) the ending date of employment is in conflict with the letter from [redacted] as well as counsel's statements; and 3) the regulation requires a letter from the prior employer attesting to the experience of the beneficiary, not a letter from the proposed employer attesting to experience gained elsewhere.

The record also contains a letter from [redacted] Club Business Manager of [redacted] in Princeton, New Jersey dated June 15, 2009, which states that the petitioner has contracted with [redacted] to provide catering, the employees of the petitioner are paid directly by [redacted] and the beneficiary has been employed by the petitioner since 1996. This letter fails to meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it does not attest to employment with the entity which provided the letter and it fails to provide a description of the beneficiary's duties, job position, or other details of his experience. Further, the letter is in conflict with the claims made by the petitioner and the beneficiary that it was [redacted] which employed the beneficiary. The AAO notes that presenting inconsistent evidence about where the beneficiary gained his qualifying employment experience would be a material misrepresentation. *See* previously referenced section

212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, and 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation.

As previously stated, the beneficiary set forth his qualifications and signed the labor certification application under penalty of perjury. Misrepresenting those actual qualifications would be deemed a willful effort to procure a benefit ultimately leading to permanent residence under the Act.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, *See id.*

It appears that the petitioner wishes to claim in the context of the ability to pay discussion that it employed the beneficiary, while it claims in the context of an analysis of the beneficiary's experience that employed the beneficiary and provided the required two years of experience as a sous chef.

The petitioner set forth the job parameters on the labor certification, which required two years of experience in the job offered, and then the owner of the petitioner signed his name on April 26, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. The Form ETA 750 at question 13 states that the duties of the position of sous chef are as follows:

> Prepare lunch and dinner entrees, supervise support staff, as indicated by Manager. Must be familiar with meal timing---hot and cold food preparation, sanitary and health requirements. Must have understanding of the relationship between food and preparation in kitchen and service in dining room. Must have good interactive social skills in order to accommodate needs of patrons with regards to food services.

The petitioner, through counsel, submitted conflicting letters of experience attesting to the beneficiary's experience. If counsel's assertions and the letter from Mr. of are taken as accurate, then it appears that the petitioner hired the beneficiary for the position of sous chef in 1996 prior to the beneficiary having gained experience in the position with and then submitted the labor certification for the position of sous chef in 2001, claiming that the position required two years of experience in the job. No evidence was submitted into the record of proceeding to clarify the contradiction created by the claims that the position required two years of experience even though the beneficiary was previously hired for the position without the requisite two years of experience in the job.

Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or**

> **experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

(Emphasis added.)

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA):

> [W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.[4]

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)[5] in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,[6] the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position of sous chef are two years of experience in the job

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[4] In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in Delitizer is not an exhaustive list. *See E & C Precision.*

[5] 20 C.F.R. § 656.21(b)(5) [2004].

[6] See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

offered. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. *See* 20 C.F.R. § 656.21(b)(5) (2004). However, counsel states that the beneficiary was hired in the offered position as a sous chef in 1996. The AAO also notes that the beneficiary's Form G-325A submitted with the Form I-485 also states that he was hired by the petitioner as a sous chef in 1996. The record of proceeding contains no probative evidence of any employment experience in the position prior to this claimed employment.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that it had been employed with the petitioner in any position. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.[7]

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely solely 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 evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[7] The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. 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.