**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: JUN 2 4 2013 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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,

Jon K
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook specializing in Mexican cuisine. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 13, 2011. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish that the beneficiary possessed the minimum employment experience required to perform the duties of the offered position by the petition's priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The record documents the procedural history in this case, which is incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983);

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[1] Section 203(b)(3)(A)(i) of the Act grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

[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 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).

*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).

Where the job requirements of an offered position are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" to determine the qualifications that the beneficiary must possess. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the job requirements in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the ETA Form 9089 states the following minimum requirements for the offered position of Mexican specialty cook:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.8. Alternate combination of education and experience: None accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The labor certification states that the beneficiary qualifies for the offered position based on 27 months of employment experience as a "Cook – Mexican Cuisine" at in Mexico from October 1, 1995 until December 31, 1997. The labor certification also states that the beneficiary has worked for the petitioner in the offered position since February 1, 2000. Part J.21 of the ETA Form 9089, however, states that the beneficiary did not gain any qualifications for the offered position with the petitioner.[3] The beneficiary signed the labor certification on November 1, 2011, declaring under penalty of perjury that the contents of the ETA Form 9089 relating to him are true and correct.

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

> 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

[3] The labor certification also states that the beneficiary worked as a gardener in , California from January 1, 1998 to August 1, 1999. The petitioner, however, does not claim that this employment relates to the beneficiary's qualifications for the offered position.

the experience of the alien.

The record contains an "affidavit in lieu of experience" from a purported former co-worker of the beneficiary, dated June 6, 2006. The former co-worker states that he also worked as a cook at a restaurant that served Mexican cuisine. The former co-worker claims that the beneficiary worked there continuously on a full-time basis as a Mexican specialty cook from October 1995 through December 1997 and provides a description of the beneficiary's duties there. The former co-worker states that he worked with the beneficiary throughout the beneficiary's period of employment there and saw him perform his job duties on a daily basis.

In response to the director's Request for Evidence (RFE) of June 15, 2012, which acknowledged the affidavit but requested regulatory required evidence or corroborating secondary evidence, the petitioner submitted letters from its sole shareholder and the beneficiary. The letters state that both the shareholder and the beneficiary tried to obtain additional evidence of the beneficiary's previous employment as a cook at in accordance with the director's RFE. They state that they contacted the beneficiary's family members in Mexico, who live near the beneficiary's former place of employment. The shareholder and the beneficiary claim that the beneficiary's family members told them that the is no longer in business. The beneficiary's family members were trying to contact relatives of the restaurant's former owner in an effort to obtain her address and telephone number, according to the shareholder and the beneficiary, but were unsuccessful as of the petitioner's response to the RFE on September 7, 2012.

The shareholder and the beneficiary also state that they were trying to obtain letters from former customers of the as evidence of the beneficiary's employment there. The shareholder and the beneficiary state that they cannot obtain any direct records of the beneficiary's employment because restaurants in Mexico did not then issue tax forms to cooks, the restaurant paid the beneficiary in cash, and no pay vouchers exist. Since responding to the RFE, the petitioner has not submitted any additional evidence of the beneficiary's qualifying employment in Mexico.

As the director stated in his decision, the non-existence or unavailability of required evidence creates a presumption of ineligibility for the benefit request. 8 C.F.R. § 103.2(b)(2)(i). Where a required document does not exist or cannot be obtained, a petitioner must demonstrate the non-existence or unavailability of the document and submit "secondary evidence" of the facts at issue. *Id.* If neither the required document nor secondary evidence can be obtained, a petitioner must demonstrate the unavailability of both the required document and secondary evidence, and submit at least two affidavits from non-parties to the petition "who have direct personal knowledge of the event and circumstances." *Id.*

In the instant case, the petitioner claims that it cannot obtain the required document, a letter from the beneficiary's previous employer in Mexico, as well as secondary evidence of the beneficiary's employment there, such as tax forms, pay vouchers and employment records. To demonstrate the unavailability of the required document and the secondary evidence, the petitioner's shareholder and the beneficiary have stated that the beneficiary's family members in Mexico could not obtain any

additional evidence of his qualifying employment because the employer no longer operates and they could not locate the employer's former owner.

The petitioner has not sufficiently demonstrated that the employer's letter and secondary evidence of the beneficiary's employment at are unavailable. The letters of the petitioner's sole shareholder and the beneficiary, both of whom have interests in obtaining the petition's approval, are self-serving and therefore entitled to minimal weight. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (stating that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The letters also rely on second-hand information from the beneficiary's family members in Mexico, the people the petitioner claims directly sought the additional evidence, reducing the reliability of the letters' contents.

The petitioner has not provided statements from the beneficiary's family members regarding their first-hand attempts to obtain additional evidence of the beneficiary's employment in Mexico, or explained why their statements cannot be submitted. The petitioner has also not submitted letters from local Mexican government officials, or demonstrated any attempts to contact such officials, who may be able to confirm the termination of the business and the unavailability of employment records. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972).

Even if the petitioner had demonstrated the unavailability of the previous employer's letter and secondary evidence of the beneficiary's employment in Mexico, the petitioner has not established the beneficiary's qualifications for the offered position. In the absence of the required employment letter and secondary evidence, the regulation at 8 C.F.R. § 103.2(b)(2)(i) requires at least two affidavits from non-parties with direct, personal knowledge of the event and circumstances at issue. The petitioner has submitted only one affidavit from a non-party: the beneficiary's purported former co-worker. Even that affidavit is of questionable value because it does not provide the purported co-worker's address or any other contact information that would allow USCIS to confirm the truthfulness of his testimony. *See* "Affidavit" in Glossary on USCIS website, http://www.uscis.gov/portal/site/uscis (requiring affidavit to include an affiant's full printed name and address, date and place of birth, relationship to the parties, and complete details of how the affiant acquired knowledge of the circumstances at issue) (accessed June 11, 2013); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring letter from a prior employer to include the employer's name, address, and title and a description of the beneficiary's experience).

In addition, statements on the Forms I-140, Immigrant Petitions for Alien Worker, in this petition and in a previous petition that the petitioner filed on behalf of the beneficiary, raise questions about the beneficiary's purported dates of qualifying employment in Mexico. In accordance with the affidavit of his purported former co-worker, the beneficiary states on the separate labor certifications accompanying the petitions that he worked at from October 1995 through December 1997. The Forms I-140, however, state the beneficiary's "Date of Arrival" in the United States as May 1995. This casts

doubt on the beneficiary's claimed employment experience. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the sufficiency and reliability of the remaining evidence in support of the petition).

If the beneficiary last arrived in the U.S. in May 1995, he could not have worked in Mexico from October 1995 through December 1997. The petitioner has not explained whether the beneficiary last arrived in the U.S. in May 1995 or has since re-entered the country. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

On appeal, counsel asserts that USCIS unreasonably requires tax returns, pay vouchers or employment records to confirm the beneficiary's employment as a cook in Mexico more than 15 years ago. He argues that USCIS fails to explain why the affidavit of the beneficiary's purported co-worker and the letters of the petitioner's shareholder and the beneficiary are not sufficient and reliable evidence of the beneficiary's qualifications and the unavailability of additional evidence of his employment.[4]

Contrary to counsel's assertion, USCIS does not require specific secondary evidence - such as tax returns, pay vouchers and employment records - to establish the beneficiary's qualifying experience for the offered position. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) specifically requires a letter from the claimed employer. As discussed above, the absence of the required letter from the beneficiary's previous employer creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). However, the regulation permits the petitioner to submit unspecified secondary evidence "pertinent to the facts at issue," such as official government or business records. *Id.* To overcome the presumption in this case, where the petitioner asserts no primary and no secondary evidence is available, the petitioner must demonstrate the unavailability of the employer's letter and secondary evidence of the beneficiary's qualifying employment, and submit at least two affidavits from non-parties with direct, personal knowledge of the beneficiary's employment. *Id.* Thus, USCIS allows the petitioner to demonstrate the beneficiary's qualifications for the offered position without the submission of tax forms, pay vouchers or employment records, but the petitioner has failed to do so in accordance with regulations.

Also as discussed above, the letters from the petitioner's shareholder and the beneficiary are not sufficiently reliable because they are self-serving and contain second-hand information. The letters do not constitute independent, objective evidence of the petitioner's attempts to obtain evidence of

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[4] As of the date of this decision, the AAO has not received a brief or additional evidence, which the petitioner stated on the Form I-290B, Notice of Appeal or Motion, it would submit within 30 days of filing the appeal on November 1, 2012. However, the Form I-290B, which the petitioner's counsel signed, states the basis for the appeal and contains arguments for the petitioner. *See* 8 C.F.R. § 103.3(a)(4)(iv) (any appeal that fails to state the reason for the appeal will be summarily dismissed). Further, the AAO notes that the director's decision analyzes the evidence submitted and the regulations for primary and secondary evidence, and provides a conclusion as to the sufficiency of the evidence.

the beneficiary's qualifying employment in Mexico because the petitioner's shareholder and the beneficiary are parties to this petition. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). Statements from local Mexican officials, other records regarding the business, or news articles published about the business in Mexico would constitute more reliable evidence of the termination of business and the unavailability of employment records because these sources lack direct interests in this petition.

The letters of the petitioner's shareholder and the beneficiary also rely on second-hand information from the beneficiary's family members in Mexico. Statements from Mexican government officials or other independent, credible sources would be more reliable proof of the termination of business and the unavailability of evidence in Mexico because government officials or other sources may have more direct, personal knowledge of the restaurant's closing and the unavailability of employment records. Moreover, the petitioner has not demonstrated that it tried to obtain such statements from local officials and the beneficiary's family members.

Counsel also argues that USCIS's rejection of the affidavit of the beneficiary's purported co-worker lacks "logical explanation" when the agency accepted the same affidavit as sufficient proof of the beneficiary's qualifying experience in the petitioner's previous petition for the beneficiary in the same offered position. The petitioner also submits copies of decisions and notices showing that the AAO ultimately denied the previous petition based on the petitioner's failure to establish its ability to pay the proffered wage rate, not on its failure to establish the beneficiary's qualifications for the offered position.[5]

Prior, erroneous approvals do not require the AAO to approve benefit requests where the applicants or petitioners have not demonstrated eligibility. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). USCIS need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). The AAO does not find the USCIS decisions on the petitioner's previous petition persuasive where the petitioner has failed to establish the beneficiary's

[5] The record shows that the AAO also grounded its denial of the petitioner's previous petition on the petitioner's failure to demonstrate that it was a "successor-in-interest" to the labor certification employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986) (an employer that seeks to offer the same job opportunity contained in the labor certification of another employer must show that it acquired the essential rights and obligations necessary to carry on the labor certification employer's business and otherwise qualifies as a petitioner). The record shows that the petitioner's shareholder previously operated the business as a sole proprietorship and filed the labor certification that accompanied the previous petition. The record shows that the petitioner filed a motion to reopen the AAO's previous decision, but that the AAO rejected the motion as untimely. Because a new labor certification in the name of the petitioner accompanies the instant petition, the petitioner's relationship to the previous labor certification employer is not at issue in this petition.

qualifications for the offered position. Further, USCIS ultimately denied the petitioner's previous petition, albeit on other grounds.

Counsel's arguments on appeal do not overcome the evidence in the record, which shows that the petitioner has failed to establish that the beneficiary possessed the employment experience required by the labor certification as of the petition's priority date.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the beneficiary's proffered wage as of the petition's priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed at least three I-140 petitions for other beneficiaries since 2006. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages of all the beneficiaries from the priority date of the instant petition until the beneficiaries obtained lawful permanent resident status or their petitions were denied, withdrawn or revoked. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document: the priority date, proffered wage or wages paid to each beneficiary; whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has not established its continuing ability to pay the combined proffered wages of all of its I-140 beneficiaries.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the director 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In summary, the AAO affirms the director's decision that the petitioner failed to establish the beneficiary's qualifications for the offered position as required by the labor certification by the petition's priority date. The beneficiary therefore does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. In addition, the AAO finds that the petitioner failed to demonstrate its continuing ability to pay the combined proffered wages of the beneficiary and the beneficiaries of its other petitions from the petition's priority date onward.

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.