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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 01 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a housekeeper. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to submit any evidence of the petitioner's ability to pay the proffered wage, and denied the petition accordingly.

On appeal, the petitioner, through counsel contends that the director should have requested additional evidence of eligibility.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education, experience and other requirements specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

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[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

Here, as noted above, the application for labor certification was accepted for processing on January 4, 2008, which establishes the priority date. It was certified by DOL on January 30, 2008. The proffered wage set forth on the ETA Form 9089 is $7.80 per hour, which amounts to $16,224 per year.

No experience, education or training is required for the offered job. However, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 certified wage,[2] as well as the beneficiary's qualifications for the job as of the priority date are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

The petitioner submitted the I-140 petition with the ETA Form 9089 only. No evidence of the petitioner's ability to pay the proffered salary was submitted with the petition, although counsel claims on appeal that a copy of the petitioner's 2007 tax return was provided with the petition and points to a copy of his transmittal letter submitted with the petition. The director denied the petition on January 18, 2009, concluding that the petitioner had failed to submit evidence establishing its continuing financial ability to pay the proffered wage; and that the petition and ETA Form 9089 were the only documents submitted.

On appeal, counsel asserts that the director failed to issue a request for evidence. We are not persuaded that the director was obliged to issue a request for evidence. Therefore, the petitioner has not established its continuing financial ability to pay the proffered wage of $7.80 per hour, which amounts to $16,224 per year.

The burden of proof lies with the petitioner in establishing eligibility for the visa classification sought. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 204.5(g)(2) requires that any employment-based petition filed for a beneficiary that requires an offer of employment must be accompanied by evidence that the petitioner has the continuing financial ability to pay the proffered wage. Further, as noted by the director, the regulation at 8 C.F.R. § 103.2(b)(1) requires that eligibility for the requested benefit must be established at the time of

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[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 wage, although in some circumstances, other factors affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In this case, such consideration is not necessary because the record lacks any financial documentation.

filing the application or petition. The regulation at 8 C.F.R. § 103.2 (b)(8)(ii) specifies that if all required initial evidence is not submitted with the petition or does not demonstrate eligibility, USCIS may, in its discretion, deny the petition for lack of initial evidence or ineligibility.[3]

The petitioner failed to submit the pertinent documentation demonstrating its continuing financial ability to pay the proffered wage either with the initial filing or on appeal. Based on a review of the record, the AAO finds that the director properly denied the petition based on the lack of documentation corroborating the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 103.2(b)(1); 8 C.F.R. §§ 204.5(g)(1) and 204.5(g)(2); 8 C.F.R. § 103.2(b)(8)(ii); and 8 C.F.R. § 204.5(l)(3)(ii)(D). As the petitioner failed to submit any documentation regarding its ability to pay the proffered wage on appeal, the appeal must be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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[3] 8 C.F.R. § 103.2(b)(1) states that a petitioner must demonstrate eligibility at time of filing:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

If the application does not demonstrate eligibility, the director is not required to send a request for evidence. *See* 8 C.F.R. § 103.2(b)(8):

> . . .
>
> (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

As the petitioner failed to submit all the required initial evidence, the director in his discretion denied the petition pursuant to the regulations and was not required to issue an RFE.

ORDER: The appeal is dismissed.