(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: FEB 0 1 2013 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a cosmetic center. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. 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.[1] 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 17, 2009 denial, the primary issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Classification as a Skilled Worker

Here, the Form I-140 was filed on September 27, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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] On appeal, the petitioner asserts that the labor certification did

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[1] It is noted that according to the Washington State Bar, the petitioner's attorney is deceased. *See* (accessed January 24, 2013). Therefore, the AAO considers the petitioner to be self-represented in this proceeding.

[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 the regulation at 8 C.F.R. § 103.2(a)(1). The

state a requirement of two years of experience or training. The petitioner indicates that Item 15 of Part A of the Form ETA 750 required a license, that California law requires cosmetologists to have a license issued by the state, that an individual must pass a licensing examination to obtain a cosmetologist license in California, that the pre-examination requirement for a cosmetologist in California is 1600 hours of education and training, and that 1600 hours would require two or more years to complete. Thus, the petitioner concludes that the labor certification's minimum requirement is two years of training or experience.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

At Item 14 of Form ETA 750 Part A, the labor certification indicates that an applicant must have eight years of grade school education and four years of high school education. There are no training or experience requirements for the proffered position listed at Item 14. Item 15 of the Form ETA 750 Part A lists the following other special requirements: "Ability to speak Cantonese and Mandarin" and "Must have a License."

United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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'r 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). On appeal, the petitioner asserts that a California cosmetologist license is required for the proffered job. While Item 15 of Part A of the labor certification requires a "license," the labor certification does not specify that a California cosmetologist license is the type of license required. The AAO will not impose additional requirements on the labor certification as requested by the petitioner.[3]

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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).

[3] 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

Further, the DOL assigned the occupational code of 39-5012.00 and title 'Hairdressers, Hairstylists & Cosmetologists' to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.[4] The O*NET online database states that this occupation falls within Job Zone 3. According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." http://www.onetonline.org/link/summary/39-5012.00 (accessed January 28, 2013). Thus, the occupation does not require at least two years of training or experience based on normalized occupational standards that DOL assigned to the labor certification in the instant case.

Additionally, the petitioner asserts that 1600 hours of training would require two or more years to complete. However, 1600 hours of training can be completed in less than one year, depending on the number of hours completed each week. For example, based on a 52-week year, an individual would have to complete less than 31 hours of training per week to complete the 1600 hour training requirement in one year. Thus, the petitioner's assertion that 1600 hours of training would require two or more years to complete is without merit.

Given all of the above, the labor certification did not specify that a California cosmetologist license was required. Further, the occupation does not require at least two years of training or experience based on normalized occupational standards. Finally, 1600 hours of training does not require at least two years to complete. Thus, the evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Beneficiary Qualifications

Beyond the decision of the director, 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. 8

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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.

[4] *See* http://www.bls.gov/soc/socguide.htm (accessed January 24, 2013).

C.F.R. § 103.2(b)(l), (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 the instant case, regarding education, the labor certification states that the offered position requires eight years of grade school education and four years of high school education. On the labor certification, the beneficiary did not list any grade school education or high school education. The petitioner did not submit any evidence to establish that the beneficiary has the required eight years of grade school education and four years of high school education.

Regarding other special requirements, the labor certification requires the ability to speak Cantonese and Mandarin, and the petitioner did not submit any evidence to establish that the beneficiary has the ability to speak Cantonese and Mandarin.

The AAO also notes that the petitioner submitted the beneficiary's esthetician license issued by the California Bureau of Barbering and Cosmetology.[5] The petitioner, however, asserts that a California cosmetologist license is required. The petitioner did not submit evidence that the beneficiary has a California cosmetologist license. A cosmetologist license has different requirements than an esthetician license in California. Regarding training requirements, a cosmetologist license requires 1600 training hours and an esthetician license requires 600 training hours.[6] Therefore, even if we accepted the petitioner's assertion that a California cosmetologist

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[5] The California Board of Barbering and Cosmetology website indicates that the beneficiary has held an esthetician license in the State of California since August 3, 1999. *See* (accessed January 28, 2013). The website does not indicate that the beneficiary was issued a cosmetologist license in California.

[6] The examination application for barbers, cosmetologists, estheticians, electrologists and manicurists in California states as follows:

> Qualifications to take the Board of Barbering and Cosmetology (Board) exams:
> □ Be at least 17 years of age
> □ Has competed the 10th grade in a public school or its equivalent (12th grade for Electrologist)
> □ Has committed no acts or crimes constituting grounds for denial of licensure under Section 480 of the Business and Professions Code, and
> □ Has completed the following hours in a Board Approved School/or completed a 3200 hour apprentice program in California:
> Cosmetologist 1600 Hours
> Manicurist 400 Hours
> Barber 1500 Hours
> Esthetician 600 Hours
> Electrologist 600 Hours

See http://www.barbercosmo.ca.gov/forms_pubs/examapp.pdf (accessed January 28, 2013).

license is a special requirement for the proffered job, the petitioner did not establish that the beneficiary possessed a California cosmetologist license.

Additionally, in response to the director's request for evidence dated March 3, 2009, the petitioner submitted a letter dated March 27, 2009 from of in Hong Kong indicating that the beneficiary worked as a beautician from July 1991 to August 1993. This letter appears to have been submitted to establish that the beneficiary had the 1600 training hours required to obtain a cosmetologist license in California. However, this letter verified prior employment, not training. Further, the employment was not listed on Part B, Item 15 of the labor certification. 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.

The evidence in the record does not establish that the beneficiary possessed the required education and special requirements set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record does not any contain an annual report, federal tax return, or audited financial statement for the petitioner for 2003. The petitioner's failure to provide a complete annual report, federal tax return, or audited financial statement for 2003, the priority date year, is sufficient cause to dismiss this appeal.

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 (9th 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.[7] 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.

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[7] It is not clear whether the petition is supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record that the beneficiary is the daughter-in-law of the petitioner's sole shareholder, Under 20 C.F.R. §656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See*

ORDER: The appeal is dismissed.

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also C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).