



U.S. Citizenship  
and Immigration  
Services

B6

[REDACTED]  
[REDACTED]  
DATE: NOV 01 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

[REDACTED]  
[REDACTED]  
[REDACTED]  
INSTRUCTIONS:

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

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

Thank you,

*Kiera Forbes for*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 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>

The petitioner describes itself as a beauty salon. It seeks to permanently employ the beneficiary in the United States as a cosmetologist. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) which 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.

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 26, 2001. *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. On appeal the AAO identified two additional issues, whether or not the petitioner established it has the continuing ability to pay the proffered wage and whether or not the petitioner has established the beneficiary possessed the ability to obtain a cosmetologist license in the State of Virginia.

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.

**Beneficiary Qualifications: Experience**

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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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

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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 8 C.F.R. § 103.2(a)(1).

Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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:

EDUCATION

Grade School: None required.

High School: None required.

College: None required.

TRAINING: None Required.

EXPERIENCE: Two (2) years of experience in the job offered as cosmetologist or two (2) years of experience in various positions in a beauty salon.

OTHER SPECIAL REQUIREMENTS: Must have or be able to obtain license at time of employment.

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience:

- As a shampoo attendant with the petitioner in Arlington, VA from July 1999 until April 25, 2001, the date the beneficiary signed the labor certification, working 40 hours per week.
- As a shampoo attendant at [REDACTED] from February 1995 until December 1998, working 40 hours per week.
- As a cosmetologist at [REDACTED] in Cochabamba, Bolivia from January 1985 until December 1985, working 40 hours per week.

The record contains an experience letter from [REDACTED] owner of the petitioner on plain paper dated May 8, 2006. The letter states the petitioner employed the beneficiary as a helper from July 1999 until April 26, 2001, which represents 21 months of experience in a related occupation.

The record contains a letter dated January 10, 2008 from the beneficiary stating that she was unable to obtain employment verification from the owner of ██████████ because the owner refused to provide employment verification for immigration purposes. The beneficiary's statement is self-serving and does not provide independent, objective evidence that an experience letter from her former employer is unavailable. 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)).

To establish the beneficiary's experience at ██████████ the petitioner submitted secondary evidence consisting of a letter from a co-worker, a copy of an Internal Revenue Service (IRS) Form W-2 for 1998 and a copy of a paycheck from sometime in 1995, both of which appear to have been issued to the beneficiary by ██████████<sup>2</sup> However, as the petitioner has not established that primary evidence of the beneficiary's experience at ██████████ is unavailable, this secondary evidence will not be considered.

The record contains no evidence of the beneficiary's work experience at IBN. However, this experience conflicts with the beneficiary's sworn statement at her adjustment interview, in which she stated that she worked as a cosmetologist/facial specialist for six months outside of the United States.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, counsel asserts that the director summarily dismissed evidence regarding the beneficiary's experience at ██████████ including the co-worker's letter, the 1998 Form W-2, and the 1995 paycheck without discussion.

The regulation at 8 C.F.R. § 204.5(g)(1) provides:

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<sup>2</sup>Additionally, the petitioner submitted an IRS Form 4852, Substitute for Form W-2 executed by the beneficiary wherein she indicates that she did not receive a 1995 Form W-2 from ██████████ and reported her income from ██████████ based on her paycheck. None of these documents establish that the beneficiary was working full-time or what duties she performed.

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

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 petition is for a skilled worker and requires two years of experience, yet the record of proceeding does not contain evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). *The non-existence or other unavailability of required evidence creates a presumption of ineligibility.* 8 C.F.R. § 103.2(b)(2)(i).

The petitioner has established the beneficiary has one year and nine months of experience as a helper in a salon, but beyond that 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 petitioner has failed to submit an experience letter from IBN. Likewise the petitioner has failed to submit an experience letter from [REDACTED] that meets the regulatory requirements, and the petitioner has failed to establish that a regulatory experience letter from [REDACTED] is unavailable. As noted above, although the petitioner submitted the beneficiary's January 10, 2008 letter, the beneficiary's statements are not supported by documentary evidence that the regulatory-prescribed letter is unavailable. Therefore, as the petitioner has not established that the regulatory experience letter is unavailable, there is no basis to consider the co-worker's letter, the 1998 Form W-2, and the 1995 paycheck. Furthermore, even if the AAO considered this evidence, these documents do not demonstrate that the beneficiary worked as a full-time shampoo attendant at [REDACTED]. The Form W-2 and paycheck do not establish the beneficiary's full-time employment or establish the capacity in which the beneficiary was employed.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum experience 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 skilled worker under section 203(b)(3)(A) of the Act.

**Continuing Ability to Pay the Proffered Wage**

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage of \$37,315.20 each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If either the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner did employ the beneficiary in the years 2001 through 2007 and submitted IRS Forms W-2 which reflect the wages paid as shown in the table below:

- In 2001, Form W-2 reflects wages of \$20,176.73.<sup>4</sup> Wage shortfall of \$17,138.47.<sup>5</sup>
- In 2002, Form W-2 reflects wages of \$25,006.81. Wage shortfall of \$12,308.39.
- In 2003, Form W-2 reflects wages of \$28,993.32. Wage shortfall of \$8,321.88.
- In 2004, Form W-2 reflects wages of \$26,102.28. Wage shortfall of \$11,212.92.
- In 2005, Form W-2 reflects wages of \$20,820. Wage shortfall of \$16,495.20.
- In 2006, Form W-2 reflects wages of \$20,296.15. Wage shortfall of \$17,019.05.
- In 2007, Form W-2 reflects wages of \$18,455.99. Wage shortfall of \$18,859.21.

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<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>4</sup> The wage for each year is the amount shown in Box 1.

<sup>5</sup> The wage shortfall is the difference between the proffered wage and the wages paid.

The petitioner submitted copies of its 2001 through 2007 tax returns which indicate the petitioner is a C corporation operating on a fiscal year ending March 31.<sup>6</sup> For fiscal years 2001 through 2007, the petitioner's tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120 stated net income of -\$7.<sup>7</sup>
- In 2002, the Form 1120 stated net income of -\$8.
- In 2003, the Form 1120 stated net income of \$397.
- In 2004, the Form 1120 stated net income of \$1,605.
- In 2005, the Form 1120 stated net income of -\$6,689.
- In 2006, the Form 1120 stated net income of \$8,460.
- In 2007, the Form 1120 stated net income of \$5,063.

For fiscal years 2001 through 2007, the petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below:

- In 2001, the Form 1120 stated net current assets of \$12,446.<sup>8</sup>
- In 2002, the Form 1120 stated net current assets of \$15,857.
- In 2003, the Form 1120 stated net current assets of \$18,273.
- In 2004, the Form 1120 stated net current assets of \$18,431.
- In 2005, the Form 1120 stated net current assets of \$12,583.
- In 2006, the Form 1120 stated net current assets of \$41,202.
- In 2007, the Form 1120 stated net current assets of \$26,325.

The petitioner has not demonstrated that it paid the beneficiary the full proffered wage in the years 2001 through 2007. As the Forms W-2 relate to the calendar year, and the tax returns relate to the petitioner's fiscal year, determining the petitioner's ability to pay is not simply a matter of combining the net income or net current assets from its tax returns with the wages listed on the Forms W-2. It is not clear how much, if any, of the petitioner's net income and net current assets are attributable to each calendar year, thus it is not clear how much, if any, of the petitioner's net income and net current assets were available to pay the wage shortfall in any given calendar year.

The record contains a previously-filed Form I-140 from the petitioner which includes a 2002 Form 1120, which reports the petitioner's net income as \$623 and its net current assets as \$16,557. This inconsistency has not been explained.

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<sup>6</sup> Although the petitioner did not submit its complete tax return for any year, it did submit pages 1 through 4 of its returns for each year.

<sup>7</sup> The petitioner is a C corporation reporting income on Form 1120, U.S. Corporation Income Tax Return. USCIS considers net income to be the figure shown on Line 28 of the Form 1120.

<sup>8</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. 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.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition...[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary.<sup>9</sup>

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

#### **Beneficiary Qualifications – Licensure**

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary has or will be able to obtain a cosmetology license in the State of Virginia. As noted above, the labor certification lists under Other Special Requirements that the beneficiary “must have or be able to obtain license at time of employment”. *The record contains no evidence that the beneficiary either has or will be able to obtain a cosmetology license in Virginia.*

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.

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<sup>9</sup> The petitioner asserts that the 2001, 2002, and 2005 wages of other employees should be considered as being available to pay the beneficiary. In general wages already paid to others are not available to prove the ability to pay the proffered wage and there is no evidence that the position of the other employees involves the same duties as those set forth on the labor certification. Moreover, the petitioner has not documented the position, wage, duties, and termination of the other workers.