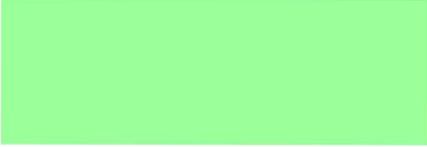


(b)(6)

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



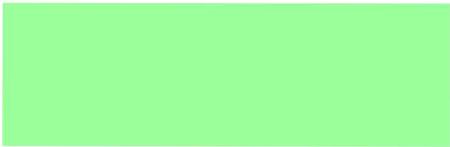
DATE: NOV 15 2012 OFFICE: NEBRASKA SERVICE CENTER

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:



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

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 13, 2009 denial, an 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 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 \$12.22 per hour (\$25,417.60 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of automobile-body repairer.

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1977 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary claimed to work for the petitioner since April 1990.

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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Forms 1099 were submitted indicating that the petitioner paid the beneficiary wages according to the table below.

- In 2007, the Form 1099 stated wages paid to the beneficiary of \$26,010.78.
- In 2008, the Form 1099 stated wages paid to the beneficiary of \$26,010.78.

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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).

Therefore, as the proffered wage was \$25,417.60 per year, the Forms 1099 indicate that the petitioner paid the beneficiary in excess of the proffered wage in 2007 and 2008. No Forms 1099 or W-2 were submitted for any other years, thus the petitioner would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2001	\$25,417.60	\$0	\$25,417.60
2002	\$25,417.60	\$0	\$25,417.60
2003	\$25,417.60	\$0	\$25,417.60
2004	\$25,417.60	\$0	\$25,417.60
2005	\$25,417.60	\$0	\$25,417.60
2006	\$25,417.60	\$0	\$25,417.60
2007	\$25,417.60	\$26,010.78	\$0
2008	\$25,417.60	\$26,010.78	\$0

The AAO notes that the beneficiary's 2006 Form 1040 was submitted which reflects \$25,687.00 in other income next to a notation that it was received from [REDACTED]; however, without a copy of the Form 1099 or W-2 demonstrating the payment to the beneficiary from the petitioner, the amount will not be considered. Further, the AAO notes that the petitioner's tax returns for 2007 and 2008 do not appear to reflect the above 2007 and 2008 payments to the beneficiary. The petitioner has not submitted evidence into the record which resolves this inconsistency. Thus as the claimed payments to the beneficiary are not reflected on the petitioner's tax returns, it is not clear that the petitioner made the above payments, and the amounts above will not be considered in determining the petitioner's ability to pay the proffered wage.

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).

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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

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 supports a family of three. The proprietor provided a listing of recurring household expenses which totaled \$4,480.28 per month (\$53,763.36 per year). The proprietor's tax returns reflect the following information for the following years:

- In 2001, the Form 1040 stated adjusted gross income<sup>2</sup> of \$31,708.00
- In 2002, the Form 1040 stated adjusted gross income of \$42,117.00
- In 2003, the Form 1040 stated adjusted gross income of \$46,362.00
- In 2004, the Form 1040 stated adjusted gross income of \$35,780.00
- In 2005, the Form 1040 stated adjusted gross income of \$30,512.00
- In 2006, the Form 1040 stated adjusted gross income of \$60,131.00
- In 2007, the Form 1040 stated adjusted gross income of \$17,677.00
- In 2008, the Form 1040 stated adjusted gross income of \$58,873.00

The sole proprietor's adjusted gross income exceeds the proffered wage of \$25,417.60 in each year except in 2007, in which the adjusted gross income is less than the proffered wage. The AAO notes however, that the proprietor's monthly household expenses must be considered in determining whether or not the proprietor has the ability to pay the proffered wage. In the instant case, it is improbable that the sole proprietor could pay the proffered wage on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the household expenses in 2001, 2002, 2003, 2004, 2005, and 2007. In 2006, and 2008, the adjusted gross income exceeds the

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<sup>2</sup> The adjusted gross income on the proprietor's Forms 1040 is found on line 33 in 2001, line 35 in 2002, line 34 in 2003, line 36 in 2004, and line 37 in 2005 – 2008.

amount of recurring household expenses, but would leave insufficient funds to pay the proffered wage as shown below.

Year	Adjusted Gross Income	Household Expenses	Balance Available to Pay Proffered Wage
2001	\$31,708.00	\$53,763.36	\$0
2002	\$42,117.00	\$53,763.36	\$0
2003	\$46,362.00	\$53,763.36	\$0
2004	\$35,780.00	\$53,763.36	\$0
2005	\$30,512.00	\$53,763.36	\$0
2006	\$60,131.00	\$53,763.36	\$6,367.64
2007	\$17,677.00	\$53,763.36	\$0
2008	\$58,873.00	\$53,763.36	\$5,109.64

The proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the proffered wage of \$25,417.60 in 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008.

On appeal, counsel asserts that: USCIS erred in not taking into account the petitioner's statement that it has employed the beneficiary since 1990 at a pay rate of \$12.22 per hour; USCIS did not consider the petitioner's claims in light of an internal USCIS memo; and USCIS did not look beyond the petitioner's net income and consider the magnitude of the business.

Counsel asserts that the Schedule C attachments in the record indicate payment of the beneficiary's wage and the ability of the proprietor to pay the full proffered wage. The AAO notes that the petitioner's statement asserting that it employed the beneficiary as a full-time employee since 1990 is not supported by the evidence. First, the record does not include Forms 1099 or W-2 for any year prior to 2007. In addition, the wages paid on the Schedule C attachments in the record do not match the amount of wages claimed to be paid to the beneficiary. The wages as reflected on the Schedule C attachments are indicated below.

- 2001 \$7,317.00
- 2002 \$26,954.00
- 2003 \$38,750.00
- 2004 \$15,240.00
- 2005 \$9,020.00
- 2006 \$20,144.00
- 2007 \$0.00
- 2008 \$0.00

The AAO notes that these wages could not have included payment of the proffered wage to the beneficiary in 2001, 2004, 2005, 2006, 2007, and 2008, as the amount of wages paid is less than the

claimed wage paid to the beneficiary, and as previously stated, the 2007 and 2008 Schedules C do not reflect any wages paid. Further, the proprietor claims to employ two workers, thus it is not clear how much of any claimed wages paid was paid to the beneficiary and how much was paid to another employee. Therefore, it is clear that the proprietor has not submitted sufficient evidence that it paid the beneficiary the proffered wage in any year.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since 1990, according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Further, in view of the above inconsistencies in the evidence submitted, the proprietor in the instant case has failed to provide credible verifiable evidence that it has employed the beneficiary and paid him the proffered wage.

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 *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.

Counsel submits a letter from the proprietor dated September 3, 2009, stating that his business has been operating since 1974, has a long-term relationship with the community, and has served government clients. Counsel also submits copies of the proprietor's business card, a keychain, and a magnetic calendar with the name of the business. The AAO notes that the letter from the proprietor and the copies of the business card, keychain, and calendar do not serve as probative evidence as to the magnitude of the business.

In the instant case, the proprietor's gross receipts during the relevant years varied, as did the amount of wages paid. The proprietor indicated on the Form I-140 that he employs two people. Salaries and wages were not substantial and indicated that any employees were working less than full-time in 2001, 2005, 2007, and 2008 when wages were minimal or zero. While the proprietor has been in business over thirty years, he does not earn substantial compensation from the business. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which he has since recovered, or of the proprietor's reputation within the auto body repair industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the proprietor has not established that he had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered of automobile-body repairer. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an automobile-body repairman working 40 hours per week for the petitioner, [REDACTED] Los Angeles, California from April 1990 to the present.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a letter from [REDACTED] on the letterhead of [REDACTED] dated February 5, 2009, which states that the beneficiary has been employed as an auto body repairman by [REDACTED] since April 1990. The petitioner has not submitted any evidence into the record to indicate that the employer in this case is an incorporated business as the letterhead indicates. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Thus, is it not clear why this letter of experience is written on the letterhead of a corporation when the petitioner was structured as a sole proprietorship.

The record also contains a letter from [REDACTED] Manager, on the letterhead of [REDACTED] located at [REDACTED] states that the beneficiary worked as an auto body repairman in the business 40 hours per week from March 1986 until April 1990. The beneficiary set forth his credentials on the labor certification and signed his name on April 16, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list this work experience with [REDACTED]

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<sup>3</sup> The Form ETA 750 at Part B, question 15 previously included the listing of only [REDACTED] under the beneficiary's work experience, but this employer's name was marked out, and the correction approved by DOL on May 2, 2007.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Therefore, the evidence of the beneficiary's employment experience at [REDACTED] is insufficient as it was not set forth by the beneficiary on the labor certification. In addition, the experience gained with the petitioner may not be used to qualify for the offered position.

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>4</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>5</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>6</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.

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<sup>4</sup> 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*.

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

<sup>6</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.

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, there is no evidence in the record that DOL conducted a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.<sup>7</sup>

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position. Moreover, as previously noted above, the AAO has found the evidence of the beneficiary's employment with the petitioner to be insufficient due to unresolved inconsistencies between the wages claimed to be paid to the beneficiary and the lack of such payment reflected on the petitioner's tax returns.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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

**ORDER:** The appeal is dismissed.

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<sup>7</sup> The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.