(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 24 2013 OFFICE: CALIFORNIA 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:

SELF-REPRESENTED

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,

Rachel M Irvio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (director) revoked the approval of the employment-based immigrant visa petition. The petitioner has appealed the director's decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a garment manufacturer and wholesaler. It seeks to permanently employ the beneficiary in the United States as a fashion designer (SOC/O*Net Code 142.061-018). The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date DOL accepted the labor certification for processing, is December 29, 1997. *See* 8 C.F.R. § 204.5(d).

In her decision revoking the approval of the Form I-140, Immigrant Petition for Alien Worker, the director found that the record failed to establish that the beneficiary had possessed the minimum four years of experience required to perform the offered position as of the priority date. On appeal, the petitioner asserts that United States Citizenship and Immigration Services (USCIS) did not have good and sufficient cause to revoke the Form I-140 as its decision was based on the unsupported statements of a consular official in Seoul, South Korea.[1]

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

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

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years

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[1] In a November 29, 2012 Request for Evidence (RFE), the AAO asked the petitioner to submit a new Form G-28, Notice of Appearance as Attorney or Representative, for its counsel. In response to the RFE, counsel indicated that the petitioner was not submitting a new Form G-28 as the individual who had signed the previous Form G-28 had died and no other representative of the petitioner was willing to authorize his representation. In that counsel's response indicates that he no longer represents the petitioner in this matter, the AAO will consider the petitioner to be self-represented, although all submissions and representations by counsel will be considered.

[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).

training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. It 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); *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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date, 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Com. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The minimum requirements for an offered position are set forth in Part A.14. and Part A.15. of the Form ETA 750.

In the instant case, Part A.14. and Part A.15. of the Form ETA 750 reflect the following minimum requirements:

EDUCATION
Grade School: Not required.
High School: Not required.
College: Not required.
College Degree Required: Not required
Major Field of Study: N/A
TRAINING: None Required.
EXPERIENCE: Four (4) years in the job offered.
OTHER SPECIAL REQUIREMENTS: None.

Part B of the Form ETA 750, Statement of Qualifications of Alien, indicates that the beneficiary qualifies for the offered position based on her experience as a fashion designer for [redacted] in Seoul, South Korea from May 1988 to July 1994. The other employment experience listed by the beneficiary is her ownership of a Korean restaurant from October 1995 until May 1997. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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 the experience of the alien.

The record contains several Certificates of Experience issued by the that indicate the company employed the beneficiary as a fashion designer from May 1988 to July 1994.

In the October 13, 2009 revocation of the Form I-140, the director noted that a Notice of Intent to Revoke (NOIR) had been issued to the petitioner on January 3, 2005 on the basis of information that had been uncovered by an overseas investigation and which appeared inconsistent with the beneficiary's claim to have been employed by the Although the director acknowledged that the petitioner's submission of evidence in response to the NOIR established that the had been in business at the time of the beneficiary's claimed employment, she also found that the petitioner's submission of evidence demonstrating the unavailability of tax records to establish the beneficiary's employment was not fully responsive to the NOIR, which had not limited the request for documentation of the beneficiary's work experience to tax documents. The director noted that, although the boutique's business structure appeared to have changed since it had employed the beneficiary, there was no indication of a break in its business activities. She concluded, therefore, that it was reasonable to believe that the would have a range of records pertaining to the beneficiary's work history, records that could have been obtained by the petitioner and used to establish the beneficiary's prior employment. She also observed that the petitioner had failed to indicate that it had sought corroborating evidence of the beneficiary's employment from the beneficiary herself. The director further indicated that the two Certificates of Experience issued by the regarding the beneficiary's employment, dated September 12, 2001 and January 17, 2005, were insufficient proof of the beneficiary's employment as they failed to provide any detail regarding the duties she performed. As the director found the record to contain insufficient proof of the beneficiary's employment by the from May 1988 to July 1994, she determined that the petitioner had failed to establish the beneficiary's qualifications for the offered position as of the priority date of the Form ETA 750 and revoked the approval of the Form I-140 accordingly.

On appeal, the petitioner asserts that the revocation of the approval of the Form I-140 was based on "the conclusory and speculative findings" of an officer at the U.S. embassy in Seoul, South Korea. The petitioner contends that a revocation cannot be based on unsupported statements of investigators and, further, that any inconsistencies identified by the officer who conducted the investigation of the beneficiary's employment with the have now been rebutted by the evidence submitted by the petitioner.

The petitioner also contends that USCIS failed to review the January 17, 2005 Certificate of Experience submitted in response to the NOIR and that this document, pursuant to the regulation at 8 C.F.R. § 204.5(g)(1), is sufficient to establish the beneficiary's qualifying experience. However, in response to the director's finding that neither of the previously submitted Certificates of Experience was sufficient to establish the beneficiary's employment with the the

petitioner submits another Certificate of Experience, dated October 22, 2009, which is signed by Jae the Chief Executive Officer of the . In his statement, attests that he employed the beneficiary as a women's apparel fashion designer from May 1988 to July 1994 and that she performed "design sketch, pattern making, sample production and product development."

The petitioner further contends that no corroborating evidence can be provided to support the submitted Certificates of Experience and that if there were such evidence, the director would have requested it. To explain this lack of evidence, the petitioner references the January 14, 2005 facsimile transmission from the Audit Division of Seodaemun (South Korea) Tax Office stating that tax records for the period 1988 to 1994 would have been destroyed in 2001. The petitioner also asserts that, at the time of the beneficiary's employment, not everything was computerized and stored in a database, and that as the was then a sole proprietorship, there was no regulation or need to maintain all paper documents, "especially those pertaining to former employees."

On appeal, the petitioner also puts forward an equitable estoppel claim, asserting that, had the NOIR been issued in a timely manner, rather than three years after the approval of the Form I-140 on February 1, 2002, the petitioner might have been able to obtain tax documents from the Korean Tax Office to document the beneficiary's employment at the The petitioner also contends that because of the subsequent four-year interval between the issuance of the NOIR and the actual revocation of the approval of the Form I-140 on October 13, 2009, the petitioner "changed its position to its detriment in gathering additional evidence, if such is even available." The petitioner contends that based on these unreasonable delays, the director was estopped from issuing the revocation.

The AAO now turns to a consideration of the record on appeal and whether, as the petitioner claims, it demonstrates the beneficiary's qualifications for the offered position of fashion designer.

As previously indicated, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the date it is filed with DOL. 8 C.F.R. § 103.2(b)(1), (12). Therefore to demonstrate that the beneficiary in this case is qualified to perform the offered position, the petitioner must establish by a preponderance of evidence that the beneficiary had four years of experience as a fashion designer prior to December 29, 1997, the date on which DOL accepted the Form ETA 750 for processing.

In the October 13, 2009 Notice of Revocation, the director indicated that her decision to revoke the approval of the Form I-140 was based on the petitioner's failure to submit any independent objective evidence of the beneficiary's claimed employment with the On appeal, the AAO also finds the petitioner to have failed to provide such evidence or to have established that such evidence is unavailable.

The AAO acknowledges the Certificates of Employment issued by the , but finds

them insufficient to establish the beneficiary's qualifying experience in the absence of supporting documentary evidence. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Although the petitioner contends that no reliable evidence is available to support the Certificates, these claims are unpersuasive.

The January 14, 2005 facsimile transmission from the Audit Division of Seodaemun (South Korea) Tax Office, which indicates that tax records may be destroyed after five years (Grade A Income Taxes) or seven years (non-reporting taxes), demonstrates that the petitioner is unable to provide South Korean tax records to establish the beneficiary's employment from 1988 to 1994. However, the record contains no similar evidence demonstrating that South Korean businesses would be unable to document employment from this same period. While the petitioner claims that the as a sole proprietorship was not required to keep employment records at the time of the beneficiary's employment, the record provides no documentary evidence in support of the petitioner's assertion, nor any statement from the that it did not maintain records for its employees while it operated as a sole proprietorship. Instead, it includes a January 17, 2005 statement from a supervisor at the who indicates that, at the time of the investigation into the beneficiary's employment history, he informed the investigator that changes in the company's business structure made it "currently" impossible to verify records and documents from the period when the company was a sole proprietorship. This statement appears to indicate that the did keep employment records when it was operating as a sole proprietorship and nothing in the record indicates these records no longer exist. The record also lacks any evidence that demonstrates that the petitioner has attempted to obtain employment records from the beneficiary.

The AAO notes the petitioner's claim that the director's failure to specify the documentation to be submitted by the petitioner in response to the January 3, 2005 NOIR is itself proof that such documentation does not exist. However, in making this assertion, the petitioner misconstrues the director's silence on what specific types of employment documentation were to be provided by the petitioner to establish the beneficiary's employment by the . The petitioner fails to acknowledge the purpose of the NOIR, which, as indicated by the director in the October 13, 2009 Notice of Revocation, was to require the petitioner "to call upon all of its applicable resources to resolve the issue(s) raised in the notice," not to limit the type of evidence it might provide in response.

Based on the record on appeal, the AAO does not find the petitioner to have established that the beneficiary had four years of experience as a fashion designer as of the priority date of the Form ETA 750. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has not provided independent objective evidence to establish the beneficiary's experience as a fashion designer and has not demonstrated that such evidence does not exist.

With regard to the petitioner's claim that the director was estopped from revoking the Form I-140 based on the unreasonable delays in the issuance of the NOIR and the Notice of Revocation, the AAO has no authority to address an equitable estoppel claim. The AAO, like the Board of Immigration Appeals, has no authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente,* 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). AAO's jurisdiction is also limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

The record does not establish that the beneficiary met the minimum requirements of the offered position set forth in the Form ETA 750 as of the December 29, 1997 priority date and, therefore, that she qualifies for classification as a professional or skilled worker under section 203(B)(3)(A) of the Act. Accordingly, beneficiary is not eligible to benefit from the Form I-140 filed by the petitioner, and the AAO will affirm the director's revocation of the petition.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.