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 0 3 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 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

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 financial and investment company. It seeks to employ the beneficiary permanently in the United States as a management accountant. 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, and that the beneficiary did not possess the minimum education required to perform the offered position by the priority date. 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 April 17, 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 or not the beneficiary is qualified to perform the duties of the proffered position.

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 November 16, 2004. The proffered wage as stated on the Form ETA 750 is $31.87 per hour ($66,289.60 per year based on forty hours per week). The Form ETA 750 states that the position requires four years of college with a bachelor's degree in accounting and four years of experience in the job offered as a management accountant.

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 on June 10, 1993, to have a gross annual income of $393,938, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on November 11, 2004, the beneficiary claimed to have worked for the petitioner beginning in July 2003 and continuing at least until the date the labor certification was signed, on November 11, 2004.

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 submitted the

---

[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).

beneficiary's Forms W-2 for 2004 through 2008.[2] The beneficiary's Forms W-2 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2004, the Form W-2 stated wages of $32,400.
- In 2005, the Form W-2 stated wages of $44,940.
- In 2006, the Form W-2 stated wages of $46,080.
- In 2007, the Form W-2 stated wages of $49,857.60.
- In 2008, the Form W-2 stated wages of $61,190.40.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. The petitioner must demonstrate its ability to pay the difference between the proffered wage and wages already paid to the beneficiary from 2004 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 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:

---

[2] It is noted that the beneficiary was the recipient of two H-1B nonimmigrant petitions sponsored by the petitioner, valid from April 16, 2003 to September 15, 2005 and from September 15, 2005 to September 15, 2008. The wages reflected on the 2004, 2005, 2006, and 2007 Forms W-2 issued to the beneficiary by the petitioner are lower than the certified wages on the labor condition applications submitted with the H-1B petitions.

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The 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 as shown in the table below.

- In 2004, the Form 1120 stated net income of $12,692.
- In 2005, the Form 1120 stated net income of $37,575.
- In 2006, the Form 1120 stated net income of $22,957.
- In 2007, the Form 1120 stated net income of -$3,215.

Therefore, for the years 2004 and 2007, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

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.[3] 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 2004 and 2007, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of -$4,040.
- In 2007, the Form 1120 stated net current assets of $62,058.

Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between the proffered wage and wages already paid to the beneficiary.

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, the petitioner asserts that it does have the ability to pay the beneficiary the proffered wage. The petitioner states, "We are submitting all of our payroll returns in which it shows we have been paying the proffered wage to this day. We are also submitting the benificiary's [*sic*] W-2 which also shows our ability to pay... We have also demostrated [*sic*] our ability to pay the proffered wages..." The petitioner submitted copies of the following financial documentation:

- Quarterly Wage and Withholding Reports from California dated March 31, 2006 to March 31, 2009.
- The beneficiary's Forms W-2 for 2004 through 2008.
- The beneficiary's paystubs from December 18, 2008 to April 17, 2009.

No further explanation was included. No additional evidence beyond the petitioner's 2004 tax returns and the beneficiary's 2004 Form W-2 was submitted to demonstrate the petitioner's ability to pay the proffered wage in the year 2004.

---

[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.

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 (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 petition shows that the petitioner has been in business since 1993 and employs four workers. The tax return for 2004 failed to demonstrate the ability to pay the beneficiary the proffered wage through net income or net current assets. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. The petitioner also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. 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.

The petitioner has also not established that the beneficiary is qualified for the offered position based on the educational requirement. 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 has the following minimum requirements:

EDUCATION
Grade School: [BLANK]
High School: [BLANK]
College: 4 years
College Degree Required: BA
Major Field of Study: Accounting
TRAINING: None Required.
EXPERIENCE: Four (4) years in the job offered as a management accountant
OTHER SPECIAL REQUIREMENTS: [BLANK]

As set forth above, the proffered position requires four years of college culminating in a Bachelor of Arts degree in Accounting and four years of experience in the job offered as a management accountant.

On the labor certification, the beneficiary claims to qualify for the offered position based on his BA/Accounting degree from in Argentina, completed in December 2000. The beneficiary also listed that he received a degree in mercantile from in Argentina in December 1987. However, the petitioner failed to submit a copy of the beneficiary's bachelor's degree, mercantile degree, or transcripts. 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)). The AAO notes that the record contains multiple documents in a foreign language. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The record of proceeding contains an evaluation of the beneficiary's credentials prepared by for on January 9, 2002. The evaluator sates that he "... has achieved the equivalent of three and a half to four semesters of college (approximately 55 semester credits) in an Accounting program at an accredited institution in the United States." In the evaluation, the evaluator referenced the beneficiary's studies in Argentina at from 1996 to 1999 in a public accountant program.

The record also contains an evaluation prepared by for on March 14, 2002. The evaluation states, "I reached my conclusions based on [the beneficiary's] combination of education and work experience, based on the assumption that to at least some [reasonable] degree, certain upper level courses could be replaced by relevant work experience." The evaluation includes a statement dated March 13, 2002 from Ms. stating, "... Sr. has achieved the equivalent of a Bachelor's degree in business, with a concentration in Accounting. I would qualify by saying that this degree would represent a degree from a mid-level college... The combined education and experience would not reflect what we refer to as a 'CPA track' education, as the candidate would require additional courses, which are reflected in neither the education or experience of the candidate." In the evaluation, the evaluator states that she examined the beneficiary's curriculum vitae, supported by certifications of employment from the employers, and the certification from Mr. of the beneficiary's educational background, accompanied by school records.

The January 9, 2002 evaluation indicates that the beneficiary's degree from is less than four years. The evaluation dated March 14, 2002 only states that the beneficiary has the equivalent of a bachelor's degree in business, with a concentration in accounting, when combining the beneficiary's education and experience. The Form ETA 750 does not provide that the minimum academic requirements of four years of college and a Bachelor of Arts degree in accounting might be met through three years of college or some other formula other than that explicitly stated on the Form ETA 750. Further, as previously discussed, the petitioner failed to submit a copy of the beneficiary's bachelor's degree, mercantile degree, or transcripts.

The AAO also notes that there are inconsistencies in the record. The January 9, 2002 evaluation from references the beneficiary's studies at from 1996 to 1999. The labor certification states that the beneficiary attended Lomas de from March 1996 to December 2000. The dates of attendance listed in the evaluation cannot be reconciled with the dates listed on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance,

reliability, and probative value of the testimony).

On appeal, the petitioner states:

> We previously submitted evidence from School of Management that [the beneficiary] has achieved the equivalent of a Bachelor's degree in accounting business. At this time a copy of the Evaluation is being submitted... When form ETA-750 was accepted back on November 16, 2004, the prospective employee, Mr. had the minimum or equivalent bachelor's degree and four years experience in the job. We previously submitted all the information... We believe that the equivalent to a bachelor's degree is that the individual has met all the proper requirement to be consider [*sic*] as having a bachelor's degree and the work experience to have been engaged in the business for the require [*sic*] experience needed.

The petitioner submitted copies of the evaluations previously submitted. No further explanation was included. The petitioner submitted no evidence to support its statement that it intended the equivalent of a bachelor's degree to be a combination of education and experience such as that possessed by the beneficiary. 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)).

The evidence in the record does not establish that the beneficiary possessed the required education 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 based on the educational requirement.

Beyond the decision of the director,[4] the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with four years of qualifying employment experience. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on November 16, 2004.

---

[4] 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).

In the instant case, the labor certification states that the offered position requires four years of experience in the job offered as a management accountant. On the labor certification, the beneficiary listed the following experience:

- Management Accounting with the petitioner, in California beginning in July 2003 and continuing at least until the date the labor certification was signed, November 11, 2004.
- Unemployed/Studies from August 2001 to July 2003.

The beneficiary included an annotation that states, "Please see attached Exhibit 'A'" under Part c. No attachments or exhibits were found in the record indicating any further experience.

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). To demonstrate the beneficiary's four years of experience, the petitioner submitted a letter written by , President, for (the petitioner) dated December 4, 2007, indicating that the beneficiary has been working for the company since July 2003 and continuing at least to the date the letter was issued on December 4, 2007. The letter indicates that the beneficiary is currently employed full-time as a management accountant.

At the outset, DOL's certification of the Form ETA 750 does not supersede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3). Thus all documentation supporting an application must be provided directly to USCIS by the petitioner.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a management accounting, with from July 2003 and continuing until the date the Form ETA 750 was signed on November 11, 2004, working 40 hours per week. His duties included:

> Coordinating & collecting all financial data from all representatives. Maintain all financial records properly in order to report all of insurance, securities & investment companies. Coordinate and direct the accounting system under the supervision of the chief financial officer. Will coordinate the estate and financial planning the life insurance and the educational investment seminars. Prepare financial reports, etc. and supervision of 4 assistants.

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.[5]

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)[6] 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,[7] the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that

---

[5] In a subsequent decision, 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 Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

[6] 20 C.F.R. § 656.21(b)(5) [2004].

[7] See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13,

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 are four years of experience in the job offered as a management accountant. As the actual minimum requirements are four years of experience, the petitioner could not hire workers with less than four years of experience for the same position. *See* 20 C.F.R. § 656.21(b)(5) [2004].[8] In its letter of December 4, 2007, the petitioner states that it employed the services of the beneficiary as a management accountant for the following duties:

> His duties include coordinating financial responsibilities between the business and collect all financial data from all representatives. Maintain all financial records properly in order to report all of the insurance securities & investment companies. Under supervision, [the beneficiary] will coordinate and direct the accounting system for PSP's businesses, the estate and financial planning, the life insurance and the educational investment seminars. Analyze financial information & prepare financial reports for cost and asset management and performance. Supervision of four individuals, receptionist, marketing, advertisement & design department.

These duties closely match the duties of the offered position of management accountant, as stated by the petitioner in Item 13 of Form ETA 750:

> Coordinate financial responsibilities between the business and collect all financial data from all representatives. Maintain all financial records properly in order to report all of the insurance, securities & investment companies. Under supervision of

---

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.

[8] In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than four years of experience, it is evident that the job duties of the offered position can be performed with less than the four years of experience listed on Form ETA 750. Therefore, four years of experience as a management accountant cannot be the actual minimum requirement for the offered position of management accountant. The AAO notes that, in the December 4, 2007 letter from the petitioner states, "He entered our work force with the required two years experience."

chief financial officer, will coordinate and direct the accounting system for PSP's businesses, the estate and financial planning, the life insurance and the educational investment seminars. Will analyze financial information & preparer financial reports for cost and asset management and performance. Duties include the supervision of four individuals, receptionist, marketing, advertisement & design dept.

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 represent on Form ETA 750, Part B that it had been employed with the petitioner as a management accountant. However, no evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience was provided.

The petitioner has not established the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered, as the job duties for management accountant, as listed on Form ETA 750, are similar. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

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 as a management accountant gained with the petitioner was in a position similar to the offered position, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position.

The record also contains the following experience letters:

- An employment certification dated September 6, 2001 from Public Accountant, in Argentina. The certification states that the beneficiary was employed as a Public Accountant from January 1, 1988 to January 30, 1989. The certification does not include the beneficiary's duties, or indicate whether the beneficiary was employed full- or part-time.[9]
- An employment certification dated September 7, 2001 from Attorney, in Argentina. The certification states that the beneficiary was employed as an Accounting Analyst from July 1, 1990 to July 30, 1992. The certification does not include the company's address, the beneficiary's duties, or indicate whether the beneficiary was employed full- or part-time.

[9] The AAO notes that the dates of this employment were eight years prior to the beneficiary entering an accounting program at the No evidence was submitted to explain how the beneficiary was able to practice as a Public Accountant before taking up any studies in this profession.

- An employment certification dated September 12, 2001 from , in Argentina. The certification states that the beneficiary was employed as an Accounting Manager from August 1, 1992 to February 28, 2000. The certification does not include the company's address, the name and title of the author, the beneficiary's duties, or indicate whether the beneficiary was employed full- or part-time.[10]
- An employment certification dated September 12, 2001 from in Argentina. The certification states that the beneficiary was employed as an Accounting Manager who carried out Team Leader tasks during the year 1999. The certification does not include the company's address, the name and title of the author, the beneficiary's duties, the beneficiary's specific dates of employment, or indicate whether the beneficiary was employed full- or part-time.[11]
- An employment certification dated September 6, 2001 from in Argentina, written by Partner Manager. The certification states that the beneficiary was employed as an Accounting Manager from March 1, 2000 to August 1, 2001. The certification does not include the company's address, the beneficiary's duties, or indicate whether the beneficiary was employed full- or part-time.[12]

None of the above listed experience was listed on the Form ETA 750. 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. Further, the dates of employment cannot be reconciled with the dates the beneficiary claims to have been studying at the . It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, 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).

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.

---

[10] The dates of this employment overlap with the beneficiary's claimed studies at the from 1996 to 2000.

[11] The dates of this employment overlap with the beneficiary's claimed studies at the from 1996 to 2000.

[12] The dates of this employment overlap with the beneficiary's claimed studies at the from 1996 to 2000.