



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUL 06 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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

The petitioner is a manufacturing company. It seeks to employ the beneficiary permanently in the United States as an electrician-tech support. 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 or that the beneficiary met the position requirements as set forth on Form ETA 750. 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 29, 2009 denial, the first 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 \$18.30 per hour for regular time with five hours of overtime required each week at a rate of \$24.40 per hour (for a total of \$44,408 per year).¹

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.²

On appeal counsel submits a brief; copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007; and a letter dated May 18, 2009 from [REDACTED] Plant Facilities Manager for [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1936,³ to have a gross annual income of \$1,954,428, and currently to employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is from July 1 until June 30. On the Form ETA 750B, signed by the beneficiary on February 29, 2007, the beneficiary claims to have worked for the petitioner since November 1998.

On appeal, counsel asserts that the petitioner has sufficient net income and net current assets to pay the beneficiary the difference between wages already paid and the full proffered wage for each year under consideration. Counsel also asserts that United States Citizenship and Immigration Services (USCIS) should consider the totality of the petitioner's financial situation in making its determination.

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, USCIS

¹ The director incorrectly identified the proffered wage as \$38,064 per year, this wage being based solely upon the basic pay rate of \$18.30 per hour for a 40-hour work week. Sections 10 and 12 of Form ETA 750 indicate that the prospective electrician-tech support would be required to work five hours of overtime per week at a rate of \$24.40 per hour. The mandatory overtime wages must be included in the proffered wage so that the correct figure is \$44,408 per year.

² 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).

³ According to the petitioner's U.S. Corporation Income Tax Return (Form 1120) for fiscal year 2005, the petitioner was incorporated on May 2, 1960.

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. In the instant case, the petitioner provided copies of IRS Form W-2 which it issued to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The W-2 statements from 2001, 2002, 2003, 2004, 2005, 2006 and 2007 bear a social security number for an individual who is deceased.⁴ USCIS will not consider the wages reflected on a stolen

⁴ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

social security number towards a determination of the ability to pay. The W-2 statement issued to the beneficiary in 2008 bears a social security number which is registered in his name. The beneficiary's IRS Form W-2 shows compensation received from the petitioner, as shown in the table below.

- In 2008, the Form W-2 stated compensation of \$44,177.00.

In the instant case, the record does not contain properly submitted evidence of wages paid to the beneficiary for 2001, 2002, 2003, 2004, 2005, 2006 or 2007.⁵ For 2008, the petitioner provided evidence of having paid the beneficiary but an amount which was less than the proffered wage.⁶ Therefore, for each of the years from 2001 through 2007, the petitioner must demonstrate the ability to pay the beneficiary the full proffered wage. However, for 2008 the petitioner must demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage, that difference being \$231.

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

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

⁵ The director's determination that the petitioner had demonstrated that it paid the beneficiary a portion of the proffered wage in 2001, 2002, 2003, 2004 and 2005 and that it paid the full proffered wage in 2006 and 2007 is withdrawn.

⁶ The director's determination that the petitioner had demonstrated that it paid the beneficiary the proffered wage in 2008 is withdrawn.

(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).

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 27, 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 fiscal year (FY) 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for FY 2007 was the most recent return available. However, in his March 11, 2009 request for evidence, the director noted that the petitioner had initially only provided its federal income tax return for 2005. Therefore, the director specifically requested that the petitioner submit annual reports, U.S. income tax returns, or audited financial statements for 2001, 2002, 2003, 2004, 2006, 2007 and 2008 if the last year was available. In its response, the petitioner provided copies of its Employer's Annual Federal Unemployment (FUTA) Tax Return (IRS Form 940) but failed to provide any of the three types of regulatory evidence requested. Further, neither in response to the director's request nor on appeal has the petitioner provided an explanation for its failure to provide the requested evidence. Now, on appeal, counsel submits copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for fiscal years 2001, 2002, 2003, 2004, 2005, 2006 and 2007.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8

C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The petitioner's tax returns demonstrate its net income for FY 2005, as shown in the table below.

- In FY 2005, the Form 1120 stated net income of \$43,270.00.

Therefore, for the fiscal years 2001, 2002, 2003, 2004, 2006 and 2007, the petitioner did not properly submit regulatory prescribed evidence. For 2005, the petitioner did not demonstrate sufficient net income to pay the beneficiary the full proffered wage.⁷

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.⁸ 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. In the instant case, the only federal income tax which the petitioner properly submitted was the return for FY 2005. However, the petitioner did not submit the Schedule L for this year. Therefore, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage in 2005 or any other year between 2001 and 2007.

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.

⁷ The director's determination that the petitioner demonstrated sufficient net income to pay the difference between wages already paid and the full proffered wage is withdrawn.

⁸ 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.

On appeal, counsel asserts that the petitioner has the ability to pay with respect to all three avenues articulated above, that is that the petitioner has paid the beneficiary the proffered wage in three of the eight years identified (2006, 2007 and 2008) and that the petitioner has sufficient net income or net current assets to pay the difference between wages already paid and the full proffered wage for the remaining five years (2001 – 2005). In support of his assertion, counsel makes reference to copies of the petitioner's U.S. Corporation Income Tax Returns (Form 1120) for fiscal years 2001, 2002, 2003, 2004, 2005, 2006 and 2007 which, with the exception of FY 2005, were submitted for the first time on appeal.

As explained above, the director specifically requested these documents in his March 11, 2009 request for evidence. However, the petitioner failed to provide them in its response. The AAO will not now consider documents which were requested but are only being provided for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

On appeal, counsel makes reference to the copies of IRS Form W-2 which the petitioner issued to the beneficiary as evidence of wages already paid. However, as explained above, the W-2 statements issued to the beneficiary from 2001 through 2007 bear the social security number of an individual who is deceased. USCIS will not consider wages paid, using a stolen social security number, in a determination of the petitioner's ability to pay the proffered wage. The petitioner provided a copy of IRS Form W-2 for 2008 which bears a bona fide social security number which is registered to the beneficiary. However, according to the beneficiary's W-2 statement for 2008, the beneficiary was paid \$44,177 or \$231 less than 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the

number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1936. However, the petitioner has only properly submitted federal income tax returns for one year: 2005. The petitioner also submitted copies of its Employer's Annual Federal Unemployment (FUTA) Tax Return (IRS Form 940) for 2001, 2002, 2003, 2004, 2006, 2007 and 2008. According to these documents, the wages which the petitioner paid for the seven years identified remained consistent. However, based upon the properly submitted regulatory evidence, the petitioner has not established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. Further, the petitioner has not demonstrated that the beneficiary would be replacing a former employee or an outsourced service. 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 second issue in this matter is whether the beneficiary possessed the required training and experience, as set forth on Form ETA 750 as of the priority date. In his decision dated April 29, 2009, the director found that the beneficiary did not possess the training and experience required to perform the proffered position as of the priority date.

On appeal counsel submits a letter dated May 18, 2009 from [REDACTED] Plant Facilities Manager of [REDACTED]. Counsel asserts that this letter properly identifies the dates of the beneficiary's training and shows that the beneficiary possesses the training which is required on the labor certification.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Eight (8) years

High School: Four (4) years

College: None Required

College Degree Required: None Required

Major Field of Study: Not Applicable

TRAINING: Two (2) years and three (3) months of training in Technology / Professional Elec. Required.

EXPERIENCE: Two (2) years in the job offered or in the related occupation of Technician Operator

OTHER SPECIAL REQUIREMENTS: None.

The labor certification includes information regarding the beneficiary’s education in Section 11 of Part B. According to this document, the beneficiary attended the [REDACTED] in [REDACTED] Mexico City, Mexico, studying technology from 1988 until 1990. However, the beneficiary left blank the block in which he would identify the degree or certificate received. Therefore, there is no indication that the beneficiary completed this program. This section also indicates that the beneficiary attended [REDACTED] in 1991. Again the beneficiary left blank the block in which he would identify the degree or certificate received. Form ETA 750B also states that the beneficiary attended [REDACTED] from 2001 until 2002 and received a completion diploma.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a supervising electrician with [REDACTED] California from November 1998 until the time that the beneficiary signed the labor certification, February 19, 2007. The labor certification also states that the beneficiary worked as a technician/machine operator at [REDACTED] California from 1997 until 1998. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents

are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains no evidence of certificates which were awarded to the beneficiary upon the completion of grade school or high school, both of which are required by the terms of Form ETA 750. The record contains a certificate of completion from [REDACTED] dated January 3, 2002. The certificate indicates that it was granted "in recognition of completion of the Prescribed Course: [REDACTED] The record also contains the associated official student transcript for this course. According to the transcript, the first course of study is dated March 20, 2001. Based upon such evidence, the beneficiary completed one month of training as of the priority date of April 30, 2001.

The record contains a letter from [REDACTED] Plant Facilities Manager of [REDACTED] [REDACTED] letterhead which is supposed to attest to the beneficiary's training. With the initial petition submission, in support of the beneficiary's claimed training, the petitioner supplied solely a copy of the certificate from the [REDACTED]. In his March 11, 2009 request for evidence, the director asked that the petitioner submit "evidence that the alien obtained the required 2 years and 3 months of training in technology professional electric before April 30, 2001." The director noted that "evidence of training must be in the form of letters from current or former trainers, giving the name, address, and title of the trainer and a description of the training received, including specific dates of the training." In response, the petitioner supplied a letter from [REDACTED] in which he states "[the beneficiary] was under my direct supervision and was trained by me in the production and maintenance of our [REDACTED] Power Drive Units. The training included basic electrical wiring, and connections, reading and following schematics along with the mechanical aspects of building and testing Power Drive Units, that go on our custom made cold storage power operated doors." Mr. [REDACTED] states, "This training began shortly after Mr. [REDACTED] was hired (1998)."

According to the terms of Form ETA 750, the prospective electrician-tech support is required to have two years and three months of training in technology / professional electricity in addition to two years of experience in the job offered or the alternate field of technician / operator. The petitioner provided the letters from Mr. [REDACTED] to attest to the beneficiary's training. While Mr. [REDACTED] states that the beneficiary began his training shortly after commencing his employment with the petitioning entity in 1998, he provides no specific information regarding the specific dates of the training, the nature of the training, the total hours of the training, the means or guidelines for measuring whether the beneficiary completed training or any other specific evidence which would demonstrate what proportion of the beneficiary's time from November 9, 1998 until April 30, 2001

was comprised of training. Without such specifics, the petitioner has not demonstrated that the beneficiary completed two years and three months of training.

On appeal, counsel asserts that the beneficiary has the required experience. In support of his assertion, counsel submits a new letter from [REDACTED] in which Mr. [REDACTED] identifies more specific dates for the beneficiary's training. In his letter, Mr. [REDACTED] states that the beneficiary's training began on November 9, 1998 and that it "was ongoing, consistent and constant during his employment with [REDACTED] continuing until the present day" (May 18, 2009). However, as indicated above, the petitioner failed to distinguish which proportion of the beneficiary's time constituted training and which proportion was dedicated to working on a full-time basis. Again, the petitioner failed to document the nature of the beneficiary's training specifically and articulate, in any detail, the manner in which it was undertaken and how the petitioner determined when it was completed. Further, the petitioner provided no other documentary evidence attesting to the beneficiary's experience.

Further, though not specifically addressed by the director in his April 29, 2009 decision, the petitioner is obligated to demonstrate that the beneficiary completed two years of experience in the job offered in addition to having completed the required training. In failing to differentiate and substantiate the proportion of time which was spent on training and the proportion which was dedicated strictly to working in the field of endeavor, the petitioner has not demonstrated that the beneficiary has the required two years of experience in the job offered. Further, the letter written by Mr. [REDACTED] contains no specific details regarding the nature of the petitioner's actual employment and the duties which he performed.

Additionally, according to the petitioner, the beneficiary commenced working for the petitioning organization in November 1998, 29 months prior to the filing of the labor certification. The beneficiary is required to possess two years and three months of training in addition to two years of experience in the job offered prior to the April 30, 2001 priority date. The petitioner has not demonstrated that the beneficiary was employed with its organization long enough to obtain both the required training and work experience prior to the priority date and provided no other evidence to substantiate the beneficiary's claimed experience.

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.)

(b)(6)

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.⁹

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)¹⁰ 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,¹¹ 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 but also allows for two year of experience in the alternate field of technician / operator. 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].¹² However, the only

⁹ 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 Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

¹⁰ 20 C.F.R. § 656.21(b)(5) [2004].

¹¹ 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.

¹² 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,

evidence supplied to substantiate the beneficiary's experiential qualifications for the proffered position are the letters written by [REDACTED] of the petitioning entity. He indicates that the petitioner trained the beneficiary to perform the duties associated with the proffered position and that the experience which he obtained, which qualifies him for the proffered position, was gained while working for the petitioner. Further, Mr. [REDACTED] indicates that the beneficiary was training in and worked in the same position for which he is being petitioned.

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. The instant petition submission contains no such evidence. Further, the petitioner provided no evidence to demonstrate that the beneficiary gained his qualifying experience in the alternate occupation of technician operator.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.

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 an electrician-tech support cannot be the actual minimum requirement for the offered position of electrician-tech support.