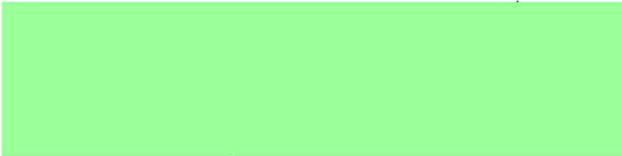


(b)(6)

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



DATE: NOV 15 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner describes itself as a medical clinic. It seeks to employ the beneficiary permanently in the United States as an administrative services director. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 1, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the appeal is properly 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.<sup>2</sup>

On appeal, counsel submits a brief and resubmits the documents which were provided in response to the director's request for evidence (RFE): the beneficiary's resume; a Certificate of Business Name Registration dated August 17, 2004; a certificate of an amendment of Business Name Registration dated August 17, 2006; a Certificate of Business Name Registration dated February 16, 2005; a Mayor's Permit dated March 16, 2006; a letter from the beneficiary dated September 17, 2007; and a copy of ETA Form 9089.

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<sup>1</sup> 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 training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</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 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).

On appeal, counsel asserts that the director erred in refusing to consider the beneficiary's declaration as sufficient to demonstrate her qualifying experience for the proffered position, particularly when coupled with the business permit provided as evidence. On appeal, counsel also asserts that the director erred in requesting additional evidence of the beneficiary's experience without articulating why the beneficiary's declaration was insufficient (for e.g., whether it was inaccurate or not credible).

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: Bachelor's degree in Business Administration.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months.
- H.7. Alternate field of study: Finance or Accounting.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 12 months in any managerial position.
- H.14. Specific skills or other requirements: None Required.

The labor certification also states that the beneficiary qualifies for the offered position based on a

Bachelor's degree in Business Administration and experience as an Administrative Services Director with the petitioner, the [REDACTED] in Temecula, California from October 1, 2006 through the present. The labor certification also identifies the beneficiary's experience as the owner/manager of [REDACTED] in Pampanga, Philippines, from August 17, 2004 until September 1, 2006. 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.

With the initial petition submission, as evidence of the beneficiary's qualifying experience, the petitioner submitted an experience letter from the beneficiary, attesting to her ownership of [REDACTED] from August 17, 2004 until September 1, 2006. In her letter, the beneficiary stated that she performed the following duties:

Overseeing daily accounting & operations of the establishment. Coordinating and managing activities to ensure customer satisfaction, overseeing inventory, reviewing recipes, ordering food, equipment and supplies. Arranging for routine maintenance and upkeep of equipment and facilities. Communication with customers, advertisers and employees to grow business. Administrative HR functions such as recruiting new employees, monitoring employee performance and training and scheduling work hours. Monitoring safety and health standards and making sure they are obeyed. Accounting charges and receipts against records of sales, deposits and securing them. Balancing books.

The petitioner also submitted a Mayor's Permit which granted her permission to operate the [REDACTED] from March 2006 until December 31, 2006; in addition to a Certificate of Business Name Registration for the [REDACTED]

On April 13, 2009, the director issued an RFE, asking the petitioner to supply additional evidence of her qualifying experience. In his RFE, the director stated:

If the beneficiary has no managerial experience apart from that in her own establishment, please provide a letter with the above information from an assistant manager or other coworker. Beneficiary may also provide tax records from the company evidencing the legitimacy of the operation.

Though the director did not explicitly state the reason for the request, he clearly found the beneficiary's self-attestation regarding her qualifying experience to be inadequate. The AAO would concur with this finding.

The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

While the Mayor's Permit and Certificate of Business Name Registration confirm that the beneficiary was authorized to operate an eating establishment, these documents do not provide substantiation of the nature of the work which the beneficiary performed or detail the specific duties which the beneficiary performed while operating her business. Therefore, the director was warranted in issuing an RFE, requesting additional evidence in support of the beneficiary's claimed experience. See 8 C.F.R. 103.2(b)(8).

In its response, the petitioner did not provide the evidence requested by the director but, instead, provided the beneficiary's own resume and resubmitted the beneficiary's self-attestation, the Mayor's Permit and the Certification of Business Name Registration which were submitted with the initial petition submission. Further, the petitioner provided no explanation for neglecting to submit the requested evidence.

The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

On appeal, counsel cites *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7 (D.D.C. 1988) to assert that the director erred in refusing to consider the beneficiary's self-attestation, when combined with the Mayor's Permit and the Certificate of Business Name Registration, as sufficient for demonstrating that the beneficiary has the required qualifying experience. Counsel further asserts that the director did not explicitly state that the beneficiary's self-attestation was either inaccurate or lacking credibility and, therefore, had no basis for issuing the RFE.

Regarding *Lu-Ann Bakery*, although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Further, in that case, it was determined that the petitioner had complied with the regulations in that it provided letters from the beneficiary's former employer, describing the beneficiary's training and experience, even though the information contained in the letters was found to be inconsistent and later challenged by the Immigration and Naturalization Service (INS).

In the instant case, the petitioner has not provided letters from the beneficiary's former employer because, according to the beneficiary, she was self-employed. Therefore, the beneficiary drafted a self-attestation, describing her experience.

However, as stated above, the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

The petitioner provided independent, objective evidence demonstrating only that the beneficiary was authorized to operate an eating establishment. However, the Mayor's Permit and Certificate of Business Name Registration are not evidence of the beneficiary work experience. For that reason, the director was warranted in issuing an RFE, requesting evidence of appropriate secondary or tertiary evidence, attesting to the beneficiary's experience (e.g. affidavits from co-workers or clients). See 8 C.F.R. 103.2(b)(2).

The petitioner did not provide the requested evidence and therefore, has precluded a material line of inquiry, thereby establishing grounds for denying the petition. See 8 C.F.R. 103.2(b)(14).

Therefore, in failing to provide the requested documentary evidence, the petitioner has not provided independent, objective evidence which demonstrates that the beneficiary has the required 12 months of experience in performing the duties enumerated in Section H.11 of ETA Form 9089, to wit:

Coordinate, direct & supervise office managers at all locations to ensure that the company is operating efficiently & plans, sets goals and creates procedures & policy to improve in office productivity, as well as client services. Manage and oversee financial matters for all offices, including preparation of individual financial reports, cash flow, management developing strategies and implementing long term goals of company. Outsource financial reports and tax matters as needed to outside accountants. Prepare financial reports that summarize and forecast the organizations financial position, such as income statements, balance sheets, and analysis of future earnings or expenses, for the individual offices as well as company as a whole. Oversee the accounting and billing departments, including the monitoring of collections of past-due accounts and controlling flow of cash receipts. Assist in preparation of the business and all related financial growth in a financially viable way.

It will also be noted that although the beneficiary was working for the petitioner for one year prior to the filing of the labor certification, in the proffered position, the experience gained through such

employment cannot be used to qualify the alien for the proffered position, even though the evidence indicates that the petitioner is not seeking to qualify the beneficiary based upon such experience.<sup>3</sup>

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.<sup>4</sup> Specifically, the petitioner indicates that question J.19, which asks about an

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<sup>3</sup> The petitioner answered "yes" to question 20 (Does the alien have the experience in an alternate occupation specified in question H.10?) but "no" to question 21 (Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?).

<sup>4</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....  
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

alternate combination of education and experience, is not applicable. However, the petitioner indicated in response to question J.20, that the alien does have experience in an alternate occupation, as permitted by question H.10.<sup>5</sup> In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 12 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>6</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the

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- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
  - (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

- (i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>5</sup> This experience was supposedly gained at the beneficiary's own restaurant in the Philippines.

<sup>6</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

beneficiary indicates, in response to question K.1., that her position with the petitioner was as an Administrative Services Director (the proffered position), and the job duties identified in Section K.1 are the same duties as the position offered, as described above and in Section H.11. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, though the terms of the labor certification supporting the instant I-140 petition permit consideration of experience in an alternate occupation, the beneficiary's experience with the petitioner was in the position offered and may not be used to qualify the beneficiary for the proffered position.

The AAO affirms the director's decision that the petitioner failed to establish 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 not 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.