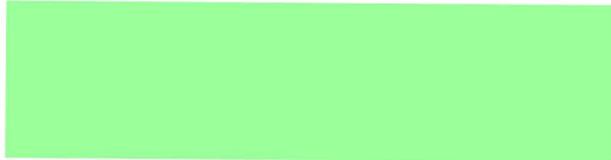




U.S. Citizenship
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Services

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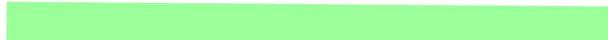


DATE: JUN 26 2013

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:



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 preference visa petition was denied by the Director, Nebraska Service Center, and the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO rejected the appeal as untimely filed and returned the matter to the director for consideration as a motion to reopen and reconsider. The AAO subsequently found that it had issued its previous decision in error, and the AAO reopened the matter on its own motion. The petitioner resubmitted its brief previously submitted on appeal and supporting documentation for the AAO's consideration. The appeal will be dismissed.

The petitioner is a landscape and gardening company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 did not possess the minimum high school diploma and two years of experience in the job required to perform the offered position by 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 March 18, 2009 denial, an issue in this case is 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.

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 June 26, 2003. The proffered wage as stated on the Form ETA 750 is \$11.88 per hour (\$24,710.40 per year based on 40 hours per week). The Form ETA 750 states that the position requires completion of four years of high school and two years of experience in the job offered of landscape gardener.

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 the petition, the petitioner claimed to have been established in 1995 and currently to employ five workers. According to the tax returns in the record, the petitioner's fiscal year begins on May 1st and ends on April 30th. On the Form ETA 750B, signed by the beneficiary on June 6, 2003, the beneficiary claims to have worked for the petitioner from February 1996 to the present.

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. Forms W-2 were submitted indicating that the petitioner paid wages according to the below table.

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 2004, the Form W-2 stated wages paid to the beneficiary of \$21,702.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of \$21,801.00.
- In 2006, the Form W-2 stated wages paid to the beneficiary of \$23,847.50.
- In 2007, the Form W-2 stated wages paid to the beneficiary of \$27,278.00.
- In 2008, the Form W-2 stated wages paid to the beneficiary of \$27,762.00.

Therefore, as the proffered wage was \$24,710.40 per year, the petitioner did not demonstrate that it paid the proffered wage in 2003, 2004, 2005, and 2006 and would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2003	\$24,710.40	\$0.00	\$24,710.40
2004	\$24,710.40	\$21,702.00	\$3,008.40
2005	\$24,710.40	\$21,801.00	\$2,909.40
2006	\$24,710.40	\$23,847.50	\$862.90
2007	\$24,710.40	\$27,278.00	\$0.00
2008	\$24,710.40	\$27,762.00	\$0.00

However, in the instant case, the petitioner provided Forms W-2 for wages it paid to the beneficiary under two different Social Security numbers (SSNs). The Form W-2 from 2008 used one number, while the other Forms W-2 submitted used a different number. Research in all available databases reveals that both SSNs are attributed to individuals other than the beneficiary. No evidence was submitted in the record to explain why the beneficiary was using two different SSNs or to verify that the beneficiary was the actual recipient of the wages paid.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, *Matter of Ho* 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."

Therefore, absent evidence in the record of proceeding that explains why two different SSNs were used on payment documents issued by the petitioner to the beneficiary, the AAO will not consider the above Forms W-2 in calculating the amount of wages paid to the beneficiary by the petitioner.²

² Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The following provisions of law deal directly with SSN fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on June 18, 2013).*

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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 the Service 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 and Line 24 of the Form 1120-A, U.S Corporation Short-Form Income Tax Return. The record before the director closed on March 2, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 should have been the most recent return available. Tax returns for 2003, 2004, 2005, and 2006 were submitted. The 2007 tax return was not submitted. The petitioner’s tax returns demonstrate its net income for 2003, 2004, 2005, and 2006 as shown in the below table.

- In 2003, the Form 1120 stated net income of -\$53,962.00.
- In 2004, the Form 1120 stated net income of \$9,642.00.
- In 2005, the Form 1120 stated net income of \$0.00.

- In 2006, the Form 1120-A stated net income of \$46,927.00.

Therefore, for the years 2003, 2004, 2005, and 2007, the petitioner did not demonstrate that it had sufficient net income to pay the proffered wage.

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.³ 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. No tax return from 2007 was submitted, and the tax return from 2006 did not include a completed Schedule L. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003, 2004, and 2005 as shown in the below table.

- In 2003, the Form 1120 stated net current assets of \$33,322.00.
- In 2004, the Form 1120 stated net current assets of \$22,484.00
- In 2005, the Form 1120 stated net current assets of \$15,068.00.

Therefore, for the years 2004, 2005, and 2007, the petitioner did not demonstrate that it had sufficient net current assets to pay the proffered wage.

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 as of the priority date through an examination of wages paid to the beneficiary, its net income, or its net current assets.

On appeal, counsel asserts that the petitioner may establish its ability to pay the proffered wage by demonstrating its ability to pay the difference between the wages already paid to the beneficiary and the proffered wage in each year. In support of this assertion, counsel submits copies of the Forms 1120 for 2005 and 2006 as well as copies of its bank statements from 2005 and 2006 and argues that the shortfall in 2005 may be covered by funds in the business bank accounts. However, as previously noted above, the petitioner issued Forms W-2 to the beneficiary using two different SSNs that are not being accepted as reliable evidence. Thus, the petitioner has not demonstrated its ability to pay the proffered wage in 2004, 2005, and 2007. In addition, Counsel's reliance on the balances

³According 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.

in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 \$100,000.00. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 gross receipts during the relevant years varied but had decreased in each year from 2003 to 2006. The petitioner indicated on the Form I-140 that it employs five people. Salaries and wages were not substantial and had been decreasing from 2003 until 2006 when the most recent tax return submitted showed \$0.00 in wages and salaries. While the petitioner claims to have been in business since 1995, the tax returns indicate that it was incorporated in 2001. The tax returns reflected \$18,780.00 in officer compensation paid in 2003, but none in any

subsequent years. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of its reputation within its industry. 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 director's decision also states that the evidence failed to demonstrate that the beneficiary possessed the minimum high school diploma and two years of experience in the job offered of landscape gardener as of the priority date as required by the Form ETA 750.

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).

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: Six years

High School: Four years

College: None

College Degree Required: Blank

Major Field of Study: Blank

TRAINING: Blank

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: Blank

Part B of the labor certification states in Item 11 that the beneficiary's highest level of education is elementary school, completed in 1963. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a landscape and maintenance worker with [REDACTED] from September 1994 until November 1996 and through experience as a landscape and maintenance worker with the petitioner, [REDACTED] and Maintenance, in [REDACTED] from February 1996 until the present. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on June 6, 2003.

The record does not contain any evidence that the beneficiary meets the minimum education requirement of four years of high school. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1. In response to the director's RFE, the petitioner provided a letter dated February 17, 2009 asserting that the actual minimum requirements for the proffered position are "either a High School Diploma OR 2 years experience in the job offered." The petitioner provided no evidence to support this assertion, such as correspondence with the DOL clarifying these requirements or copies of advertisements showing how the minimum requirements were communicated to U.S. workers. 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, counsel makes the same unsupported assertion as the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not demonstrated that it intended the minimum requirements to be anything other than what is written on the labor certification, which is four years of high school and two years of experience. In fact, if the AAO accepts the petitioner's assertion that the requirements are a high school diploma *or* two years of experience, the petition does not qualify for classification as a skilled worker, and the petition must be denied as it was filed in the wrong category. Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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. If the labor certification were read as the petitioner asserts, the minimum requirement for the offered position is a high school diploma, which is less than two years of

experience, requiring that the petition be filed in the preference classification for other unskilled workers.

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

The record contains an experience letter from the beneficiary attesting to his employment with [REDACTED] but no letter from this prior trainer or employer was submitted. As the letter fails to meet the requirements of 8 C.F.R. § 204.5(1)(3)(ii)(A) listed above, it is not sufficient evidence that the beneficiary possessed the required two years of experience in the job offered. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. at 591-592 (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. at 158 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

The record also contains an experience letter, dated July 18, 2007, from [REDACTED], president, stating that his company employed the beneficiary as a landscape/gardener since February 1996, working at least 40 hours per week. However, the letter does not provide the name and address of the employer, and it is not written on the petitioner's letterhead.

On appeal, the counsel asserts that the letter from the petitioner is sufficient evidence of the beneficiary's experience and qualifications since "[c]ompanies will never hire an employee who is not qualified for the job position he is applying for."

The AAO notes that, when determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. 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 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.⁴

In addition, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503.

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.

⁴ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. *See E & C Precision*.