identifying data deleted to prevent clearly unwarranted **invasion of personal privacy**

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

PUBLIC COPY

B6

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 1 0 2010

LIN 08 139 51431

In re: Petitioner: [redacted]
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:

[redacted]

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 petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be rejected.

The petitioner is a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed with a copy of the labor certification approved by the Department of Labor (DOL) on March 15, 2002 and valid until 180 days from the certification date of October 31, 2007. The director denied the petition because the petitioner did not submit the original ETA Form 750.[1]

Section 203(b)(3)(A)(i) of 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. AND/OR Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO maintains plenary power to review each appeal on a de novo basis, which has long been recognized by the federal courts. *See Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, counsel submits the original Form ETA 750 to the record. Counsel states that the director prematurely denied the I-140 petition without giving the petitioner an opportunity to submit supporting documents.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

---

[1] The AAO notes that the petitioner also did not submit any evidence of its ability to pay the proffered wage to the beneficiary, with the initial I-140 petition, or evidence as to the beneficiary's three years of high school and two years of prior work experience as stipulated on the ETA Form 750. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner failed to properly submit an original Form ETA 750 Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). The regulation at 8 C.F.R. § 103.2(b)(4) requires that, "application, and petition forms, and documents issued to support an application or petition (such as labor certifications . . .) must be submitted in the original unless previously filed with USCIS [United States Citizenship and Immigration Services]." A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petitioner submitted a copy of the entire Form ETA 750 with its I-140 petition.

The regulation at 8 C.F.R. § 103.2(b)(8) states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petition was submitted without the original ETA Form 750. Accordingly, the denial was appropriate, even though the petitioner submits the original ETA Form 750 on appeal.

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

As the original of the petitioner's labor certification was not submitted, the director denied the petition without consideration of the merits of the instant petition. The AAO affirms the director' decision to deny the petition on this basis; however, the AAO will remand the matter to the director for consideration of the original ETA Form 750, submitted on appeal.

ORDER: The appeal is rejected. The AAO will remand the matter to the Director for further consideration of the petitioner's original ETA Form 750.