



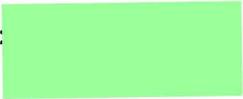
U.S. Citizenship  
and Immigration  
Services

(b)(6)

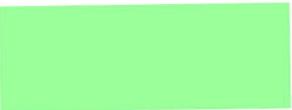


DATE: **DEC 08 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a dry cleaning and alternation business. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary has two years of experience which are required to perform the proffered position as of the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's May 26, 2009 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 7, 2007. The proffered wage as stated on the ETA Form 9089 is \$27,186 per year. The ETA Form 9089 states that the position requires 24 months of experience in the job offered: alteration tailor.

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.<sup>1</sup>

On appeal, counsel submits a brief; copies of the sole proprietor's U.S. Individual Income Tax Return (Form 1040) for 2006, 2007 and 2008; copies of the sole proprietor's personal checking account statements from 2007 and 2008; copies of the personal checking account statements from the sole proprietor's wife from 2007 and 2008; and a copy of *Matter of Sonegawa*, 19 I&N Dec. 764 (BIA 1988).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and currently to employ five workers. On the ETA Form 9089, signed by the beneficiary on February 7, 2008, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that whereas the petitioner's 2008 federal income tax return was not yet available when the director rendered his decision, the return is available at the time of the appeal and is being submitted with the appeal. Counsel asserts that this return demonstrates the ability to pay for 2008. On appeal, counsel also asserts that the petitioner's checking account statements demonstrate the petitioner's ability to pay for 2007. On appeal, counsel also asserts that the sole proprietor opened another business in 2007 with additional expenses which detracted from his adjusted gross income for that year. On appeal, counsel also asserts that while the beneficiary does not have two years of experience in the job offered, she did complete a training program, the duration of which exceeded two years and that the labor certification allows for such training.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

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

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner neither claims to have employed the beneficiary nor provided any evidence of having paid the beneficiary any wages at any time from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. The proprietor's tax returns reflect the following information for the following years:

- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$75,985.00.
- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$62,763.00.
- In 2008, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$83,077.00.

As a sole proprietor, the petitioner must demonstrate not only the ability to pay the beneficiary out of his adjusted gross income but also to support his household. To that end, the director requested that the petitioner supply a list of recurring, monthly, household expenses, including but not limited to mortgage or rent payments, automobile payments, installment loans, credit card payments, and other household expenses. In response, the petitioner supplied a list of monthly expenses to include rent, car payment, auto insurance, health insurance, electricity bill, phone and cell phones, gas and household expenses. The monthly total for the sole proprietor's personal expenses is \$3,088 annualized at \$37,056. However, absent from the list is food and clothing. Further, the proprietor did not substantiate his claimed expenses with documentary evidence such as bills or statements.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Therefore, while the petitioner claims that the annual total for his recurring, household expenses is \$37,056, without accounting for food and clothing it is likely that the total is significantly higher. Thus, while the sole proprietor's adjusted gross income for 2006, 2007 and 2008 is sufficient to pay the beneficiary the proffered wage, the petitioner has not demonstrated that the adjusted gross income is sufficient both to pay the beneficiary the proffered wage and support the sole proprietor's household.

In his RFE, the director requested that the sole proprietor supply copies of his checking and savings account statements to demonstrate personal assets. In response, the sole proprietor supplied bank statements from two business checking accounts. The first group of statements reflects the balances for the account ending in 4351 but contains only the monthly statements from January through May 2008. The second group of statements reflects the balances for the account ending in 1512. For 2008 the statements for the second account for June, July and December are missing. For 2009, statements were provided for only January through April. No statements were provided for 2007.

Further, the statements which were provided in response to the director's RFE represent funds which were located in the sole proprietorship's business checking account at the [REDACTED]. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On appeal, counsel cites *Ranchito Coletero*, 2002-INA-105 (BALCA 2004) to assert that USCIS should consider the sole proprietor's individual assets in determining whether or not he has the ability to pay the proffered wage. To that end, counsel asserts that he submitted checking account statements for both the sole proprietor and his wife. Counsel asserts that when considering the balances in the accounts in addition to the sole proprietor's adjusted gross income, the sum is sufficient to pay both the beneficiary and the sole proprietor's household expenses.

Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA 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).

Nevertheless, the AAO concurs with counsel's assertion in that as a sole proprietor, the petitioner operates a business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

As articulated above, in our analysis, the AAO considered the sole proprietor's adjusted gross income, his recurring, monthly household expenses and any personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. For that reason, the director requested that the petitioner submit bank statements as evidence of personal assets. However, in his response, the sole proprietor submitted his business checking account statements. These reflected funds which were located in the sole proprietorship's business checking account at the [REDACTED]. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses and do not represent additional funds which are available to pay the proffered wage.

On appeal, the sole proprietor now submits copies of his personal checking account statements as evidence of personal assets.

Normally, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Yet, because the director did not specify, in his request, that the sole proprietor should submit his personal checking account statements, the AAO will consider the checking account statements submitted on appeal.

The sole proprietor submitted two sets of checking account statements: one belonging to the sole proprietor and one belonging to the sole proprietor's wife. However, the instant petition was filed by [REDACTED] with the sole proprietor, alone, having signed Form I-140 and the labor certification. Schedule C on which [REDACTED] reports its business income and expenses was filed by the sole proprietor alone. The sole proprietor has provided no evidence demonstrating that his wife is involved in the operation of the business. Further, each of the two sets of checking account statements provided on appeal bears only one name. In other words, neither account is a joint account. The petitioner has provided no evidence, by way of a signed statement by the sole proprietor's wife, indicating that the wife is willing to contribute the funds from her personal checking account towards the compensation of the beneficiary.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Further, even if the AAO were able to consider the balances in the wife's checking account, these funds would not be sufficient to pay the beneficiary the proffered wage or the difference between the available funds and the proffered wage.

For example, the record of proceeding contains monthly statements from the sole proprietor's wife's personal checking accounts covering the period January through December of 2007 and 2008, with average annual balances of \$1,812.13 and \$1,645.60 for the years 2007 and 2008, respectively. As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. In the case of the sole proprietor's wife, the balance in 2007 is minimal at \$1,812.13, a sum which is not sufficient for purposes of paying the proffered wage. Further, in 2008, the average balance decreased by \$166.53. Therefore, the funds from the wife's account would be not sufficient to demonstrate a continuing ability to pay the proffered wage.

In the case of the sole proprietor, the record of proceeding contains monthly statements from his personal checking account covering the period January through December for 2007 and 2008, with average annual balances of \$1,225.85 and \$3,607.39 for the years 2007 and 2008, respectively. Following the rationale explained above, the balance for 2007 is not sufficient to pay the beneficiary the proffered wage. Further, the sole proprietor's average annual balance increased by only \$2,381.54 from 2007 to 2008. The difference in the balance from 2007 to 2008 is not sufficient to pay the beneficiary the proffered wage for the subsequent year.

On appeal, counsel also asserts that the petitioner started another business venture in 2007 and that expenses incurred during the commencement of the new business detracted from the sole proprietor's profitability for 2007. However, according to the sole proprietor's tax return for 2007, the new business operates from the same location as the petitioning business and is also a dry

cleaning service. In Section A of Schedule C for 2007, the new business is described as "Drop Off" and would, therefore, seem to be a service offered by the petitioning enterprise. The petitioner has provided no documentary evidence demonstrating how the commencement of the new service or business had a specific adverse impact upon the sole proprietor's profitability, whether through the purchase of new equipment, additional premises, additional insurance or equipment. Rather, counsel simply states that such an impact was made.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

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

In the instant case, the petitioner provided financial documentation for three years of business operations. The sole proprietor's gross sales and payroll have remained relatively consistent during the three years. Further, whereas the petitioner provided some business checking account statements in an effort to demonstrate current assets which would be available to pay the proffered wage, based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI,

which is insufficient to establish the petitioner's ability to pay the proffered wage. The petitioner has not established the historical growth of its business enterprise, overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

As set forth in the director's May 26, 2009 denial, the second issue in this case is whether or not the beneficiary has the two years of experience which are required to perform the proffered position as of the priority date of the visa petition.

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)(1), (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 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job 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 labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.

- H.10. Experience in an alternate occupation: 24 months as an alteration tailor or as a fashion design trainee.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a fashion design trainee at the [REDACTED] from January 1, 1991 until February 28, 1993. No other experience is listed. 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 a Certificate of Graduation from [REDACTED] President of the [REDACTED]. According to the document, the beneficiary completed a 26-month training program in Fashion Design from January 1, 1991 until February 28, 1993, learning and performing the following skills:

...fashion design, pattern making, and illustration. In addition, she performed the following duties: marked, cut, and sewed most of the commercialized styles of clothing, which include men's, women's, and children's, for alternation to fit the customer's body structure. For this, the trainee was required to examine the garment and determine the customer's body structure for necessary alterations; repair and replace defective garment parts; and fit clothing on the customer to determine required alterations. These procedures require the skilled utilization of rulers, pattern markers, scissors, rippers, and razor blades as well as sewing and over-locking machines. The trainee successfully met all the requirements for the program upon which the certificate was bestowed.

The training which the beneficiary completed and the experience which she gained while at the [REDACTED] correspond with the nature of the duties associated with the proffered position. Further, according to O\*Net Online,<sup>2</sup> the proffered position falls within Job Zone Three indicating that it requires "medium preparation" which might be acquired through vocational training, "on-the-job experience" or an associate's degree. On ETA Form 9089, the petitioner indicates that the proffered position required 24 months of experience but also indicated that a foreign educational equivalent would be accepted and that experience in an alternate occupation, such as "Fashion Design Trainee" would be accepted. Given the nature of the proffered position, standard educational / experiential requirements for the field, and the petitioner's requirements, as

<sup>2</sup> <http://www.onetonline.org/link/summary/51-6052.00> (accessed September 20, 2012).

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stipulated on ETA Form 9089, the AAO finds that the proffered position qualifies as skilled labor. In addition, since the petitioner provided evidence demonstrating that the beneficiary completed a 26-month training program in fashion design, performing duties which correspond with the duties associated with the proffered position, we also find that the beneficiary qualifies for the proffered position.

The AAO, therefore, withdraws this portion of the director's decision and finds that the petitioner established that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.