

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

(b)(6)



DATE: **AUG 09 2012**

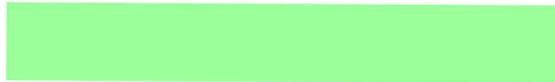
OFFICE: NEBRASKA SERVICE CENTER

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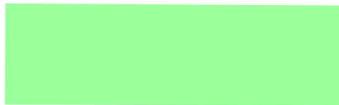
Petitioner:

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:



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

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**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 an individual poultry farm owner and operator. She seeks to employ the beneficiary permanently in the United States as a poultry farmer. 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 she had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience as a poultry farmer or assistant poultry farmer. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 27, 2009 denial, the issues in this case is whether or not the petitioner has the ability to pay the proffered wage as of May 20, 2002, the priority date, and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner established that the beneficiary meet the requirements of the labor certification as of the priority date.

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

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *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.<sup>1</sup>

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

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<sup>1</sup> 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).

*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 the Form ETA 750 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 May 20, 2002. The proffered wage as stated on the Form ETA 750 is \$8.41 per hour which is \$17,492.80 per year based on forty hours of work per week. On the Form ETA 750B, signed by the beneficiary on May 10, 2002, the beneficiary claimed to have worked for the petitioner since March 2001.

The petitioner must establish that his 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 Sonogawa*, 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. On appeal counsel claims that the beneficiary had been working for the petitioner when the labor certification was filed in 2002; however, the only evidence of employment submitted was the beneficiary's 2008 Form W-2. The beneficiary's 2008 Form W-2 shows that in 2008 the petitioner paid the beneficiary \$9,750.00, which is \$7,742.80 less than the proffered wage of \$17,492.80.

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On appeal, the petitioner submits copies of checks it has written to various individuals in 2002, 2004, 2005, 2006, 2007, 2008 and 2009. Handwritten notations on the copies indicate that checks written to [REDACTED] were payments to the beneficiary. This evidence does not establish that the petitioner paid and employed the beneficiary in any of the relevant years. No evidence was provided to establish that "[REDACTED]" is the beneficiary, or that any of these payments were for employment. 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)). Therefore, the petitioner has not established by documentary evidence that it employed and paid the beneficiary the full proffered wage from the priority date in 2002.

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 (1<sup>st</sup> 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).

According to the most recent tax return of record, the petitioner owns and operates a poultry and egg production/cattle farm. Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. *See* <http://www.irs.gov/publications/p225/ch03.html> (accessed July 10, 2012). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor is single. The petitioner's tax returns reflect the following AGI:<sup>2</sup>

- 2002 = \$8,653.<sup>3</sup>
- 2003 = \$30,365.<sup>4</sup>
- 2004 = \$34,532.<sup>5</sup>
- 2005 = \$(2,123).<sup>6</sup>
- 2006 = \$10,211.
- 2007 = \$25,147.

In years 2002, 2005, and 2006, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$17,492.80 per year. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Furthermore, as mentioned above, sole proprietors must show that they can cover their existing business expenses, pay the proffered wage out of their adjusted gross income or other available funds, and support themselves and their dependents. Although the sole proprietor's adjusted gross income for 2003, 2004, and 2007 are greater than the proffered wage, without considering the sole proprietor's monthly expenses, it is impossible to evaluate the petitioner's ability to pay.

In response to the director's February 25, 2009 request for evidence (RFE), the petitioner submitted a list of her annual household expenses, indicating the following amounts:

- 2002 = \$14,915.
- 2003 = \$16,813.
- 2004 = \$35,628.
- 2005 = \$42,219.
- 2006 = \$29,253.
- 2007 = \$30,380.

After subtracting the annual expenses from the petitioner's AGI, the petitioner has not demonstrated sufficient funds to pay the proffered wage while incurring these annual expenses. In fact, in all years except 2003, the petitioner's annual expenses were greater than the AGI reported on Forms 1040.

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<sup>2</sup> The petitioner submitted its 2001 federal tax return. This evidence pre-dates the instant priority date and will not be considered as evidence of the petitioner's ability to pay the proffered wage from the priority date onward.

<sup>3</sup> AGI as reflected on IRS Form 1040, U.S. Individual Income Tax Return, Line 35.

<sup>4</sup> AGI as reflected on IRS Form 1040, Line 34.

<sup>5</sup> AGI as reflected on IRS Form 1040, Line 36.

<sup>6</sup> AGI as reflected on IRS Form 1040, Line 37.

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Therefore, the petitioner's sole proprietor's AGI is not sufficient to establish its ability to pay the proffered wage in any of the relevant years.

The record also contains the petitioner's compiled financial statements from 2001 to 2007. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel asserts that depreciation should be taken into account when examining the petitioner's ability to pay the proffered wage. As discussed above and in *River Street Donuts*, depreciation is a systematic allocation of the cost of a tangible long-term asset and does not represent specific cash expenditure. Depreciation is the 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. Therefore, these amounts cannot be added back to a petitioner's net income or, in the instant case, adjusted gross income, to be considered available amounts to pay wages.

Counsel also submitted on appeal a copy of sole proprietor's 2009 property taxes receipt and appraisal showing the value of the sole proprietor's property. Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, counsel relies on the letter dated April 1, 2009, signed by [REDACTED], Certified Public Accountant (CPA) with [REDACTED] as an expert opinion on the financial situation of the petitioner and wages paid to the beneficiary during all relevant years since 2002. Mr. [REDACTED] explained that the petitioner's expenses since 2002 have included wages paid to the beneficiary as shown on line 34b of the petitioner's 2002 Form 1040, Schedule F (contract labor). For the years 2003, 2004, 2005, and 2006, the beneficiary's wages were reflected on line 34b of the petitioner's Forms 1040, Schedule F, and for 2007, on line 34d, as Outside Services. The CPA's assertions are not supported by any documentary evidence that these amounts were actually paid to the beneficiary. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section

204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the amounts listed on line 34d of Schedule F are less than the proffered wage in all years.

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 such 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 ability to pay the proffered wage was not established for all years considered based on the sole proprietor's adjusted gross income. Furthermore, the petitioner's annual household expenses exceed the adjusted gross income in all but one year. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during the relevant years. No evidence was submitted to establish a basis for the petitioner's expected growth. Although the petitioner claimed to be in business since 1980, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. 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.

Another issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth in the Form ETA 750, Application for Alien Employment Certification.

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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of poultry farmer. In the instant case, the applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A or in the related occupation of assistant poultry farmer. Item 15 of Form ETA 750A reflects that the beneficiary must live on the employer's premises.

The beneficiary set forth his credentials on Form ETA 750B and signed his name on May 10, 2002, under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part B, eliciting information of the beneficiary's work experience, he represented that he worked as a poultry farmer for the petitioner from March 2001 to present.<sup>7</sup> The beneficiary also represented his employment with [REDACTED] in Texas, as an assistant poultry farmer from February 2000 to March 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. 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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In response to the director's RFE, the petitioner submitted a letter dated March 20, 2009, signed by

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<sup>7</sup> As the labor certification was signed by the beneficiary on May 10, 2002, the AAO will consider the end date of employment to be at least until that date.

Ms. [REDACTED] stated that the beneficiary helped Ms. [REDACTED] farm by doing some house repairs and cleaning the chicken houses. As indicated in the director's denial, this letter fails to comply with the requirements of the regulations. It does not list the job position, employer's name, title of the signatory, period of employment, and number of hours worked per week.

The petitioner also submitted a letter signed by [REDACTED] stating that the beneficiary worked on his farm for six months. This letter also fails to comply with the requirements of the regulations, as it does not list the beneficiary's job title, does not provide a description of his duties, does not mention the period of employment, and omits whether the beneficiary was a full-time or part-time employee. In addition, the letter omits the title of its signatory. Furthermore, the beneficiary did not represent any work experience with [REDACTED] on the labor certification. Without independent and objective evidence, the beneficiary's experience with Lamar Norton cannot be considered 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.

With the appeal, the petitioner submitted new letters from [REDACTED] and [REDACTED] Ms. [REDACTED] stated in her second letter that the beneficiary came in 1999 and helped Mr. [REDACTED] for a while, and then in July the beneficiary started to work at Ms. [REDACTED] farm. Although Ms. [REDACTED] provided a list of the beneficiary's duties, the letter still omits the period of employment, the signatory's title, the job title, and the hours worked by the beneficiary per week.

Mr. [REDACTED]'s letter was written on [REDACTED]' letterhead, and contains a handwritten statement that the beneficiary worked for [REDACTED] from February 1999 through August 1999 or September 1999. The period of employment is uncertain and contradicts Ms. [REDACTED] letter. In addition, Mr. [REDACTED]'s letter once more does not comply with the requirements of the regulation as it does not state the beneficiary's job title, the signatory's title, and the number of hours worked per week.

On Form G-325A (Biographic Information) signed by the beneficiary on August 14, 2007, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status, the beneficiary represented that he lived in Mexico from October 1975 until February 2000, and that from January 2000 to present<sup>8</sup> he has been working at [REDACTED] located at [REDACTED]. The beneficiary represented on the labor certification that he worked with [REDACTED] from February 2000 to March 2001. The beneficiary's representation on the labor certification, signed by the beneficiary on May 10, 2002, cannot be reconciled with the beneficiary's representation on Form G-325A, signed by the beneficiary on August 14, 2007. Doubt

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<sup>8</sup> As Form G-325 was signed by the beneficiary on August 14, 2007, the AAO will consider the end date of employment to be at least until that date.

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).

On appeal, counsel asserts that, "Department of Labor was satisfied that the beneficiary has worked for the petitioner for many years, and accepted the experience in granting the labor certification."

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.<sup>9</sup>

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<sup>9</sup> 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).

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>10</sup> 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,<sup>11</sup> 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 are two years of experience in the job offered or in the related occupation of assistant poultry farmer. 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].<sup>12</sup>

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 petitioner failed to demonstrate that the beneficiary has gained the two years of qualifying experience with another employer. On the labor certification, the beneficiary represented that he worked as an assistant poultry farmer with [REDACTED] from February 2000 to March 2001, which is less than the required two years. The only experience listed on Form ETA 750B to be considered is the experience gained with the petitioner. However, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity

<sup>10</sup> 20 C.F.R. § 656.21(b)(5) [2004].

<sup>11</sup> 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.

<sup>12</sup> 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 two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as a poultry farmer or assistant poultry farmer cannot be the actual minimum requirement for the offered position of poultry farmer.

between the position the beneficiary previously held with the employer and the permanent position offered. 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 it seems that 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 petitioner failed to demonstrate the beneficiary's experience in the related occupation of assistant poultry farmer, 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.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.