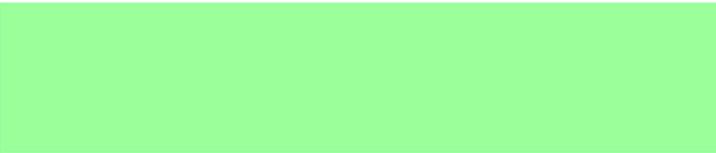


(b)(6)

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

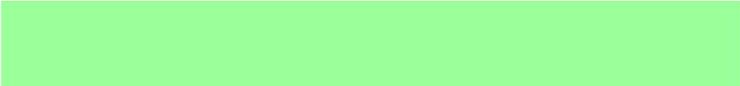
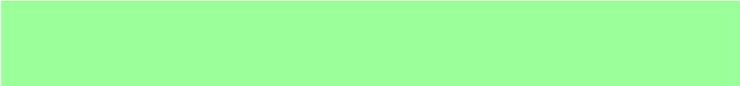


U.S. Citizenship  
and Immigration  
Services



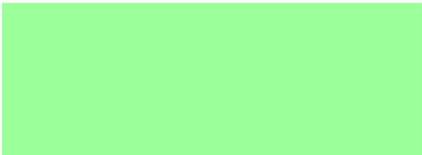
DATE: **NOV 26 2012** OFFICE: TEXAS SERVICE CENTER

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,

A handwritten signature in black ink, appearing to be "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.

The petitioner describes itself as a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape foreman. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 19, 2004.<sup>2</sup>

The director's decision denying the petition concluded that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed 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.

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>3</sup>

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

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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 19, 2004. The proffered wage as stated on the Form ETA 750 is \$17.37 per hour (\$36,129.60 per year). The Form ETA 750 states that the position requires two years of experience as a landscape manager or two years of experience as a landscaper.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ twenty-two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 11, 2004, the beneficiary claim to have worked for the petitioner since March 2000.

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 submitted W-2 Forms issued to the beneficiary for 2004, 2005 and 2006. However, the 2004 W-2 Form was issued to the beneficiary under the social security number [REDACTED], while the 2005 and 2006 W-2 Forms were issued under social security number 231-09-0988. The petitioner also submitted a 2007 W-2 Form issued to [REDACTED] social security number [REDACTED]. This appears to be the beneficiary's son. 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). Therefore, since there is no evidence in the record to establish that any of these social security numbers were issued to the beneficiary by the Social Security Administration, none of the W-2 Forms will be used to establish the petitioner's ability to pay the proffered wage.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

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

We find that the AAO has a rational explanation for its policy of not adding

depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The record before the director closed on May 1, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income<sup>4</sup> of -\$39,465.
- In 2005, the Form 1120S stated net income of -\$5,661.
- In 2006, the Form 1120S stated net income of -\$11,014.
- In 2007, the Form 1120S stated net income of -\$15,762.

Therefore, for the years 2004 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.<sup>5</sup>

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

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<sup>4</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 5, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2004 through 2006, the petitioner’s net income is found on Schedule K of its tax returns for 2004 through 2006.

<sup>5</sup> The record also contains the petitioner’s profit and loss statements for 2003 through 2006. While 8 C.F.R. § 204.5(g)(2) does state in appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service, except for 2006, the profit and loss statements do not establish the petitioner’s net income was sufficient to pay the proffered wage. Further, this is supplemental evidence, and the petitioner provided no reason why the profit and loss statements should be considered more reliable evidence of its net income than its federal tax returns.

difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for as shown in the table below.

- In 2004, the Form 1120S stated net current assets of -\$119,233.
- In 2005, the Form 1120S stated net current assets of -\$2,980.
- In 2006, the Form 1120S stated net current assets of \$5,294.
- In 2007, the Form 1120S stated net current assets of \$17,805.

Therefore, for the years 2004 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

On appeal, counsel submitted a letter from the petitioner's certified public accountant, [REDACTED] and asserts that [REDACTED] confirms that the petitioner had sufficient funds during each of the relevant years to pay the beneficiary the differences due to him in order to meet the proffered wage.

As stated previously, acceptable evidence of the petitioner's ability to pay the proffered wage includes copies of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). Therefore, a statement from a CPA regarding the petitioner's ability to pay the proffered wage will not be considered.

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

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<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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.

The petitioner has not submitted evidence establishing the number of its employees, the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. The petitioner's gross sales, officer compensation, and payroll have fluctuated substantially from year to year. Thus, assessing the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.<sup>7</sup> 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

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<sup>7</sup> 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).

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 as a landscape manager, or two years as a landscaper. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a landscaper with the petitioner since March 2000; and, as a landscaper with [REDACTED] from September 1996 to March 2000.

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 the petitioner stating the beneficiary had been employed with the petitioner as a grounds maintenance division foreman since March 1999.

The record does not contain a letter from [REDACTED] verifying the beneficiary's experience with this company as claimed on the labor certification.

Regarding the beneficiary's 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>8</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>9</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>10</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 as a landscape manager or two years of experience as a landscaper. As the actual minimum requirement is 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]. In the letter from the petitioner, [REDACTED] states that the beneficiary performed the duties of “maintain commercial property grounds, inspect work done by crew members and other supervisor. To manage the supervisors of all crews, and the members of his own. To manage the work yard as in cleaning grounds, supervision of truck and equipment cleaning, etc.”

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary represented on Form ETA 750, Part B that he had been employed with the petitioner in the position of a landscaper. However, he also represented that he had been employed by [REDACTED] as a landscaper, that would make it appear he acquired the experience required on the labor certification by employment other than with the petitioner. Therefore, if the DOL conducted a *Delitizer* analysis of the dissimilarity of the

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<sup>8</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 Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

<sup>9</sup> 20 C.F.R. § 656.21(b)(5) [2004].

<sup>10</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.

offered position and the positions in which the beneficiary gained experience, it would have concluded that he met the minimum two year requirement based on experience with [REDACTED] and not the petitioner.

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 between the position the beneficiary held with them 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, based on the description of the duties performed by the beneficiary while employed with the petitioner since 1999, 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, the beneficiary's experience in the alternate occupation of landscaper was also gained while employed by the petitioner. Therefore, this experience may not be used to qualify the beneficiary for the proffered position.

As the petitioner did not submit a letter of experience from [REDACTED] 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 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.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.

Beyond the decision of the director, according to the Maryland Department of Assessments and Taxation, the petitioner is not in good standing. See [REDACTED]

[REDACTED] If a corporation is not in good standing, it raises questions regarding the company's ability to conduct business and whether a *bona fide* job offer exists. If the petitioner is no longer in business and/or a *bona fide* job offer no longer exists, the petition and appeal would be moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation upon the termination of a petitioning organization's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

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.