U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-Y-H-O-

DATE: JAN. 31, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an educational institution, seeks to employ the Beneficiary as an elementary school teacher first grade. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director determined that the Petitioner did not respond to a notice of intent to deny (NOID) and denied the visa petition due to abandonment under 8 C.F.R. § 103.2(b)(13). The Petitioner filed a combined motion to reopen and reconsider, which the Director also denied. The Petitioner then filed a second motion to reopen. Upon review of the second motion, the Director issued a new NOID, asking the Petitioner for evidence of its ability to pay and informing the Petitioner that the record did not establish that the Beneficiary had the education or experience required by the labor certification. The Director ultimately affirmed his denial of the visa petition, finding that the record did not establish the Petitioner's ability to pay the proffered wage as of the priority date.

The matter is now before us on appeal.[1] The Petitioner asserts that it is a nonprofit government-funded school and should have been considered under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) and that the Director did not read the audited financial report properly.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor

[1] In an addendum to the Form I-290B, Notice of Appeal or Motion, the Petitioner indicates that it will submit a brief in support of its claims. As of the date of this decision, we have not received the promised brief, and the record is considered complete.

certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves the immigrant visa petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving the labor certification in this case, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d)

II. ANALYSIS

The initial issue before us in this matter is whether the Petitioner has established its ability to pay the Beneficiary the proffered wage. Additionally, although it was not addressed by the Director in his decision, we will consider whether the record establishes that the Beneficiary has the required education and experience for the offered position of elementary school teacher first grade.

A. Petitioner's Ability to Pay

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.

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A 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).

To determine a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered *prima facie* proof of the petitioner's ability to pay. If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure, 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. Nov. 10, 2011).[2] If the petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also take into account the overall magnitude of the petitioner's business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In assessing the totality of a petitioner's circumstances, USCIS may consider such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In the present case, the priority date of the petition is February 1, 2013, and Part G.1. of the labor certification reflects a proffered wage of $51,380. Therefore, the Petitioner must establish its ability to pay the annual proffered wage of $51,380 to the Beneficiary from February 1, 2013, onward. The labor certification reflects that the Petitioner has employed the Beneficiary since 2009.

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[2] 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).

The record indicates the Petitioner is structured as a tax-exempt corporation under section 501(c)(3) of the Internal Revenue Code and files its tax returns on IRS Form 990, Return of Organization Exempt from Income Tax. According to the tax returns in the record, the Petitioner's fiscal year begins on July 1 and ends June 30 of the following year.

At the outset, we note that the record does not demonstrate that the Petitioner has a continuing ability to pay the proffered wage based on the wages paid to the Beneficiary's. Although the Beneficiary's Form W-2 for 2013 reflects income of $52,003.34, which exceeds the proffered wage and establishes the Petitioner's ability to pay in 2013, her Forms W-2 report income of $49,565.12 in 2014, and $45,289.60 in 2015, each less than the proffered wage. Therefore, the record does not establish the Petitioner's ability to pay the proffered wage in 2014 and 2015, based on the wages paid to the Beneficiary. Nevertheless, we will credit the amounts paid to the Beneficiary when examining whether the Petitioner's net income or net current assets equal or exceed the proffered wage.

A nonprofit corporation's net income or revenue is reported on IRS Form 990.[3] Here, the Petitioner has submitted its Forms 990 for 2012 (year ending June 30, 2013), and 2013 (year ending June 30, 2014), but not for 2014 (year ending June 30, 2015).[4] The Petitioner's return for 2013 (which covers the time period from July 1, 2013, until June 30, 2014) reflects -$224,626 in net revenue. Although it only represents half of the 2014 calendar year, the negative net revenue does not indicate that the Petitioner had the resource available in 2014 to cover the difference between the wages paid to the Beneficiary and the proffered wage in that year. As noted, the Petitioner did not submit its tax returns covering the second half of 2014 or any time period in 2015, and as such, we cannot find that the Petitioner's net revenue was sufficient to establish its ability to pay for either year in question.[5]

As the record does not demonstrate that the Petitioner has sufficient net revenue to pay the Beneficiary the proffered wage, we will consider whether its ability to pay may be based on its net current assets, which are the difference between its current assets and current liabilities.[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of 1 year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within 1 year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. We note that the Form 990 does not allow a nonprofit corporation to identify its net current assets and that this information must be obtained from the company's audited balance sheets.

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[3] For the years prior to 2008, a nonprofit corporation's excess (or deficit) for the year can be found at Line 18 of the Form 990. From 2008 onward, this figure is found at Line 19.

[4] The Petitioner's 2014 returns should have been available at the time the Petitioner responded to the Director's second NOID, which specifically requested evidence of the Petitioner's ability to pay.

[5] The Director misstated the Petitioner's net resources for 2014 as -$456,881, relying on the Petitioner's audited financial report to reach this total. Although we note that the Petitioner on appeal, asserts that the Director did not properly read its financial statements, no evidence in the record indicates that the Director's calculation of its 2014 net resources is the basis for this assertion.

[6] In a nonprofit organization, current assets minus current liabilities are also known as net working capital or net working deficit.

In the present case, balance sheets are included in the audited 2012 (year ending June 30, 2013) and 2013 (year ending June 30, 2014) financial statements that the Petitioner has submitted for the record. However, as the balance sheet included in the Petitioner's audited financial statement for 2013 (year ending June 30, 2014), reports net current assets of -$456,881, and the Petitioner has not submitted an audited financial statement for the year ending June 30, 2015, the record also does not establish that the Petitioner had sufficient net current assets to pay the proffered wage in 2014 or 2015.

Where a Petitioner has not established its ability to pay through an examination of wages paid to the Beneficiary, or its net income or net current assets, we will consider the overall magnitude of a petitioner's business activities in determining its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 612. As in *Sonegawa*, USCIS, at its discretion, may consider evidence relevant to a petitioner's financial circumstances that falls outside its net income and net current assets, including 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 it deems relevant to a petitioner's ability to pay the proffered wage.

On appeal, the Petitioner asserts that as a nonprofit government-funded school, its ability to pay should have been considered under *Sonegawa*. However, while we acknowledge the Petitioner's claim, we find the record to contain insufficient evidence of the circumstances that it believes parallel those present in *Sonegawa*.

Although we find the record to indicate that the Petitioner, established in 1972, has been in operation for a significant number of years, no evidence demonstrates that the significant negative net revenues and net current assets reported in its tax returns and financial statements were the result of unusual circumstances that no longer affect its organization. The record contains both a 2013 printout of the Petitioner's registration with the State of New Mexico that indicates it is not in good standing and a February 5, 2016, statement from the Petitioner's business manager in which she indicates that the Petitioner is experiencing a "budget shortage." Further, the Petitioner's 2012 Form 990 (year ending June 30, 2013), which reports -$200,897 in net income, reflects that the Petitioner reported -$228,133 in net income for 2011 (year ending June 30, 2012). Therefore, it does not appear that the Petitioner's difficult financial circumstances, like those of the Petitioner in *Sonegawa*, are temporary in nature. Accordingly, we do not find the record to establish that the totality of the Petitioner's circumstances in this matter establish its ability to pay.

In that the record does not establish the Petitioner's ability to pay the proffered wage based on the wages it has paid to the Beneficiary, its net revenue, it net current assets, or the totality of its circumstances, we will affirm the Director's denial of the visa petition.

B. Beneficiary Qualifications

Beyond the Director's decision, we will consider whether the Petitioner has demonstrated that the Beneficiary has the education and experience required by the terms of the labor certification. A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on an accompanying labor certification by a petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I&N Dec. at 49.

In the present case, the labor certification states the following requirements for the position:

H.4.	Education: Bachelor's.
H.4-B.	Major field of study: Elementary education.
H.5.	Training: None required.
H.6.	Experience in the job offered: Required.
H.6-A.	Number of months experience required: 60 months.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Not accepted.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d at 1012-13. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834.

Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[7]

In the present case, the labor certification requires the Beneficiary to hold a U.S. bachelor's or foreign equivalent degree in elementary education followed by 5 years of progressively more

[7] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals (BALCA), we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

responsible experience in the offered position of first grade school teacher. For the reasons that follow, we do not find the record to demonstrate that the Beneficiary has the necessary degree or experience.

1. Education

To establish the Beneficiary's academic credentials for the offered position, a U.S. bachelor's or foreign equivalent degree in elementary education, the Petitioner has submitted a copy of her 1993 bachelor of science degree in family life and child development from the [redacted] as well as her academic transcripts. We do not, however, find the degree held by the Beneficiary to be the degree in elementary education required by the labor certification.

In its response to the Director's second NOID, the Petitioner asserted that while the Beneficiary's degree in family life and child development from the [redacted] was not in elementary education, it was the equivalent of such a degree, thereby meeting the labor certification's requirement for a degree in elementary education. In support of its claim, the Petitioner provided a printout from the National Association for the Education of Young Children (NAEYC) website, https://www.naeyc.org/academy/degreeequivalents, which indicates that the equivalent of a baccalaureate degree in elementary education may be established by a baccalaureate degree in any discipline, with a minimum of 36 college credits in early childhood education, child development, elementary education, or early childhood special education. It also submitted a credentials evaluation from [redacted], which finds the Beneficiary's degree to be the equivalent of a U.S. bachelor's degree in elementary education with "an emphasis on child and family development." The Petitioner further submitted an advertisement and posting notice for the position noting that this evidence indicated that it would accept a "bachelor's degree in elementary education or similarly-related field."

While we acknowledge the NAEYC equivalency information and the Petitioner's advertisement, neither demonstrates that the Beneficiary may qualify for the offered position based on her degree in family life and child development.[8] In determining the Beneficiary's eligibility for the offered position, we may not ignore the requirements of the labor certification, which specifically state that the offered position requires a U.S. bachelor's or foreign equivalent degree in the field of elementary education. Moreover, the labor certification in this matter specifically rejects a degree in a field of study other than elementary education. The Petitioner answered "No" in response to the question in Part H.7. of the labor certification, "Is there an alternate field of study that is acceptable?" As a result, it may not qualify the Beneficiary for the offered position based on her Philippine degree in family life and child development.[9]

[8] Although the Petitioner submitted an advertisement in an unnamed publication and a copy of its posting notice, the Petitioner did not submit its recruitment report or other materials to show whether it allowed U.S. workers to qualify for the proffered position with a degree in a field other than elementary education.

[9] Part J.12. of the labor certification reflects that the Beneficiary stated that her degree from the [redacted] was in elementary education.

Even if we were to find the labor certification to allow the Beneficiary to qualify for the offered position based on a degree in a field found equivalent to a degree in elementary education, the record would not establish this equivalency. While we note the discussion of how an equivalency to a bachelor's degree in elementary education may be established on the NAEYC website, this general information does not constitute an evaluation of the Beneficiary's academic credentials. Further, the evaluation's findings are inconsistent with those reached by a May 8, 2007, Report of Evaluation of Educational Credentials prepared by , which concluded that the Beneficiary's Philippine degree was the equivalent of a U.S. bachelor's degree in child and family studies, not elementary education. Credentials evaluations are used by USCIS as advisory opinions only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.* 19 I&N Dec. 817 (Comm'r 1988). Moreover, we find the website at to reflect that the university offers undergraduate degrees in both family life and child development, and elementary education, indicating that there are academic distinctions that may be made between these programs. The website further indicates that the university's family life and child development program was created in to prepare students for professional careers in the "teaching and supervision of preschool children in different institutional settings," not to teach in an elementary school. Accordingly, the record does not establish that the Beneficiary has the degree required by the labor certification for the proffered position.

Our conclusion should not, however, be read as a finding that the Beneficiary is unqualified for employment as an elementary school teacher in New Mexico. Proof that she is qualified to teach in New Mexico at the elementary school level is established by the copy of her "Level Two Professional K-8 Elementary License" for the period July 1, 2014, to June 30, 2023, found in the record. At the same time, the Beneficiary's license does not establish that she is eligible for the offered teaching position under the requirements stated in the labor certification. We note that the New Mexico Public Education Department at www.ped.state.nm.us/licensure indicates that New Mexico does not require a teacher to have a college degree in elementary education. A teaching license may be awarded to an individual with an unspecified bachelor's/master's degree who has completed an approved educator preparation program (30-36 semester hours in an elementary education program that includes student teaching).[10] Therefore, the fact that the Beneficiary's degree meets New Mexico requirements to teach in a public elementary school does not mean that she has the degree required by the labor certification in this case.

For the foregoing reasons, we find that the Petitioner has not established that the Beneficiary has the degree required for the offered position, as it is described on the labor certification.

[10] We note that the Beneficiary's résumé reflects that she completed undergraduate units in education and constitutions at from October 2007 to May 2008, prior to being hired by the

2. Experience

Parts H.6. and 6-A. of the labor certification require the Beneficiary to have 5 years of experience in the offered position of first grade elementary school teacher. In Part K. of the labor certification, the Beneficiary states the following employment experience:

- Elementary teacher, with the Petitioner, full-time from August 10, 2009, to February 1, 2013;
- Elementary teacher, [redacted] full-time from August 19, 2008, to August 10, 2009;
- Teacher, [redacted] full-time from May 1, 2006, to May 2, 2007; and
- Elementary Teacher, [redacted], full-time from July 1, 2000, to March 2, 2006.

To establish a beneficiary's work experience in employment-based immigration proceedings, the regulation at 8 C.F.R. § 204.5(g)(1) requires that:

> [E]vidence 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 of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In support of the employment experience claimed by the Beneficiary on the labor certification, the Petitioner has submitted a letter from its principal who states that the school has employed the Beneficiary as a full-time elementary teacher since July 2009 and that she is currently its first grade teacher. The record also contains a statement from the business manager at the [redacted] who reports that the school employed the Beneficiary as a first grade teacher from August 20, 2007, to May 22, 2009; three employment certificates and several pay slips relating to the Beneficiary's employment at [redacted] from May 2006 to May 2007; and statements from [redacted] confirming its employment of the Beneficiary as a teacher from July 1, 2000, to March 2, 2006. The Petitioner has also submitted evidence of the Beneficiary's Philippines employment history that is not reflected on the labor certification. However, for the reasons that follow, this evidence does not establish that the Beneficiary has the 5 years of experience as a first grade elementary school teacher required by the labor certification.

Pursuant to DOL regulations at 20 C.F.R. § 656.17, a beneficiary may not qualify for an offered position based on employment experience gained with a petitioner unless it is established that the work performed by the beneficiary was not substantially comparable to the job offered.[11]

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[11] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

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

Here, the record reflects that the Petitioner checked "No" in response to the question in Part J.21. of the labor certification, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" Generally, if the answer to the question in Part J.21. of the labor certification is no, then experience with the employer may be used by a beneficiary to qualify for the offered position if that experience was not substantially comparable and the terms of the labor certification in Part H.10. allow applicants to qualify for the job opportunity through an alternate occupation. However, the Petitioner checked "No" in response to the question in Part H.10, "Is experience in an alternate occupation acceptable?" Therefore, as the terms of the labor certification do not permit consideration of experience in an alternate occupation and the Beneficiary's experience with the Petitioner appears to have been in the offered position,[12] that experience may not be used to qualify the Beneficiary for the offered position.

The certificates issued by [13] and the statements from also do not qualify the Beneficiary for the offered position. They reflect that both are Philippine preschools and that they employed the Beneficiary as a preschool teacher, not in the offered position of first grade teacher. Although we note that the Petitioner's recruitment materials state the offered position's experience requirement as "postgraduate experience of 5 years in the field," the language of the labor certification clearly restricts qualifying experience to that acquired in the offered position of first grade teacher. As such, the Beneficiary's experience with may not be considered qualifying experience for the offered position.

The letter from the business manager of the states that the school employed the Beneficiary on a full-time basis as a first grade teacher from August 20, 2007, to May 22, 2009. While the dates listed in the school's letter conflict with those provided by the Beneficiary in the labor certification, the Petitioner has resolved this inconsistency with the submission of the Beneficiary's Forms W-2 for the years 2007 through 2009, which reflect her employment by . Accordingly, we find the letter from to provide the Beneficiary with approximately 1 year and 9 months of qualifying employment as a first grade school teacher.

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

[12] The Petitioner's principal states in his letter that the Beneficiary is currently the school's first grade teacher, the description of the Beneficiary's duties in Part K. of the labor certification, as well as her résumé and a Form G-325A, Biographic Information, contained in the record indicate that she has worked as a first grade teacher since she was hired by the Petitioner.

[13] In any future proceeding, the Petitioner will need to resolve the discrepancy in the dates of the Beneficiary's employment reflected in the February 4, 2016, certificate signed by the supervisor, corporate human resources development at , previously . The certificate indicates that the Beneficiary was employed by from June 2007 to August 2008, rather than May 2006 to May 2007, as stated in the other certificates and in the labor certification.

As previously indicated, the Petitioner has also submitted documentation relating to the Beneficiary's work experience in the Philippines, including Philippine government records reflecting that the Beneficiary was employed as a teacher from 1994 to 2007; statements from the Beneficiary's mother and brother regarding their attempts to obtain her tax records from the Philippine government; and a letter from in the Philippines, which reflects that it employed the Beneficiary as a preschool teacher from January 1, 1994, to March 21, 1997. However, as this additional evidence does not relate to the employment claimed by the Beneficiary on the labor certification, it is of limited evidentiary value in this matter. The Board of Immigration Appeals observed in *dicta* in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) that the credibility of evidence and facts asserted regarding a beneficiary's employment is lessened if that experience is not certified by DOL on the labor certification. Moreover, while we note the letter from , it addresses the Beneficiary's experience as a preschool teacher, which, for the reasons already discussed, is not the qualifying experience required by the labor certification.

The record establishes that the Beneficiary has only 1 year and 9 months of qualifying employment experience, rather than the 5 years required by the labor certification. Accordingly, she does not have the experience required by the labor certification.

III. CONCLUSION

The Petitioner has not established its ability to pay the Beneficiary the proffered wage from the priority date onward; nor has it demonstrated that the Beneficiary has education or the employment experience required by the labor certification.

The petition will be denied and the appeal dismissed for the above stated reason, with each considered as an independent and alternative basis for the decision. In visa proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of D-Y-H-O-*, ID# 77667 (AAO Jan. 31, 2017)