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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: JAN 26 2010

LIN 07 216 52836

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The director's decision was based on the petitioner's failure to submit all of the required initial evidence pursuant to 8 C.F.R. § 103.2(b).[1] Specifically, the director cited the petitioner's failure to submit a signed labor certification, evidence that the beneficiary meets the experience requirements of the Form I-140,[2] and evidence that the petitioner has the ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

> (a) Filing applications.
>
> > (1) . . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

Although an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien, counsel, or the petitioner. A second copy of the ETA Form 9089 appears in the record and this copy is signed, however, it was been submitted on appeal instead of with the original petition. In a letter dated August 24, 2009, [redacted] an office assistant with Orange County's Center of Legal Services,

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[1] 8 C.F.R. § 103.2(b) states:

> (b) *Evidence and processing*—(1) *General.*
> An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

[2] The petitioner submitted letters of experience on appeal.

states that "[t]he original blue color certificate was signed and sent in with the I-140, Immigrant Petition for Alien Worker in July 2007. All necessary documents and forms were submitted as required." We note that neither [redacted] nor Orange County's Center of Legal Services is an attorney or legal firm on record in this case.[3] The record contains "the original blue color certificate," ETA Form 9089, submitted with the initial filing, which evidences that the petitioner and beneficiary failed to sign it in compliance with 20 C.F.R. § 656.17. The signature that appears on the copy of the ETA Form 9089 from [redacted] of the petitioner, is dated September 15, 2008, which is after July 24, 2007, the date that the I-140 petition was filed, and was only submitted on appeal.

In addition to the signed copy of the ETA Form 9089 submitted on appeal, the record does not demonstrate the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[3] The regulation at 8 C.F.R. § 292.1 provides general representation provisions in immigration matters and lists following six categories of representatives who may represent a person entitled to representation: (1) Attorneys in the United States, (2) Law students and law graduates not yet admitted to the bar, (3) Reputable individuals, (4) Accredited representatives, (5) Accredited officials, and (6) attorneys outside the United States. However, the regulation governing representation in filing immigration petitions and/or applications with USCIS is the regulation at 8 C.F.R. § 103.2(a)(3), which provides in pertinent part that:

> (3) *Representation.* An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

Therefore, it is clear that the regulation at 8 C.F.R. § 103.2(a)(3) limits the three categories of representatives, that is, attorneys in the United States, attorneys outside the United States and accredited representatives only in representing applicants or petitioners in filing immigration applications or petitions before U.S. Citizenship and Immigration Services (USCIS) with properly executed Form G-28, while the regulation at 8 C.F.R. § 292.1 allows all six groups of representatives to assist applicants or petitioners with non-filing immigration matters. In the instant case, [redacted] is not an attorney in or outside the United States, nor an accredited representative as defined in § 292.1(a)(4) and is not authorized to represent a petitioner.

The other categories listed in 8 C.F.R. § 292.1 (law students, law grads, reputable individuals) may ONLY appear in person with an applicant or petitioner at an interview literally before, as in the presence of, a Department of Home Security (DHS) official who must make a discretionary decision to permit them to appear after conducting an inquiry as to the requirements in section 292.1. The regulation at 8 C.F.R. § 292.1 specifically requires that a reputable individual must get a permission for his appearance from the official before whom he wished to appear.

> *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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The ETA Form 9089 was filed by [redacted]

On appeal, the petitioner submitted personal financial information for [redacted]. This evidence includes [redacted] and [redacted] 2007 W-2 forms, a bank statement demonstrating the balance in the petitioner's account from July 29 to August 26, 2008, and a bank statement demonstrating the balance in [redacted] account from April 1, 2008 to June 30, 2008. The petitioning entity in this case is not [redacted] or [redacted] but instead is a corporation, [redacted]. No regulatory prescribed financial information was submitted about the petitioning entity, [redacted] to establish the corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Nothing in the record indicates that the petitioning employer is a sole proprietorship. The evidence in the record does not allow the AAO to determine the petitioner's form of corporate status to determine its ability to pay or whether the documents submitted can be properly considered.

The only evidence concerning the petitioner's financial situation is the one bank statement demonstrating the balance in the petitioner's bank account for a period of one month: July 29 to August 26, 2008. This evidence is insufficient to demonstrate the petitioner's ability to pay the proffered wage beginning on June 4, 2007 when the labor certification was accepted by the DOL. 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. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

As the petitioner failed to submit evidence demonstrating its eligibility for the benefits sought, the petition may not be approved. 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.