

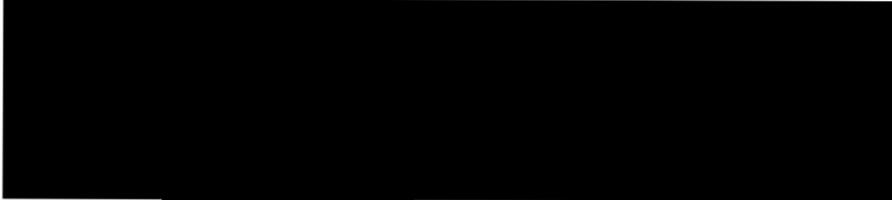
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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date APR 04 2006
WAC 04 079 52385

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
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 full service hair salon. It seeks to employ the beneficiary permanently in the United States as a hairdresser. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner failed to provide sufficient evidence that the beneficiary is qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 30, 2001.¹

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of programmer/analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

¹ The present beneficiary is a substituted beneficiary on the original ETA 750, and the petitioner has submitted an updated Part B for the instant petition.

14.	Education	
	Grade School	NA
	High School	NA
	College	NA
	College Degree Required	NA
	Major Field of Study	NA

The petitioner also specified that any applicants have two years of experience in the job offered or two years of experience in the related occupation that is described as “verifiable experience w/high volume salons including product sales”. Under Item 15, the petitioner also set forth additional special requirements as follows: “Industry norm for hiring standards is the ability to perform the job duties associated with offered employment and all techniques including licensure or licensure eligibility in cosmetology.” The job offered lists the following duties on Item 13:

Perform various duties as hairstylist including haircuts, permanents and coloring. Specialize in cutting, shaping, styling, blow dry and coloring according to latest styles and following instructions of patrons. Work on volume of clients. Ensure customer sales of salon products. Analyze hair to ascertain condition of hair. Develop styles and techniques using company’s wet and dry hair care product lines. Give hair and scalp conditioning treatments for hygiene and remedial (sic) purposes. Create new styles for patrons. Ensure customer sales of salon products. Complete full range of makeovers for clients to include hair, makeup and coloring as required. Provide demonstration and learning for other assistants while working on clients.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he had no relevant or required education. In Part 12, the beneficiary stated : “Over [two] years experience as a Senior Hairdresser for high volume salon. Experienced in sales of wet/dry hair care products and in all areas of styling and cosmetology.” In Section 13, the beneficiary stated that he had a cosmetology license that is transferable to California.² On Part 15, eliciting information concerning the beneficiary’s past employment experience, the beneficiary indicated that he worked for past employers as follows in reverse chronology:

1. The petitioner, [REDACTED] Beverly Hills, California, August 2002 to date of signing the completed Part B, ETA 750;
2. [REDACTED] Bal Harbour, Florida, November 1999 to August 2002;
3. [REDACTED] Mexico City, Mexico, February 1997 to March 1999.

Because the evidence was insufficient, the director requested additional evidence on May 5, 2004. The director noted that the petitioner had submitted a barber’s license in California. The director stated that the Form ETA 750 indicated

² The record does not contain any evidence of a cosmetology license from the state of Florida, but rather a barber license issued on January 15, 2002. In a previous I-140 petition for the same beneficiary, counsel also stated in a response to the director’s request for further evidence, that based on the beneficiary’s foreign license, he had a provisional license, prior to receiving the state of Florida barber license. Counsel noted at that time that the beneficiary had been unable to locate the provisional license.

that the beneficiary must have licensure or licensure eligibility in cosmetology. The director requested evidence to establish that the beneficiary possessed licensure or licensure eligibility in cosmetology.

In response, counsel submitted an excerpt from the legacy INS Operations Instructions , section 204.4(d), "License to Practice Profession." The excerpt states:

There is no requirement in the statute that a member of a profession must establish that he is qualified to practice that profession in the United States. The petitioner shall not therefore be required to submit such evidence. However, if the beneficiary has received a license or other permission to practice his profession, the petitioner may submit the license or other official permit which the beneficiary has received.

Counsel then submitted the beneficiary's barber license from the state of California. This document does not indicate when the beneficiary received this license, however, it is valid until June 30, 2005. Counsel also submits an excerpt from Section 7316 of the California Business and Professions Code, which states the following:

The practice of barbering is all or any combination of the following practices: 91) Shaving or trimming the beard or cutting the hair. (2) Giving facial and scalp massages or treatments with oil, creams, lotions or other preparations either by hand or mechanical appliances. (3) Singeing, shampooing, arranging, dressing, curling, waving, chemical waving, hair relaxing, or dyeing the hair or applying hair tonics. (4) Applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face, or neck. (5) Hairstyling of all texture of hair by standard methods which are current at the time of the hairstyling.

Counsel also submitted a letter from the beneficiary dated July 27, 2004, that stated he had a full and unrestricted license as a barber in the state of California. The beneficiary also stated that he had completed sufficient hours of training as a cosmetologist in Mexico to qualify for a cosmetology license in the state of California, and that he is currently taking the required steps to obtain such a license.

The director denied the petition on October 13, 2004, finding that the petitioner must establish that the beneficiary meets all minimum requirements as certified on the Form ETA 750, which included the special requirement of licensure or licensure eligibility in cosmetology. The director addressed counsel's reference to the legacy INS operations instructions, and noted that the classification in the instant petition was for a skilled worker, not for a professional. The director further determined that the letter from the beneficiary in which he stated he did qualify for a cosmetology license and was currently taking steps to obtain such a license, was insufficient evidence. The director determined that the appropriate state-licensing agency, namely, the California State Board of Barbering and Cosmetology, should have verified the beneficiary's eligibility for the license.

On appeal, counsel states that the issue at hand is whether the beneficiary, a hairdresser, must have a license to practice as a hairdresser at the time the ETA 750 was filed on April 30, 2001. Counsel states that the petitioner can show the beneficiary is fully licensed as a barber in the state of California, that he is eligible for a cosmetology license and will be fully licensed at the time the alien commences work as a permanent resident.

Counsel further states that the regulations outlined an adjudicatory framework for employment-based immigration petitioners based on approved labor certifications. Counsel states that the regulations explain what is required to the

meet the requirement for classification as a professional (a baccalaureate degree or foreign equivalent degree) and what is required to meet the requirement for classification as a skilled worker, namely educational, training, experience, and other requirements. Counsel states that based on the director's erroneous interpretation, it can be concluded that the special requirements in item 15, of Form ETA 750 Part B do not apply to professionals and only apply to skilled and other workers. Counsel states that this is incorrect and that the special requirements apply to all labor certification cases. Counsel states that the question of when the beneficiary must meet the licensure requirement is a completely different issue. Counsel states that the beneficiary must only be cosmetology license eligible. Counsel states that the beneficiary is eligible as he holds a full barber's license and will be issued the cosmetology license at the time he assumes the permanent position. Counsel asserts that the director has interpreted the term "any other requirements" of the Form ETA 750 to require that the beneficiary have licensure at the time the labor certification was filed. Counsel contends that it is neither feasible, realistic, nor possible for a beneficiary to have full and complete licensure at the time the labor certification is filed. Counsel states that when a beneficiary obtains an immigrant visa, he or she may then obtain a social security card, which is now a standard requirement to get any state license in California. After issuance of the "green card", the alien can get a social security card and complete the licensure requirements. Counsel states that this is only done after entry to the United States as a permanent resident.

Counsel again examines the INS Operations Instructions at Section 204.4, and states that the guidance with regard to license to practice as a professional is part of the general evidence requirements for approval of immigrant visa petitions based on labor certification applications. Counsel states that these provisions do not relate only to skilled workers, as the director alleged. Counsel also states that he did not assert that the proffered position is a professional position, and merely wished to explain that the government has carefully considered the issue of licensure to practice as a professional. Counsel states that the director has misunderstood the regulatory framework of the regulations by requiring that skilled or even low level "other worker" require licensure to get an immigrant petition approved.

Counsel also states that the beneficiary does possess a barber's license and is legally entitled to perform the job duties. Counsel states that the beneficiary's barber's license authorizes him to perform the job duties, and that neither a cosmetology license nor any other license is required for the approval of the instant petition. Counsel states that such licensure is required by the state at the time beneficiary commences employment on a full time permanent basis. Counsel states that the petitioner is required to verify that upon commencement of permanent employment, the alien will have all necessary licensure to perform the job. Counsel further states that the term "other special requirements" in the regulation refers to other special requirements to perform the job, and does not refer to the specific issue of licensure, since licensure is not required to obtain approval of an immigrant petition. Counsel states that it has been a principle for a long time that H-1B visa applicants do need licensure to get approved, while immigrant petitions do not require such licensure.

Counsel states that the petitioner requires that the beneficiary show that he is eligible to become licensed in the cosmetology field when he starts working for the petitioner permanently. Counsel states that cosmetology and hairdressing are substantially the same and the beneficiary is qualified for the proffered base on his experience education and training. Counsel concludes by stating that although it is clearly not necessary to do so, he wishes to submit a brief within the next thirty days, which would prove that the beneficiary is eligible for a cosmetology license, although the regulatory framework does not expect an alien who is abroad or out of state to have a full state license at the time of filing the petition.

Counsel resubmits the legacy INS Operations Instructions excerpts , as well as 8 C.F.R. § 204.5(1)(1). Counsel also submits the petitioner's job notice posted in connection with the labor certification application.³ In addition counsel

³ It is noted that the job posting identifies the proffered salary as \$80,000 while the salary on the Form ETA 750

submits the beneficiary's barber's license issued by the state of Florida in January 2002 with a letter from the State of Florida Department of Business and Professional Regulation dated December 6, 2002. This letter states that the beneficiary obtained an initial license in January 15, 2002. Counsel also submits a letter from the State of California dated March 17, 2003 that stated the beneficiary met the minimum requirements to qualify for the California licensing examination. Finally counsel submits the beneficiary's barber license for the state of California that indicates its validity until June 30, 2005.

Counsel's comments as to when the petitioner has to establish that the beneficiary is qualified and meets the education, training and special requirements stipulated by the Form ETA 750 misconstrue the guidance provided by regulations and relevant precedent decisions. As previously stated, to be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Therefore the petitioner has to establish that the beneficiary as of the priority date of April 30, 2001, was qualified to perform the job duties listed on the Form ETA 750. Thus, the petitioner has to establish that as of April 30, 2001, the beneficiary was either licensed or eligible to be licensed in cosmetology.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Therefore, the beneficiary cannot qualify as a professional since he has no degree. In the

states a salary of \$35,000. Thus, the record is not clear as to whether this posting is for the proffered position. In addition, the job positing does not contain any information with regard to cosmetology licensure or eligibility for licensure.

case of the instant petition, the beneficiary can only qualify as a skilled worker and must meet all the requirements set forth in the ETA 750, which includes a cosmetology licensure or eligibility for cosmetology licensure.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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. 1986). See also, *Mandany 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 petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes two years of experience in the job offered or in the related occupation with verifiable experience w/high volume salons including product sales, and who meets the industry norm for hiring standards, which includes licensure or licensure eligibility in cosmetology.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes two years of experience in the job offered or in the related occupation with verifiable experience w/high volume salons including product sales, and who meets the industry norm for hiring standards, which includes licensure or licensure eligibility in cosmetology. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets the other special requirements outlined in Section 15 of the Form ETA-750.

On appeal, counsel asserts that barbering and cosmetology are substantially the same. Although counsel submitted a description of the duties of a barber from the state of California Board of Barbers and Cosmetologist website,⁴ he did not provide the description of the job duties of a cosmetologist that follows in the Board document. It states as follows:

- (b) The practice of cosmetology is all or any combination of the following practices:
 - (1) Arranging, dressing, curling, waving, machineless permanent waving, permanent waving, cleansing, cutting, shampooing, relaxing, singeing, bleaching, tinting, coloring, straightening, dyeing, applying hair tonics to, beautifying, or otherwise treating by any means, the hair of any person.
 - (2) Massaging, cleaning or stimulating the scalp, face, neck, arms, or upper part of the human body, by means of the hands, devices, apparatus or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.
 - (3) Beautifying the face, neck, arms, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams.
 - (4) Removing superfluous hair from the body of any person by the use of depilatories or by the use of tweezers, chemicals, preparations or by the use of devices or appliances of any kind or description, except by the use of light waves, commonly known as rays.
 - (5) Cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person.
 - (6) Massaging, cleansing, treating, or beautifying the hands or feet of any person.
- (c) Within the practice of cosmetology there exist the specialty branches of skin care, and nail care.

⁴ See The Barbering and Cosmetology Act, Article II, Section 7316, at <http://www.barbercosmo.ca.gov/laws.htm> (Available as of March 22, 2006.)

Thus the job duties of a cosmetologist go beyond the treatment of hair, and include the treatment of feet, hands, and other techniques such as defoliation of hair. The state of California Board of Barbers and Cosmetology in its section 7321 business and Professional Code, Section 7321, also provides the following information on how a licensed barber would obtain the cosmetology licensure:

The board shall admit to examination for a license as a cosmetologist to practice cosmetology any person who has made application to the board in proper form, paid the fee required by this chapter, and is qualified as follows:

- (a) Is not less than 17 years of age.
- (b) Has completed the 10th grade in the public schools of this state or its equivalent.
- (c) Is not subject to denial pursuant to Section 480.
- (d) Has done any of the following:
 - (1) Completed a course in cosmetology from a school approved by the board.
 - (2) Practiced cosmetology as defined in this chapter outside of this state for a period of time equivalent to the study and training of a qualified person who has completed a course in cosmetology from a school the curriculum of which complied with requirements adopted by the board. Each three months of practice shall be deemed the equivalent of 100 hours of training for qualification under paragraph (1) of this subdivision.
 - (3) Holds a license as a barber in this state and has completed a cosmetology crossover course in a school approved by the board.
 - (4) Completed a barbering course in a school approved by the board and has completed a cosmetology crossover course in a school approved by the board.
 - (5) Completed the apprenticeship program in cosmetology specified in Article 4 (commencing with Section 7332).

Thus, it appears that to be eligible for a cosmetology licensure in the state of California, the beneficiary needed to do one of the five options listed above, one of which is based on the practice of cosmetology outside the state of California. Although the beneficiary submitted a letter in response to the director's request for further evidence that stated he had sufficient hours of training as a cosmetologist in Mexico to qualify for a cosmetology license in California, and he was currently taking the required steps to obtain the license, as noted by the director, this letter is not sufficient evidence to establish that the beneficiary is eligible for cosmetology licensure in the state of California.⁵

The state of California Board of Barbering and Cosmetology does affirm one of counsel's assertions, that there is reciprocity between states with regard to licensures. Section 7331 of the Act states the following:

The board may grant a license to practice to an applicant if the applicant submits all of the following to the board: (a) A completed application form and all fees required by the board. (b) Proof of a current license issued by another state to practice that is not revoked or suspended or otherwise restricted. (c) Proof that the applicant has not been subject to disciplinary action by any state in which he or she is or has been previously licensed to practice. If the applicant has been subject to disciplinary action, the board shall review that action to determine if it warrants

⁵ It is noted that if the beneficiary's training hours in cosmetology in Mexico are viewed as sufficient to make him eligible for cosmetology licensure, such eligibility existed prior to the April 30, 2001 priority date.

refusal to issue a license to the applicant. (d) Any other information as specified by the board to the extent it is required of applicants for licensure by examination under this article.

However, neither counsel nor the petitioner has provided sufficient evidence as to the beneficiary's eligibility for a cosmetology license. As noted by the director, correspondence from the state of California Board of Barbers and Cosmetologists with regard to the beneficiary qualifying to take the cosmetology exam or the acceptance of his foreign cosmetology hours of training in lieu of the other requirements, would be much more probative than the beneficiary's letter previously submitted to the record. It is further noted that the petitioner did submit the beneficiary's license as a barber in the state of Florida that was issued after the priority date of April 30, 2001. Although the petitioner stated that the beneficiary held a provisional license prior to obtaining the barber license in Florida, the record contains no evidence as to whether this license was for the barber or cosmetologist position.

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, since it has not proven that the beneficiary is licensed as a cosmetologist or is eligible to receive a cosmetology license as of the priority date, April 30, 2001.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.