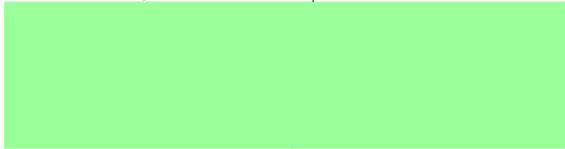




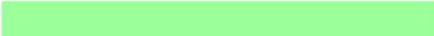
U.S. Citizenship  
and Immigration  
Services

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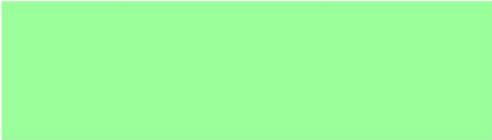
DATE: **SEP 04 2010** OFFICE: TEXAS SERVICE CENTER

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,

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. The appeal will be dismissed.

The petitioner describes itself as a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian cook. 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 26, 2001.<sup>2</sup>

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

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).

(b)(6)

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. The proffered wage as stated on the Form ETA 750 is \$435.20 per week (\$22,630.40 per year). The Form ETA 750 states that the position requires three years of experience as an Italian cook.

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 1994, to have a gross annual income of over \$489,000.00, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year runs from March 1 to February 28. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claim to have worked for the petitioner from 1999 to the present.

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 establishing the petitioner paid the beneficiary wages during calendar years 2001 through 2008, as shown on the table below.

- In 2001, the W-2 Form stated Wages, tips and other compensation of \$ 9,100.
- In 2002, the W-2 Form stated Wages, tips and other compensation of \$ 9,275.
- In 2003, the W-2 Form stated Wages, tips and other compensation of \$17,200.
- In 2004, the W-2 Form stated Wages, tips and other compensation of \$26,200.
- In 2005, the W-2 Form stated Wages, tips and other compensation of \$20,800.
- In 2006, the W-2 Form stated Wages, tips and other compensation of \$20,800.
- In 2007, the W-2 Form stated Wages, tips and other compensation of \$20,800.

- In 2008, the W-2 Form stated Wages, tips and other compensation of \$21,200.

Therefore, except for the year 2004, the petitioner did not pay the beneficiary an amount at least equal to the proffered wage during the relevant time period.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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 July 20, 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 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for fiscal year 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for fiscal years 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$ 2,146 (for the period from March 1, 2001 to February 28, 2002).
- In 2002, the Form 1120 stated net income of \$29,532 (for the period from March 1, 2002 to February 28, 2003).
- In 2003, the Form 1120 stated net income of \$6,887 (for the period from March 1, 2003 to February 29, 2004).
- In 2004, the Form 1120 stated net income of -\$5,903 (for the period from March 1, 2004 to February 28, 2005).
- In 2005, the Form 1120 stated net income of -\$3,771 (for the period from March 1, 2005 to February 28, 2006).
- In 2006, the Form 1120 stated net income of -\$10,813 (for the period from March 1, 2006 to February 28, 2007).
- In 2007, the Form 1120 stated net income of \$1,569 (for the period from March 1, 2007 to February 29, 2008).
- In 2008, the Form 1120 stated net income of \$35,898 (for the period from March 1, 2008 to February 28, 2009).

Therefore, for the years 2001, 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage. As noted above, the Form W-2 for 2003 shows that the petitioner paid the beneficiary \$17,200 during calendar year 2003. The petitioner’s tax return for 2003 shows net income of \$6,887. However, the 2003 Form W-2 relates to the calendar year, whereas the 2003 tax return relates to the petitioner’s fiscal year which runs from March 1, 2003 to February 29, 2004. Thus, determining the petitioner’s ability to pay in 2003 is not simply a matter of combining the net income from the 2003 tax return and the wages listed on the 2003 Form W-2. It is not clear how much, if any, of the petitioner’s 2003 net income is attributable to calendar year 2003; thus, it is not clear how much, if any, of the petitioner’s net income was available to pay the proffered wage in

2003. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2003, and not in the first two months of calendar year 2004, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2003. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage in either calendar year 2003 or fiscal year 2003.

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.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for fiscal years 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$6,832 (for the period from March 1, 2001 to February 28, 2002).
- In 2002, the Form 1120 stated net current assets of \$33,504 (for the period from March 1, 2002 to February 28, 2003).
- In 2003, the Form 1120 stated net current assets of \$26,835 (for the period from March 1, 2003 to February 29, 2004).
- In 2004, the Form 1120 stated net current assets of -\$13,143 (for the period from March 1, 2004 to February 28, 2005).
- In 2005, the Form 1120 stated net current assets of -\$27,563 (for the period from March 1, 2005 to February 28, 2006).
- In 2006, the Form 1120 stated net current assets of -\$51,940 (for the period from March 1, 2006 to February 28, 2007).
- In 2007, the Form 1120 stated net current assets of -\$47,413 (for the period from March 1, 2007 to February 29, 2008).
- In 2008, the Form 1120 stated net current assets of -\$15,283 (for the period from March 1, 2008 to February 28, 2009).

Therefore, for the fiscal years 2001 and 2004 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

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<sup>4</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.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, except for fiscal years 2002, 2003, 2004, and 2008 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.

Counsel's and Mr. [REDACTED] 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.

The petitioner claims to have only 3 employees. As discussed below, the petitioner had modest levels of officer compensation. Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the company's historical growth since its inception in 1994. The petitioner's net income has not been more than \$35,898.00 in those years when the corporation reported profits. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's reputation or achievements. The petitioner does not claim that the beneficiary will be replacing a former employee or an outsourced service.

Counsel asserted on appeal that the compensation of officers in 2001, 2005, 2006, and 2007 could also be utilized to pay the proffered wage. The sole shareholder of a corporation does have the authority to allocate expenses of the corporation for various legitimate business purposes, including

(b)(6)

for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, the petitioner was owned by a sole shareholder from 2001 through 2005. Thereafter, for the fiscal years of 2006, 2007, and 2008, it appears from the federal tax returns there were two shareholders.

The compensation received by the sole shareholder in 2001 through 2005, and the compensation received by the two shareholders in 2006, 2007, and 2008, is not substantial. The shareholder compensation was at a low of \$34,550 in 2002 to \$66,900 in 2005; and in years 2006 through 2008, the highest salary received by either shareholder was \$67,600. Further, the record does not contain a statement from either officer demonstrating their willingness or ability to forego either all or a portion of their compensation.

Counsel also asserts on appeal that unusual foods purchases in 2001 and uncharacteristic business expenditures in 2001, 2005, 2006, and 2007 resulted in diminished net income for those years. Counsel submitted a letter from certified public accountant, [REDACTED] Mr. [REDACTED] stated that in 2001 the petitioner's food purchases were greater than normal because purchases made in both the prior and succeeding year were paid for in 2001, resulting in lower profit in 2001. Mr. [REDACTED] also stated that the petitioner purchased an additional building in 2001, and therefore in 2005, 2006, and 2007; the carrying costs of the new building as well as additional improvements, repairs and purchases relating to the existing operation (new freezer, walk in box, HVAC), temporarily reduced the petitioner's profit.

However, no documentation of these abnormal food purchases, the petitioner's purchase of an additional building, or other expenditures was submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In addition, the AAO does not consider these to be the type of uncharacteristic business expense contemplated in *Sonegawa*.

Further, the petitioner's tax returns do not appear to support counsel's and Mr. [REDACTED]'s assertions. The petitioner's purchases shown on the federal tax returns have increased significantly since 2001, with purchase in 2001 being \$187,208 and rising in 2008 to \$410,389. Additionally, the petitioner's inventory at the end of each year has remained at \$4,500. Further, if the petitioner purchased an additional building in 2001, the carrying costs of such acquisition should be reflected in tax returns prior to 2005.

It appears from the petitioner's federal tax returns that it purchased new computers and software in 2004, and made some leasehold improvements in 2005, but did not purchase an additional building in 2001. It appears the petitioner made these leasehold improvements under the American Jobs Creation Act of 2004. The new law created a 15-year recovery period for so-called "qualified leasehold improvement property" placed in service between October 22, 2004 and January 1, 2006. This

write-off was not optional. The new law, temporarily, reduced to 15 years the depreciation period for the improvements made to leased business property (and for qualified restaurant property). The petitioner was allowed to write off these expenditures, and the write-off is already reflected in the petitioner's federal tax return, and does not appear to have reduced the petitioner's profit in 2001, 2005, 2006 or 2007.

Therefore, 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.

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).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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 three years of experience as an Italian cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook for the petitioner from 1999 to the present; as a cook with the [REDACTED] New Jersey, from 1998 to 1999; as a cook for the [REDACTED] New Jersey, from 1997 to 1998; and, as a cook for [REDACTED] New Jersey, from 1994 to 1996.

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 To Whom It May Concern letter, signed by an unknown author, stating that the beneficiary was "employed by me as an Italian Cook" from February 2, 1999 to August 13, 2007. The address listed in this correspondence appears to be that of the petitioner. No other experience letters were submitted from the beneficiary's other prior employers, in order to establish the beneficiary met the requirements stated on the labor certification.

(b)(6)

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>5</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>6</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>7</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,

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<sup>5</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>6</sup> 20 C.F.R. § 656.21(b)(5) [2004].

<sup>7</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.

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 three years of experience in the job offered and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are three years of experience, the petitioner could not hire workers with less than three years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004]. In the To Whom It May Concern of August 13, 2007, the author states that the beneficiary performed the following duties:

Prepared, seasoned and cooked soups, vegetables and specialty items from menu.  
Washed, peeled, cut, and shredded vegetables and fruits to prepared them for use.  
Took inventory and ordered foodstuffs and seasoned as required. Sterilized kitchen at the end of day.

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

Prepare, season, and cook soups, meats, vegetables and specialty items from menu.  
Wash, peel, cut, and shred vegetables and fruits to prepare them for use. Take inventory and order foodstuffs and seasonings as required. Sterilize kitchen at the end of the day.

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 it had been employed with the petitioner in the position of a cook. However, he also represented that he had been employed by other companies 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 offered position and the positions in which the beneficiary gained experience, it would have concluded that he met the minimum three year requirement based on experience with employers other than 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 previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as 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.

As the petitioner submitted no other letters of experience from the beneficiary's prior employers, 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(1)(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.

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

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.