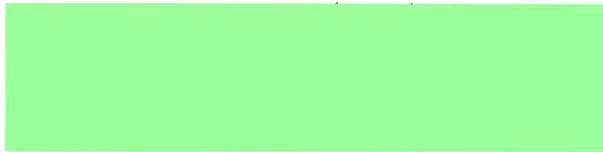




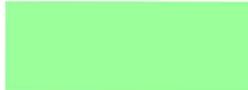
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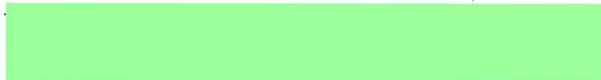
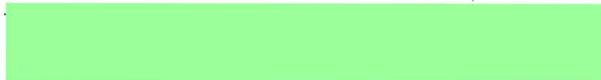
(b)(6)



Date: JUN 22 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:

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,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a clinical laboratory. It seeks to employ the beneficiary permanently in the United States as a clinical laboratory technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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, and that the beneficiary is qualified to perform the duties of the proffered position as the petitioner failed to submit evidence that the beneficiary met the requirements of the job offered as of the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 April 13, 2009 denial, the issues in this case are 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, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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 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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$20.60 per hour, which is \$42,848 per year based on forty hours per week. The Form ETA 750 states that the position requires four years of College education and four years of training on the job. It is stated On Part A.15 that the special requirements are two years of experience as a laboratory technician and college graduate.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On Form I-140 the petitioner claimed to have been established on October 18, 1991 and to currently have 25 employees, and its fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 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 submitted copies of the beneficiary's 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008 Forms W-2, showing that in those years the petitioner paid the beneficiary the following amounts:

- In 2001, the petitioner paid the beneficiary \$11,648.50.

¹ 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).

- In 2002, the petitioner paid the beneficiary \$12,587.50.
- In 2003, the petitioner paid the beneficiary \$13,291.50.
- In 2004, the petitioner paid the beneficiary \$15,825.
- In 2005, the petitioner paid the beneficiary \$37,994.28.
- In 2006, the petitioner paid the beneficiary \$34,900.
- In 2007, the petitioner paid the beneficiary \$40,290.
- In 2008, the petitioner paid the beneficiary \$40,300.

The petitioner was not able to demonstrate that it paid the beneficiary an amount equal to or higher than the proffered wage of \$42,848 per year. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during all relevant timeframe from the priority date in 2001. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage as follows:

- In 2001, the petitioner must show its ability to pay \$31,199.50.
- In 2002, the petitioner must show its ability to pay \$30,260.50.
- In 2003, the petitioner must show its ability to pay \$29,556.50.
- In 2004, the petitioner must show its ability to pay \$27,023.
- In 2005, the petitioner must show its ability to pay \$4,853.72.
- In 2006, the petitioner must show its ability to pay \$7,948.00.
- In 2007, the petitioner must show its ability to pay \$2,558.
- In 2008, the petitioner must show its ability to pay \$2,548.

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 (1st 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before

expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s tax returns of record demonstrate its net income for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2001, the Form 1120 stated net income of \$671.
- In 2002, the Form 1120 stated net income of \$37,892.
- In 2003, the Form 1120 stated net income of \$12,305.
- In 2004, the Form 1120 stated net income of \$(102,197).
- In 2005, the Form 1120 stated net income of \$40,262.
- In 2006, the Form 1120 stated net income of \$(177).
- In 2007, the Form 1120 stated net income of \$12,138.
- In 2008, the Form 1120 stated net income of \$26,161.

For the years 2001, 2003, 2004, and 2006, the petitioner did not have sufficient net income to pay the difference between what it paid the beneficiary in those years and the proffered wage. Although

it appears that the petitioner had sufficient net income to pay the difference between what it paid the beneficiary in 2002, 2005, 2007 and 2008, USCIS records indicate that the petitioner has filed other petitions since the petitioner's establishment in 1992, including I-129 petitions, and I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) and 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

Therefore, the petitioner has not demonstrated that it had sufficient net income to pay the proffered wage during the relevant time period from the priority date in 2001 or subsequently.

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, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$107,924.
- In 2002, the Form 1120 stated net current assets of \$134,350.
- In 2003, the Form 1120 stated net current assets of \$141,165.
- In 2004, the Form 1120 stated net current assets of \$(10,711).
- In 2005, the Form 1120 stated net current assets of \$(6,106).
- In 2006, the Form 1120 stated net current assets of \$(91,022).
- In 2007, the Form 1120 stated net current assets of \$(33,955).
- In 2008, the Form 1120 stated net current assets of \$56,513.

For the years 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net current assets to pay the difference between what it paid the beneficiary in those years and the proffered wage. Although it appears that the petitioner had sufficient net current assets to pay the difference between what it paid the beneficiary in 2001, 2002, 2003, and 2008, as mentioned above, USCIS records

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

indicate that the petitioner has filed other petitions since the petitioner's establishment in 1992, including I-129 petitions, and I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) and 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

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, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and to each one of the beneficiaries of the other petitions filed within USCIS through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal the petitioner resubmitted copies of its 2001 and 2002 Federal Tax Returns (Form 1120) and its 2001 unaudited financial statement. The petitioner also submitted a copy of its 2008 Federal Tax Returns (Form 1120).

Petitioner's reliance on its 2001 unaudited financial statement is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns that demonstrates that the petitioner could not pay the proffered wage from the priority date in 2001.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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's tax returns indicate it was incorporated in 1992. The petitioner submitted its tax returns for years 2001 through 2008. Even without considering the petitioner's multiple filings, the figures on its tax returns do not demonstrate the petitioner's ability to pay the beneficiary the proffered wage of \$42,848 per year in 2004 and 2006. For all years considered, the petitioner has not established that it had the ability to pay the proffered wages to all additional sponsored beneficiaries with the same or similar priority dates. No evidence was submitted to establish a basis for expected continued growth. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during those years. Although the petitioner has been in business since at least 1992, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date, in the instant case April 27, 2001. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference

status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or

(b)(6)

otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Six years of Grade School, four years of High School and four years of College.

Training: Four years on the job (laboratory technician).

Block 15: Two years of experience as a laboratory technician and College graduate.

On Form ETA 750B, the beneficiary claims to have acquired a High School certificate in 1967 from [REDACTED] in the Philippines and a College degree (Bachelor of Science) from [REDACTED] in the Philippines, in 1972. On Part 12 and 14, the beneficiary listed his additional qualifications and documents as "trouble-shoots, repairs, and services in various laboratories equipments," and his possession of various certificates of accomplishments and seminars attended.

Regarding his work experience, the beneficiary listed the following:

- Full-time medical laboratory assistant with [REDACTED], located at [REDACTED], West Covina, CA [REDACTED], from March 1992 to January 2001.
- Full-time service engineer with [REDACTED], in the Philippines, from January 1983 to December 1991.
- Full-time service engineer with [REDACTED] in the Philippines, from June 1978 to November 1982.

Although the director's January 30, 2009 Request for Evidence (RFE) explicitly requested evidence that the beneficiary met all the requirements stated on the labor certification as of the priority date, the petitioner failed to submit evidence that he obtained a College degree before April 27, 2001, that he had at least four years of training on the job as a laboratory technician, and also failed to submit letters from the beneficiary's previous employers attesting to the beneficiary's work experience as a laboratory technician for at least two years.

The beneficiary's claimed qualifying training and experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

(b)(6)

In response to the director's RFE, the petitioner submitted a letter dated March 10, 2009, signed by the petitioner's president and CEO, [REDACTED]. In this letter, the petitioner confirms that the beneficiary has been employed by [REDACTED], since 1994, as a full-time clinical laboratory technician. Although the beneficiary signed the labor certification in 2001, he failed to list this experience with the petitioner. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Further, the petitioner provided no explanation as to how it can attest to the beneficiary's prior employment with another company.

On Form G-325, Biographic Information, signed by the beneficiary on April 10, 2007, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status, the beneficiary represented that he has worked as a laboratory technician for [REDACTED], the petitioner, from October 1996 to present.³ The information related to the initial date of the beneficiary's employment with the petitioner stated on the beneficiary's Form G-325A cannot be reconciled with the information provided by the petitioner on its March 10, 2009 letter. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In the April 13, 2009 denial, the director noted that the petitioner did not provide evidence of the beneficiary's four-year College degree, and an academic evaluation. 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)). On appeal, the petitioner submitted evidence of the beneficiary's Bachelor's degree in Radio and Electronics Engineering obtained from [REDACTED] in the Philippines, in 1973 (diploma and official transcripts), an academic evaluation of the beneficiary's credentials dated May 6, 2009 and signed by [REDACTED] from [REDACTED] and several certificates of training received between 1976 and 2007.⁴ It is noted that several certificates of training were received after the

³ Since Form G-325 was signed by the beneficiary on April 10, 2007, the AAO will consider the end date of employment to be at least until that date.

⁴ The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, 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). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under

(b)(6)

priority date was established, in 2001. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Furthermore, the beneficiary's 1976, 1979, 1981, 1983, and 1988 certificates of training in the record do not report the amount of training received. Therefore, it cannot be concluded that the beneficiary actually obtained at least four years of training as a laboratory technician, as of the priority date, in 2001.

Regarding the experience gained with the employer, 20 C.F.R. § 656.21(b)(5) [2004] states:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

Representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are four years of College education, four years of training on the job as a laboratory technician, and two years of experience as a laboratory technician. Experience in a related occupation is not acceptable. As the actual minimum experience requirements are two years of experience as a laboratory technician, the petitioner could not hire workers with less than two years of experience as a laboratory technician. See 20 C.F.R. § 656.21(b)(5) [2004]. On appeal, the petitioner provided a letter dated May 8, 2009 and signed by its president and CEO, [REDACTED] stating that the beneficiary has been working with the petitioning company for almost fifteen years and he is an outstanding laboratory technician. In hiring the beneficiary with less than two years of experience for the position of a laboratory technician, the petitioner has indicated that the actual minimum experience requirements in fact, are not two years of experience as a laboratory technician. Rather, in that the beneficiary can perform the job duties of the offered position with less than two years of experience as a laboratory technician, it is evident that the actual minimum requirements for the offered position are *less* than two years of experience as a laboratory technician.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750.⁵ In the instant case,

the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

⁵ This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the

(b)(6)

as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in a related occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

(b)(6)

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.