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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

OCT 27 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 farm. It seeks to employ the beneficiary permanently in the United States as a farm equipment operator. 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 failed to demonstrate that the beneficiary met the special skill requirement set forth on Part H, 14 of the ETA Form 9089, and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and 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 regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation—*
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> (A) *General.* Any requirements of training or experience for skilled

[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.

> 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.
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> * * *
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> (D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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).

Here, as noted above, the application for labor certification was accepted for processing on September 19, 2007, which establishes the priority date. It was certified by DOL on November 16, 2007. The proffered wage set forth on the Form ETA 750 is [redacted] per hour, which amounts to [redacted] per year.

No experience, education or training is required for the offered job. However, on Part H, 14 of the ETA Form 9089, specific skill or requirements specifies that the applicant "must be able to work all shifts."

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form 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 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).

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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.

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 or documentation that the beneficiary was able to work all shifts was submitted with the petition. The director denied the petition on December 30, 2008, concluding: 1) that the petitioner had failed to submit evidence establishing its continuing financial ability to pay the proffered wage; and 2) that the petitioner had failed to submit evidence establishing that the beneficiary was able to work all shifts as required on Part H, 14 of the ETA Form 9089.

On appeal, the petitioner states that the director should have issued a request for evidence cited in the director's denial. With the appeal, the petitioner submits a statement from [redacted] of Peterson Farms, which lists the employees[3] and confirms that all workers agreed to the rotating shift policy. This satisfies the requirement set forth on Part H, 14 of the ETA Form 9089. Although stating in the appeal that a copy of the petitioner's 2007 income tax return and a copy of a 2008 W-2/1099 accompanied the appeal, the petitioner has provided no such evidence. Therefore, the petitioner has not established its continuing financial ability to pay the proffered wage of [redacted] per year.[4]

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 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.[5]

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[3] The list includes the beneficiary's name.

[4] In any further filings, the petitioner must show that it can pay for the beneficiary and all other sponsored workers.

[5] 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):

The petitioner failed to submit the pertinent documentation demonstrating its continuing financial ability to pay the proffered wage. 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). Therefore, 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.

ORDER: The appeal is dismissed.

[redacted]

. . .

> (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.