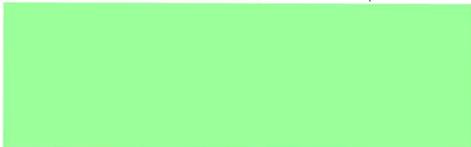




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE:

APR 03 2013

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion will be dismissed.

The petitioner describes itself as a beauty salon. It seeks to permanently employ the beneficiary in the United States as a hairdresser. 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).¹

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 30, 2001. See 8 C.F.R. § 204.5(d).

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

At issue on motion is whether the beneficiary satisfied all of the requirements of the offered position by the priority date of the 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 *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).

¹ 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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

The minimum required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. Item 14 relates to education, training and experience, and Item 15 relates to other special requirements for the offered position. In the instant case, Part A, Item 15 of the labor certification states that the offered position requires an individual with a “[I]license or ability to obtain [a] license in cosmetology.”

The address of the intended employment is in Virginia. The administrative regulations governing the licensing of cosmetologists in Virginia are at 18 Va. Admin. Code 41-20-10 to 41-20-280. In order to obtain a cosmetology license in Virginia, one must pass the Virginia cosmetology license examination or be a licensed cosmetologist in another state or jurisdiction of the United States with substantially equivalent licensing requirements. 18 Va. Admin. Code 41-20-20 and 30. In order to be eligible to sit for the licensing examination, one must complete an approved training program in Virginia; a substantially equivalent program in another state or jurisdiction of the United States; or a Virginia apprenticeship program in cosmetology. 18 Va. Admin. Code 41-20-20 and 40.

The record contains a diploma issued by [REDACTED] certifying that the beneficiary completed courses in Cosmetology Skills I and II from September 6, 2001 to June 20, 2003. The record also contains a letter from [REDACTED] dated May 7, 2003, stating that the beneficiary’s “inception date was September 6, 2001 and her anticipated completion date is June 23, 2003.” The letter further states that the beneficiary “will complete all State Board Requirements and be eligible to take the State Board Examination at the end of the school year.”

Therefore, based on the evidence in the record, the beneficiary was not even eligible to take the Virginia cosmetology license examination for at least two years after the April 30, 2001 priority date.

On appeal, counsel claimed that the beneficiary only needs to satisfy the requirements of the job offered set forth at Part A, Item 14 of the labor certification by the priority date; and that the

requirements at Part A, Item 15 only need to be satisfied “prior to the approval of the visa petition and adjustment of status not at the time of filing the labor certification.” In support of this claim, counsel states that *Matter of Wing’s Tea House* and *Matter of Katigbak* only addressed the beneficiary’s lack of employment experience, not any “other special requirements.” Counsel also notes that section 22.2(b) of the USCIS Adjudicator’s Field Manual (AFM) states:

You must determine whether the beneficiary has met the minimum education, training, and experience requirements of the labor certification at the time the application for labor certification was filed with DOL. You cannot approve a petition for a preference classification if the beneficiary was not fully qualified for the preference by the priority date of the labor certification. *See Matter of Katigbak*, 14 I&N 45 (R.C. 1971); *Matter of Wing’s Tea House*, 16 I&N 158 (Acting R.C. 1977).

Counsel claimed that, since the AFM does not mention “other special requirements” in this paragraph, the petitioner is not required to establish that the beneficiary met all of the “other special requirements” set forth at Part A, Item 15 of the labor certification by the priority date.

The AAO decision dismissing the appeal stated that:

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for a beneficiary in the requested classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, *and any other requirements of the individual labor certification*” (emphasis added).

Although the facts of *Matter of Wing’s Tea House* concern the beneficiary’s experience and not any special requirements, the Commissioner explicitly noted that the filing date of the petition in this immigrant visa preference category means the date the labor certification was filed with the DOL. *Matter of Wing’s Tea House*, 16 I&N Dec. at 160. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). “To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation.” *Id.*

In *Mandany v. Smith*, 696 F.2d at 1008, the labor certification job description included the requirement that the prospective employee be able to obtain, or already have, a Virginia nursing license. Because the beneficiary did not possess a Virginia nursing license by the priority date, the court focused on the meaning of the phrase “able to obtain.” The beneficiary argued that this language means being “eligible to sit” for the examination, and that she satisfied this requirement through her foreign nursing education. The court found that, in that case, merely being eligible to sit for an exam was not sufficient. In the instant case, the beneficiary was not even able to

sit for the cosmetology license examination. In fact, she did not start taking the Virginia cosmetology courses until over four months after the priority date.

In summary, the petitioner must establish that the beneficiary meets all of the requirements of the job offered by the priority date, including the “other special requirements” for the offered position set forth at Part A, Items 15 of Form ETA 750. Further, the evidence in the record does not establish that the beneficiary had the “ability to obtain” a license in cosmetology in Virginia as of the priority date.

The AAO dismissed the appeal and affirmed 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.

The petitioner subsequently filed a motion to reopen and reconsider the AAO decision. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of “new,” a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.³ A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The brief in support of the motion reiterates counsel’s prior claim on appeal that the beneficiary only has to meet any special requirements stated on the labor certification “prior to the approval of the visa petition and adjustment of status not at the time of filing the labor certification.” In support of this assertion, counsel cites to *Matter of Katigbak* and *Matter of Wing’s Tea House*, which are discussed in detail above and do not support counsel’s assertions. Counsel also cites to the AFM section on licensure at section 22.2(g) of the AFM, which states:

Neither the statute nor the regulations require that the beneficiary of an employment-based petition be able to engage in the occupation immediately. There are often licensing and other additional requirements that an alien must meet before he or she can actually engage in the occupation. **Unless needed to meet the requirements of a labor certification**, such considerations are not a factor in the adjudication of the petition.

(Emphasis added). The highlighted portion of this AFM section undermines counsel’s claim. Therefore, it is concluded that the motion does not establish that the AAO decision was incorrect

³ The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>” *Webster’s II New Riverside University Dictionary* 792 (1984)(emphasis in original).

based on the record at the time of the initial decision.

On motion, counsel also submits a certificate as evidence that the beneficiary completed cosmetology training in Bolivia prior to the priority date. Accompanying the certificate is a letter from [REDACTED] stating that the certificate represents the equivalent of 960 hours of training in hairstyling and cosmetology in the United States. However, the evaluator provides no basis for his conclusion.⁴ Further, the certificate is not translated from Spanish to English. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. In addition, this certificate was issued in 1979 and therefore does not constitute "new evidence" as required for a motion to reopen.

Nonetheless, even if the AAO accepted the certificate as evidence of the beneficiary's cosmetology training in Bolivia, this training is not relevant to the instant petition. As is discussed in detail above, training gained outside of the United States is not considered for cosmetology licensure or eligibility to sit for the cosmetology licensure examination in Virginia.

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.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

⁴ USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).



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ORDER: The motion is dismissed.