

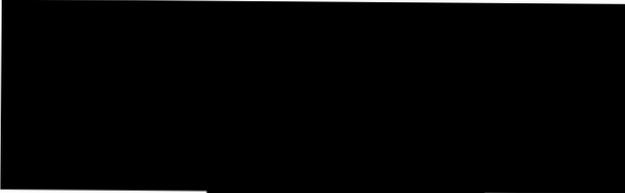


U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
WAC 03 211 52320

Office: CALIFORNIA SERVICE CENTER

Date: MAR 24 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly. The director also determined that the petitioner had not established that the beneficiary met the experience requirements as required by the Form ETA 750.

On appeal, counsel submits a brief and additional documentation

It is noted that the G-28 in the record of proceeding is not signed by the petitioner, but by the beneficiary. The regulation at 8 C.F.R. § 103.2(a)(3) states:

An applicant or petitioner may be represented by an attorney in the United States, as defined in Sec. 1.1(f) of this chapter, by an attorney outside the United States as defined in Sec. 292.1(a)(6) of this chapter, or by an accredited representative as defined in Sec. 292.1(a)(4) of this chapter. A beneficiary of a petition is not a recognized party in such a proceeding. An application or petition presented in person by someone who is not the applicant or petitioner, or his or her representative as defined in this paragraph, shall be treated as if received through the mail, and the person advised that the applicant or petitioner, and his or her representative, will be notified of the decision. Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted.

However, in the interest of fairness, the AAO will review counsel's arguments and evidence submissions.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on September 27, 1999. The proffered salary as stated on the labor certification is \$1,892.80 per month or \$22,713.60 per year.

With the petition, counsel submitted copies of documentation regarding the beneficiary's finances, bills, etc. The director considered such evidence insufficient and on December 19, 2003 and May 4, 2004, he requested additional evidence pertinent to the petitioner's ability to pay the proffered wage from the priority date of September 27, 1999 and continuing to the present. The petitioner was informed that the evidence must be either in the form of copies of annual reports, federal tax returns with appropriate signatures, or audited financial statements. In the May 4, 2004 request for evidence, the director also informed the petitioner that even though the petitioner had submitted tax returns for 2000 through 2002, those returns were not signed nor dated, and therefore, the returns must be resubmitted with appropriate dates and signatures and include the 1999 and 2003 tax returns.

In addition, the director requested evidence that the beneficiary possessed the experience listed on the Form ETA 750 and that the evidence should be in letterform on the previous employer's letterhead showing the name and title of the person verifying the information. The verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week. The director specifically requested copies of the beneficiary's Forms W-2, Wage and Tax Statements, from the petitioner, evidence that the beneficiary completed four years of high school as listed on Form ETA 750, a letter of the beneficiary's experience with the petitioner, letters from the beneficiary's prior employers, and a copy of the beneficiary's cosmetology license. The director informed the petitioner that the submission of cosmetology classes and permits to operate a beauty parlor were not sufficient evidence of full-time cosmetology experience and that the petitioner should submit letters with prior employers, or in the case of owning a salon in the Philippines, with managers, clients, government officials, etc. to include the beneficiary's title, duties, dates of employment, number of hours worked per week, and contact phone numbers for each prior employer.

In response, counsel submitted complete copies of the petitioner's 1999 through 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation; a copy of a Certificate of Participation, issued to the beneficiary by the [REDACTED] of Antipolo, Rizal in the Philippines reflecting the beneficiary's participation in a Cosmetology Class held from August 1976 through January 1977; a copy of a Sanitary Permit to Operate issued to the beneficiary in 1984 by the Office of the Municipal Health Officer of Antipolo, Rizal, Philippines; a copy of a Permit to Operate issued to the beneficiary by the Office of the Mayor of Antipolo, Province of Rizal, Philippines for the year 1984; a copy of the beneficiary's business card for her business in the Philippines, *New Look Beauty Parlor*; copies of Certificates of Attendance issued to the beneficiary by Clairol Technical Training Center Philippines evidencing the beneficiary's attendance at continuing educational training on specific procedures and use of beauty products; a statement of the beneficiary's new address; a copy of a high school Certification; a letter of employment from the petitioner; a letter of the beneficiary's experience with [REDACTED] and a copy of the beneficiary's cosmetology license.

The petitioner's 1999 tax return reflected an ordinary income or net income of \$16,739 and net current assets of \$5,365. The petitioner's 2000 tax return reflected an ordinary income or net income of -\$5,904 and net current assets of \$2,977. The petitioner's 2001 tax return reflected an ordinary income or net income of \$2,499 and net current assets of \$5,258. The petitioner's 2002 tax return reflected an ordinary income or net income of \$1,254 and net current assets of \$6,475. The petitioner's 2003 tax return reflected an ordinary income or net income of -\$4,135 and net current assets of \$469. The letter of employment from the petitioner, signed by Arnold Blanco, President of the petitioner, asserts that the beneficiary acted as an independent contractor to some of the petitioner's customers who required home visits from January 1999 until April 2004. Because of the outstanding feedback received from its customers that the beneficiary serviced, the petitioner filed Form ETA 750, offering the beneficiary a permanent position as a cosmetologist with the same duties and responsibilities as the beneficiary performed for her customers. The certification from the beneficiary's high school proclaimed that the beneficiary "had been a first year to fourth year student of this institution but she was not able to finish her fourth year during the school year 1955- 1956. She left the school on January 12, 1956." The letter from [REDACTED] signed by [REDACTED] president, stated that the beneficiary "has been providing the following services to residents at [REDACTED] since 1996. Styling and cutting hair, wash and sets, permanents, hair dyeing, manicures and pedicures." The certificates from Clairol Technical Training Center Philippines demonstrates that the beneficiary completed a course and earned the certification as hair colorist and attended a seminar workshop on hair coloring, hair perming, hair cutting, hair care and received instructions on the proper use and application of Clairol professional products.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on October 6, 2004, denied the petition.

On appeal, counsel provides previously submitted documentation and an affidavit from the beneficiary. Counsel asserts that the petitioner has established its ability to pay the proffered wage and has demonstrated that the beneficiary has the one-year experience as required by the Form ETA 750. The affidavit from the beneficiary describes her experience as first attending a cosmetology class sponsored by the Rotary Club of Antipolo in the Philippines from August 1976 to January 1977; that after acquiring her initial training, she worked for several smaller parlors in the Antipolo, Rizal area of the Philippines; that she set up her own beauty parlor called *New Look Beauty Parlor* at 76 P. Burgos St., Antipolo, Rizal, Philippines; that when she left the Philippines in March of 1987, she appointed her daughter manager of her beauty shop in the Philippines, that after having worked several odd jobs as a cosmetologist in the United States her first real job began in January 1991 when she began working part-time for Susan Hair Salon; that she continued to work for Susan Hair Salon until December 1998; that she also acquired individual clients and customers requiring home service; that in December 1998, she applied for a job with the petitioner who filed Form ETA 750 offering her a permanent position as a cosmetologist; that the petitioner referred individual clients and customers to her for home servicing until April 2004 when she received her first work permit; that during the entire time she provided part-time service to [REDACTED] and that she holds a valid license as a cosmetologist issued by the Bureau of Barbering and Cosmetology of the State of California.

Counsel contends that the petitioner has shown its ability to pay the proffered wage through its tax returns. Counsel claims that the size of the current ratio, current assets/current liabilities, "a healthy company needs

to maintain depends on the relationship between inflows of cash and the demands for cash payments. A company that has a continuous and reliable inflow of cash or other liquid assets, . . . , may be able to meet currently maturing obligations easily despite a small current ratio – say 1.10 (which means that the company has \$1.10 in current assets for every \$1.00 of current liabilities).” (Emphasis in original.) Counsel further contends that the petitioner has established that the beneficiary meets the experience requirements of the Form ETA 750 through the documents previously submitted and with the beneficiary’s affidavit filed on appeal.

In determining the petitioner’s ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 1999 through 2003 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner’s ability to pay the proffered wage, CIS will next examine the petitioner’s net income figure as reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. 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, CIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 1999 through 2003 were \$5,365, \$2,977, \$5,258, \$6,475, and \$469, respectively. The petitioner could not have paid the proffered wage in 1999 through 2003 from its net current assets.

Counsel claims that the current ratio, current assets/current liabilities, shows that the petitioner has the ability to pay the proffered wage in each relevant year. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. In isolation, a financial ratio is a useless piece of information. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital.<sup>2</sup>

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, as stated above, when determining the petitioner's ability to pay the proffered wage, CIS first examines whether the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, then CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, and finally, CIS will consider net current

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<sup>1</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>2</sup> See *Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm> (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, [http://www.ventureline.com/FinAnal\\_indAnalysis.asp](http://www.ventureline.com/FinAnal_indAnalysis.asp) (accessed March 21, 2006).

assets as an alternative method of demonstrating the ability to pay the proffered wage.<sup>3</sup> Net current assets are the same as working capital which bankers look at over time to determine a company's ability to weather financial crises. In the instant case, net current assets show its highest level in 2002 at \$6,475 and its lowest level in 2003 at \$469. Neither the petitioner's net income nor its net current assets are sufficient to pay the proffered wage in 1999 through 2003. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the obligation of paying additional wages, and this office is not persuaded to rely upon it, this office will not accept that calculation<sup>4</sup>.

The petitioner's 1999 tax return reflects an ordinary income or net income of \$16,739 and net current assets of \$5,365. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 1999.

The petitioner's 2000 tax return reflects an ordinary income or net income of -\$5,904 and net current assets of \$2,977. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2000.

The petitioner's 2001 tax return reflects an ordinary income or net income of \$2,499 and net current assets of \$5,258. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of \$1,254 and net current assets of \$6,475. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2002.

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<sup>3</sup> The AAO's analysis complied with policy set forth by William R. Yates, Associate Director of Operations of CIS, who issued an internal memorandum dated May 14, 2005 guiding adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

The petitioner's net income is equal to or greater than the proffered wage;

The petitioner's net current assets are equal to or greater than the proffered wage; or

The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

<sup>4</sup> There are several points one must keep in mind about ratios. First, they are "flags" indicating areas of strength or weakness. One or even several ratios might be misleading. Second, there is no single correct value for a ratio. The observation that the value of a particular ratio is too high, too low, or just right depends on the perspective of the analyst. Third, financial ratios are meaningful only when they are compared with some standard, such as another industry trend, ratio trend, or a ratio trend for the specific sector being analyzed.

The petitioner's 2003 tax return reflects an ordinary income or net income of -\$4,135 and net current assets of \$469. The petitioner could not have paid the proffered wage from either its net income or its net current assets in 2003.

Thus, the petitioner has failed to demonstrate that it has the continuing ability to pay the proffered wage beginning on the priority date.

The second issue in this proceeding is whether the petitioner has established that the beneficiary met the experience requirements as set forth on the Form ETA 750.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is September 27, 1999.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. This information appears as follows:

Grade School: 6 years  
High School: 4 years  
Training: 600 hours  
Type of Training: cosmetologist  
Experience: 1 year in the job offered as a cosmetologist

Block 15 requires the beneficiary to have a license from Consumer Affairs, State of California.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of cosmetologist must have one year of experience as a cosmetologist.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states in pertinent part:

*Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training must be submitted in the form of letters from current or former employers or trainers and must include the name, address, and title of the writer and a specific description of the alien's duties. If this evidence is unavailable, other documentation will be considered.

In this case, the petitioner submitted a copy of a Certificate of Participation issued to the beneficiary by the [REDACTED] of Antipolo, Rizal in the Philippines indicating the beneficiary's participation in a cosmetology class held between August 1976 and January 1977; a copy of a Sanitary Permit

to Operate issued to the beneficiary by the Office of the Municipal Health Officer of Antipolo, Rizal, Philippines; a copy of a Permit to Operate issued to the beneficiary by the Office of the Mayor of Antipolo, Province of Rizal, Philippines for the year 1984; a copy of a business card of the beneficiary's cosmetology business called *New Look Beauty Parlor*; and copies of Certificates of Attendance issued to the beneficiary by Clairol Technical Training Center Philippines. The petitioner also submitted an Employment Certification, signed and dated, by the petitioner's president, [REDACTED] attesting to the present employer-employee relationship between the petitioner and the beneficiary; a sworn declaration attesting to the referral-system relationship that existed between the petitioner and beneficiary from January 1999 until April 2004; a Certification, dated July 15, 2004, issued and signed by [REDACTED], president of [REDACTED] Inc. attesting to the beneficiary's employment as an independent contractor with [REDACTED] Inc. since September 1996, and a copy of the beneficiary's cosmetology license issued by the Department of Consumer Affairs of the State of California<sup>5</sup>

The director considered the documentation to be insufficient as proof of the beneficiary's qualifying employment and experience and denied the petition on October 6, 2004.

On appeal, the petitioner, through counsel, provides previously submitted documentation and an Affidavit of Work Experience in Lieu of Testimony in Court from the beneficiary. Counsel states:

[The petitioner] has submitted a Certification, dated July 15, 2004, issued by the president of [REDACTED] Ms. [REDACTED]. . . The Certificate states that the alien beneficiary has been providing services to the resident[s] of [REDACTED] since September of 1996, and states in detail the scope of services that the alien beneficiary has rendered. [The director] has noted that the certification does not indicate the number of hours worked by the alien beneficiary, nor does it indicate whether the services were rendered on a permanent basis. The reason for this is that the alien beneficiary rendered the services as an independent contractor, and not as an employee of [REDACTED]

Second, [the petitioner] submitted a sworn Declaration, dated July 21, 2004, signed and dated under penalty of perjury under the laws of the State of California by its President and General Manager, Mr. [REDACTED]. The Declarations [sic] states that since January of 1999, the alien beneficiary, acting as an independent contractor, and using her own tools of the trade, serviced [the petitioner's] customers who needed home visits. Mr. [REDACTED] attests that using tools such as scissors, blowers, trimmers, and similar equipment[,] the alien beneficiary performed services similar to those duties and responsibilities prescribed for the position of "Cosmetologist." . . .

Third, the alien beneficiary has been unable to submit any certificate of work experience from the Philippines because the alien beneficiary was self-employed. . . .

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<sup>5</sup> It is noted that the beneficiary's cosmetology license does not show the date of issue, and therefore, it is impossible for the AAO to determine if the beneficiary had acquired the license before the priority date of September 27, 1999.

In addition to the foregoing, [the petitioner] respectfully submits as Annex “K” the original of alien beneficiary’s Affidavit of Work Experience in Lieu of Testimony in Court. The attached affidavit states in detail alien beneficiary’s work experience both in the Philippines and in the United States. [The petitioner] respectfully submits that the affidavit will prove that the alien beneficiary has at least the one-year experience required by the Form ETA-750 and Form I-140 subject of this appeal.

(Emphasis in original).

The regulations at 8 C.F.R. § 204.5(1)(3)(ii) state the following concerning evidence which would establish a beneficiary’s qualifications:

*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.

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the alien 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 INA Dec. 45, 49 (Comm. 1971). Thus, the petitioner must illustrate that the beneficiary met the requirements for the position at the time the alien labor certification application was filed.

In the instant case, the ETA 750 requires one year of experience in the job offered. The evidence to establish that the beneficiary had one year of experience as a cosmetologist consists of affidavits from the petitioner, the beneficiary, and the president of [REDACTED]. In addition, evidence of the beneficiary’s experience included certificates of participation and training in various hair coloring workshops, a copy of a Sanitary Permit to Operate from the Office of the Municipal Health Officer of Antipolo, Rizal, Philippines, and a copy of a Permit to Operate from the Office of the Mayor of Antipolo, Rizal, Philippines.

The regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part:

(b) *Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as

applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

On appeal, counsel asserts that the evidence shows that the beneficiary has the required one-year of experience. In this case no regulatory-prescribed employer letter was submitted to corroborate the beneficiary's work experience in the Philippines. The explanation given as to why it was unavailable was that the beneficiary was self-employed. No relevant secondary evidence such as payroll records or tax information was offered. The only evidence<sup>6</sup> attempting to corroborate the beneficiary's work experience in the Philippines was not submitted until the decision was appealed. Again, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i). It is noted that counsel did submit copies of a Sanitary Permit to Operate and a copy of a Permit to Operate, both issued to the beneficiary and both dated 1984. However, those permits do not assure that the beneficiary operated the business for one year.

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<sup>6</sup> The declarations that have been provided on appeal are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of an appeal are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel has provided a declaration from the petitioner and a declaration from the president of [REDACTED] in support of the beneficiary's work experience in the United States. The declaration from the petitioner indicates that it employed the beneficiary in a full-time position as a cosmetologist since May 1, 2004. The declaration from the president of [REDACTED] indicates that it employed the beneficiary since September 1996. The declaration does not, however, list the number of hours worked per week, and no corroborative evidence such as pay stubs, Forms W-2, Wage and Tax Statements, Forms 1099-MISC, Miscellaneous Income, etc. was provided in support of the declaration. It is noted that the beneficiary also submitted a declaration in support of her work experience in the Philippines and the United States. However, since the declaration is not an affidavit, as affidavits must be sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of the event and circumstances, the declaration will not be considered evidence and will not be given any evidentiary weight. It is also noted that Form ETA 750, Part B and the beneficiary's declaration maintains that Susan's Hair Salon employed the beneficiary from January 1991 until December 1998 at sixteen hours per week. However, no evidence was provided of this employment.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Without corroborative evidence that the beneficiary possessed the required experience and license as listed on the Form ETA 750, the petition may not be approved.

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.