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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 0 6 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 a private pre-school.[1] It seeks to employ the beneficiary permanently in the United States as a preschool teacher. 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 March 24, 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 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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[1] The petitioner's name on Form I-140 and ETA 750 is The record contains the federal tax returns of from 2003 through 2005 showing Federal Employer Identification Number (FEIN) For the years 2006 through 2010, counsel submitted federal tax returns for showing the same FEIN # Although the record contains copy of the fictitious business name registration for The filed by on April 13, 2006, no evidence was provided regarding the fictitious business name registration for . Individuals or entities doing business for profit under a name different from the owner(s) full legal name(s) must file a Fictitious Name Statement with the registrar-recorder/county clerk office in the county where the business resides. This information is available at http://www.sba.gov/content/register-your-fictitious-or-doing-business-dba-name/ (accessed August 7, 2012).

> 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 October 14, 2003. The proffered wage as stated on the Form ETA 750 is $12.73 per hour, which is $26,478.40 per year based on forty hours of work per week. The Form ETA 750 states that the position requires two years of experience as a preschool teacher or in the related occupation of preschool teacher assistant.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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 1992 and to currently employ six 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 September 3, 2003, the beneficiary claimed to have worked for the petitioner as a part-time preschool teacher assistant since October 1995. No other work experience is listed on the labor certification.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On June 22, 2012 the AAO issued a Notice of Intent to Dismiss (NOID), a Notice of Derogatory Information (NDI) and a Request for Evidence (RFE). The AAO requested: (i) evidence of the petitioner's ability to pay from 2006 through 2011; (ii) a copy of the beneficiary's Social Security card; (iii) evidence to establish that [redacted] is a valid successor-in-interest to the original petitioner, [redacted] and (iv) evidence to demonstrate the beneficiary is qualified for the offered position.

In response to the AAO notice, the appellant submitted, among other things, the following evidence:

- A copy of [redacted] 2011 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns (Form 7004).
- Copies of [redacted] 2006 through 2010 federal tax returns (Form 1120S).
- Copies of the Forms W-2 issued to the beneficiary from 2003 through 2011.
- Copies of the beneficiary's jointly filed individual income tax returns from 2003 through 2011 (Form 1040).
- A declaration signed by the beneficiary regarding her Social Security Number (SSN).
- A copy of the Notice Number CP565A, dated February 19, 1997, from Department of Treasury, Internal Revenue Service, assigning the beneficiary an IRS Individual Taxpayer Identification Number.
- A copy of the fictitious business name registration for [redacted] on April 13, 2006.
- A statement of employment signed by [redacted]

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 copies of the beneficiary's Forms W-2 from 2003 through 2011, showing that the petitioner paid the beneficiary more than the proffered wage. The AAO cannot accept the Forms W-2 of record as evidence of wages paid to the beneficiary by the petitioner. Research conducted in all available databases revealed that the Social Security Number (SSN) listed on the beneficiary's Forms W-2 is associated with other individuals, including the beneficiary. It is also noted that there is no SSN listed on Part 3 of Form I-140, filed in 2007.[3] In the AAO's NOID, it was noted that the beneficiary's

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

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

Internal Revenue Service (IRS) Forms W-2 issued by the petitioner bear a SSN that does not correspond to the number listed on the beneficiary's individual federal tax returns. The AAO specifically requested a copy of the beneficiary's Social Security Card to verify her SSN and resolve any inconsistencies. In response, the petitioner submitted a copy of the Notice Number [redacted] dated February 19, 1997, from Department of Treasury, Internal Revenue Service, assigning the beneficiary an individual taxpayer identification number (ITIN). An ITIN is a tax-processing number issued by the IRS to those individuals who do not have a SSN for filing tax returns and other tax-related documents.[4] This evidence does not resolve the inconsistency noted above and does not verify that the Forms W-2 are evidence of wages actually paid to the instant beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003, or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v.*

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

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

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

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

[4]The instructions to IRS Form W-2 state that an employer should not accept an ITIN for employment purposes. When an employer prepares a Form W-2, it should show the correct SSN for the employee. *See* http://www.irs.gov/instructions/iw2w3/ch01.html (accessed August 6, 2012).

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. 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 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.
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> 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 AAO noted in its RFE that the record included the federal tax returns of [redacted] For the years 2003 through 2005, [redacted] tax returns show that it did business under the name The

(the petitioner). For the years 2006 onward, tax returns show that it did business under the name The AAO requested evidence to establish that is a valid successor-in-interest to

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

In response to the AAO notice, the petitioner submitted a copy of the Fictitious Business Name Statement for filed by on April 13, 2006. The document indicates that the business is conducted by a corporation. The record contains the federal tax returns of from 2003 through 2005 showing Federal Employer Identification Number (FEIN) For the years 2006 through 2010, counsel submitted federal tax returns for showing the same FEIN of The tax returns of record demonstrate that Fictitious Business Name from 2003 through 2005 and that current Fictitious Business Name, both holding the same FEIN. The evidence of record demonstrates that no successor-in-interest exists, but rather the petitioner changed its name in 2006 and is not a different entity than the labor certification employer.

Also, in response to the AAO notice, the petitioner submitted a copy of 2011 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns (Form 7004) and copies of 2006 through 2010 federal tax returns (Form 1120S). The petitioner's tax returns demonstrate its net income from 2003 through 2010, as shown in the table below.

- In 2003, the Form 1120S stated net income[5] of $(26,720).
- In 2004, the Form 1120S stated net income of $(36,601).
- In 2005, the Form 1120S stated net income of $22,688.
- In 2006, the Form 1120S stated net income of $106,348.

[5] 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 23 (1997-2003) 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 August 6, 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 income, credits, deductions, and other adjustments shown on its Schedule K from 2003 through 2010, the petitioner's net income is found on Schedule K of its tax returns.

- In 2007, the Form 1120S stated net income of $98,401.
- In 2008, the Form 1120S stated net income of $21,517.
- In 2009, the Form 1120S stated net income of $(10,968).
- In 2010, the Form 1120S stated net income of $(4,121).

Therefore, for the years 2003, 2004, 2005, 2008, 2009, and 2010, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] 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 from 2003 through 2010 as shown in the table below.

- In 2003, the Form 1120S stated net current assets of $33,012.
- In 2004, the Form 1120S stated net current assets of $0.
- In 2005, the Form 1120S stated net current assets of $95,720.
- In 2006, the Form 1120S stated net current assets of $35,195.
- In 2007, the Form 1120S stated net current assets of $16,480.
- In 2008, the Form 1120S stated net current assets of $28,210.
- In 2009, the Form 1120S stated net current assets of $0.
- In 2010, the Form 1120S stated net current assets of $(50,317).

Therefore, for the years 2004, 2007, 2009, and 2010, 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.

It is noted that, on appeal, counsel included depreciation in his calculation of the petitioner's ability to pay. Counsel's reliance on depreciation is misplaced. Depreciation cannot be considered in determining the petitioner's ability to pay the proffered wage. As explained in *River Street Donuts*,

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[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. Therefore, even though amounts deducted for depreciation do not represent current use of cash, they also do not represent amounts available to pay wages.

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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1992. The petitioner submitted its federal tax returns from 2003 to 2010. The figures on its tax returns do not demonstrate the petitioner's ability to pay the beneficiary the proffered wage as of the priority date in 2003 based on its net income or net current assets. The petitioner has not established a historical growth since 1992, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Although the Forms W-2 issued to the beneficiary list the wages paid during the relevant years, the AAO will not rely on evidence where there are unresolved inconsistencies, including the beneficiary's SSN. This issue must be addressed in any further filings. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director,[7] 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)(l), (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 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a preschool teacher, or in the related occupation of a preschool teacher/assistant. The position also requires completion of grade school and high school.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she worked for the petitioner as a preschool teacher assistant from October 1995 to present, working twenty-five (25) hours per week. [8] Her duties included "assistant to pre-school teacher teaching children of ages 2 to 5 years. Assist in activities and preparation of materials." No other experience is listed on the labor certification.

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 signed by from attesting to the beneficiary's employment with the petitioner in "several positions" from 1995 to the present time. However, only mentions in the letter that the beneficiary worked as an assistant to preschool teacher, assisting in activities and preparation of material, from

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[7] 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 (9th 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).

[8] Because the beneficiary signed the labor certification on September 3, 2003, the AAO will consider that she worked for the petitioner as a preschool teacher assistant at least until September 3, 2003.

October 1995 to September 3, 2003. The letter does not comply with the requirements set forth in the regulations as it does not mention title and omits whether the beneficiary was a full-time or part-time employee.

Regarding the experience gained 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.]

Representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered as a preschool teacher or a preschool teacher/assistant. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience. *See* 20 C.F.R. § 656.21(b)(5) [2004].[9]

On June 22, 2012, the AAO requested evidence that the DOL conducted an analysis of the dissimilarity of the position offered (preschool teacher) and the position in which the beneficiary gained experience with the petitioner (preschool teacher/assistant). The petitioner was advised that in lieu of this evidence the AAO would accept evidence to demonstrate the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. Such evidence may include, but is not limited to: a detailed explanation of the proposed job duties with the percentage of time to be spent on each duty, as well as the position's salary; a detailed explanation of the job duties for the beneficiary's previous/current position(s) with the percentage of time spent on each duty, as well as the position's salary; a detailed organizational chart that demonstrates the hierarchy within your organization of the proffered position, as well as the beneficiary's previously/currently held position(s), as well as those who supervise/will supervise the beneficiary and those supervised by the beneficiary; evidence of your organization's previous hiring practices for similar positions.

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[9] In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as a pre-school teacher or a preschool teacher/assistant cannot be the actual minimum requirement for the offered position of preschool teacher.

In response, the petitioner submitted a statement dated July 18, 2012, signed by President of attests to the beneficiary's employment with the petitioner since 1995 in "several positions." states that from October 1995 to September 3, 2003, the beneficiary worked as a part-time preschool teacher/assistant, and that since September 3, 2003, the beneficiary has been working as a preschool teacher.

July 18, 2012 statement describes the duties performed by the beneficiary as follows:

> Assist teacher in activities and preparation of materials to get them ready for the children on a daily basis. Ensure that the teacher's instructions are carried out in the activities to promote social, physical and intellectual growth needed for primary school in preschool. Make suggestions to teacher in planning of individual and growth activities to stimulate growth in language, social and motor skills. Assist teacher in the teaching of colors, shape, numbers, arts and crafts as well as assist in the distribution of the materials. Assist teacher in reading books while storytelling. Fill in for teacher when teacher steps away. Sit in the teacher's meetings with parents and discuss children's problems and progress.

These duties closely match the duties of the offered position of a preschool teacher as stated by the petitioner in Item 13 of Form ETA 750:

> Teach children of ages 2 to 5. Instruct children in activities designed to promote social, physical and intellectual growth needed for primary school in preschool. Plan individual and growth activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using equipment. Discuss student's problems and progress with parents.

Although counsel asserted that the duties of a preschool teacher and preschool teacher assistant are dissimilar, counsel's assertions are not supported by any documentary evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner failed to provide any of the evidence requested in the AAO notice to establish either (i) the dissimilarity of the position offered and the position in which the beneficiary gained experience, or (ii) that the beneficiary is qualified for the offered position based on experience not gained with the petitioner. Counsel asserts that the duties of a preschool teacher and a preschool teacher assistant are so intertwined and interrelated that it is very difficult to establish a percentage breakdown of the proposed job duties. Counsel also stated that "an assistant assists the teacher in whatever is the call of the day." The petitioner did not submit an organizational chart demonstrating the hierarchy of the proffered position, as well as the beneficiary's previously/currently held position(s), as well as those who supervise/will supervise the beneficiary and those supervised by the beneficiary. Nor did the petitioner submit evidence of its previous hiring practices for similar positions. The petitioner failed to establish that the position in which the beneficiary gained experience (preschool teacher/assistant) is dissimilar from the

proffered job (preschool teacher). Therefore, the record demonstrates that the beneficiary gained experience with the petitioner in an occupation similar to the proffered position.

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.[10] In the instant case, as the beneficiary's experience gained with the petitioner was in the similar position of preschool teacher assistant, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.[11] The petitioner failed to submit other evidence that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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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[10] 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.

[11] In *Valley Ranch Barbecue*, 1988-INA-239, July 23, 1990 (BALCA), the Board denied certification for the alien gained qualifying experience with the employer as an assistant cook promoted to cook. The Board found that minor additional duties set forth for the cook position were not shown to constitute a significant dissimilarity in skill level and necessary training and experience between the two positions held by the Alien. Also in *Hip Wo Inc.*, 1989-INA-24, July 23, 1990 (BALCA), the Board decided that the employer failed to establish that assistant cook/speciality cook positions were sufficiently dissimilar to avoid the bar of section 656.21(b)(6) where the only distinction made in the record between the two positions is that the Assistant Cook did not actually do the final preparation and cooking of the meals.