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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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MAR 03 2009

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner:
Beneficiary: [redacted]

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is an information systems development & consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. The petitioner requested to substitute a different beneficiary than the one appearing on the Form ETA 750, which had been approved by the Department of Labor (DOL). The petitioner subsequently failed to provide Part B of the Form ETA 750 that was completed by the new beneficiary. The director denied the petition, accordingly.

The petitioner, through counsel, asserts on appeal, that the director failed to clarify that he needed Part B of the Form ETA 750 to be completed by the substitute beneficiary rather than the original beneficiary. Counsel submits Part B of the ETA 750 on appeal and requests that it be accepted and that the petition be approved.

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).[1]

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

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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that petitions for employment-based immigrants must be accompanied by any other required supporting documentation including any required labor certification.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate

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[1] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

its continuing financial ability to pay the proffered wage beginning on the priority date, which is the day the Form ETA 750 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, the Form ETA 750 was accepted for processing on December 9, 2003. The** proffered wage is $60,000 per annum.

With the petition, filed on July 13, 2007, the petitioner indicated that that it wished to substitute the instant beneficiary for the original beneficiary named in the Form ETA 750, which had been approved by DOL with a priority date of December 9, 2003. An accompanying routing sheet submitted by the petitioner, asked USCIS (United States Citizenship and Immigration Service) not to reject due to a lack of a Form ETA 750 and requested USCIS to obtain a duplicate of the original labor certification because the original was never received in the mail. The routing sheet also indicated that the case was filed on an ETA-750A.

The petitioner subsequently received the original labor certification, including Part(s) A and B, relating to the original beneficiary and submitted it to the record. Part A of the Form ETA 750, Application for Alien Employment Certification, identifies the employer, beneficiary, job, job duties and the minimum education, training and experience required for the worker to perform the job. Part B of the Form ETA 750 is the "Statement of Qualifications of Alien." It specifies the beneficiary's individual educational and experiential qualifications for the certified job described on Part A and is attested by the beneficiary's original signature.

On April 21, 2008, the director issued a request for evidence, instructing the petitioner to provide evidence related to its continuing financial ability to pay the proffered wage. The director additionally stated the following:

> The petitioner seeks to substitute the alien. Please submit a completed ETA 750 for the alien with all appropriate original signatures.

Counsel failed to understand that the director was referring to the instant beneficiary who counsel had requested as a substitution for the original beneficiary. Instead, counsel provided copies of the original ETA 750A and Part B.

On July 21, 2008, the director denied the petition because the petitioner had failed to provide a new 750 signed by the substituted alien. The director noted that USCIS is not responsible for advising the petitioner of the evidence that it should submit with each particular case beyond providing general information via form instructions and regulations.

On appeal, counsel asserts that the director's language was ambiguous and vague and did not clearly communicate that his request should have specifically referred to the substituted alien. Counsel also states that the director did not follow the procedure outlined in a March 7, 1996 "Memorandum of Understanding," which advises that the employer must submit part B of Form ETA 750, signed by the substituted alien.

Counsel's assertion is neither persuasive nor logical. It is noted that it is the petitioner's burden to submit the appropriate evidence supporting a preference petition, including any required labor certification. *See* 8 C.F.R. § 204.5(a)(2). The petitioner elected to pursue an alien substitution request without sufficient knowledge of the requirements, which have been available to interested persons for years. Counsel demonstrated this on appeal by producing a 1996 memorandum delineating the petitioner's obligation to provide Part B of the ETA 750 signed by the new beneficiary. The reason the new beneficiary is asked to submit Part B is because it presents the new beneficiary's training, educational and job history. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I& N Dec. 45, 49 (Reg. Comm. 1971). Therefore, the request for a completed ETA 750 in the context of a substitution request refers to the new beneficiary.

The substitution procedure has also been published in various treatises[2] and online by USCIS. At the page found at the USCIS web site of http://www.uscis.gov/memoranda, under the general topic of Immigration Policy and Procedural Memoranda, there is a headquarters memorandum identified as "Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final

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[2] *See Kurzban's Immigation Law Sourcebook, 721* (Ninth ed. 2004), where it summarizes pre-July 16, 2007 procedures:

> In 1991, DOL issued regulations which no longer permitted the substitution of beneficiaries in permanent labor certifications. 20 C.F.R. §§656.30©(1), 56 Fed. Reg. 54920, 54925 (Oct. 23, 1001). However, those regulations were successfully challenged as violative of APA rulemaking. *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994). DOL subsequently reinstated the former rules permitting substitution, and set forth guidelines for substitutions. Memo, Farmer, Adm. Office of Regional Management DOL, Memo No. 37-95 (May 4, 1995), *reprinted in* 72 No. 19 *Interpreter Releases* 666, 678-82 (May 4, 1995) [Prior to A/S approval or actual employment, there is no limit to the number of substitutions]. In March, 1996, however, DOL delegated responsibility for substituting LC beneficiaries to the INS when LC has been approved. To substitute employer must submit: (a) I-140 (or new I-140 if one with former beneficiary submitted); (b) part B of ETA750 signed by new beneficiary; (c) proof that new beneficiary met all requirements for position at the time LC initially filed; (d) original ETA and DOL certification or if previously submitted to the INS (with prior I-140), photocopies of ETA's and DOL certification; and (e) a written notice of withdrawal of the first I-140 if previously filed. Memo, Crocetti, Assoc. Comm., Adjudications, HQ 204.25P (Mar. 7, 1996); *reprinted in* 73 No. 14 *Interpreter Releases* 436, 444-46 (Apr. 8, 1996); Memo, Farmer, Admin. Regional Management, DOL (Mar.22, 1996), *reprinted in* 73 No. 14 *Interpreter Releases* 436, 447-48 (Apr. 9, 1996).

rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests," HQ 70/6.2 (June 1, 2007). It explains the basic process of filing for a labor certification and an I-140 in view of the DOL amendments which took effect on July 16, 2007. It provides in pertinent part:

> DOL recently amended the administrative regulations at 20 CFR part 656 through a final rule-making published on May 17, 2007, which will take effect on July 16, 2007 (71 FR 27904) ("DOL final rule"). The DOL final rule includes several provisions that will significantly impact adjudication of Form I-140 petitions that require DOL-approved labor certifications as a supporting document. New 20 CFR 656.11 prohibits the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. New 20 CFR 656.30(b)(1) provides a 180-day validity period for approved labor certifications; employers will have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. New 20 CFR 656.30(b)(2) establishes an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to [July 16, 2007]; such labor certifications will have to be filed in support of an I-140 petition within 180 days after the effective date of the DOL final rule.
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> USCIS will continue to accept Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007.[3]
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> * * *
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> Substitution Petitions filed on or after July 16, 2007: USCIS will reject all Form I-140 petitions requesting labor certification substitution that are filed on or after July 16, 2-007 pursuant to 20 CFR 656.11.
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> * * *
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> For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be

[3] An additional USCIS UPDATE, dated July 13, 2007, and superseding an announcement, dated May 24, 2007, advises that the new DOL regulations prohibit substitution of an alien beneficiary on any application for permanent labor certification *after* July 16, 2007. The new procedures outlined in the previous [May 24, 2007] announcement will take effect on July 17, 2007 instead of July 16, 2007.

> included with the petition. For individual labor certifications filed with the Department of Labor on or after March 28, 2005, a new Form ETA-9089 signed by the substituted alien must be included with the petition.

The AAO finds that the petitioner failed to provide a completed Form ETA 750, Part B with the petition pursuant to the request for substitution of the beneficiary. The director sufficiently advised the petitioner of this deficiency. As such, a newly completed Form ETA 750, Part B will not be accepted on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have provided it in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed on this basis.

Beyond the decision of the director, the AAO notes that the regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to show the continuing financial ability to pay the proffered wage as of the priority date until the beneficiary obtains lawful permanent resident status. Required evidence must include annual reports, federal tax returns, or audited financial statements.

In this case, the petitioner provided copies of its federal tax returns consisting of Form(s) 1120S, U.S. Income Tax Return for an S Corporation for 2003, 2004, 2005, 2006, and 2007. They indicate that the petitioner has reported net income[4] of -$82,169 in 2003; -$404,555 in 2004; -$80,730 in 2005; $12,141 in 2006 and net income of -$321,483 in 2007. Net current assets as reflected on the Schedule L balance sheet of the petitioner's respective tax returns represent

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[4] Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005) and on line 18 for (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2003 through 2007 the petitioner's net income is found on line 23 for 2003, line 17e for 2004 and 2005, and line 18 for 2006 and 2007.

$683,235 in 2003; $410,441 in 2004; $323,597 in 2005; $553, 973 in 2006; and $879,154 in 2007. [5]

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS considers whether the petitioner may have employed and paid the beneficiary during the relevant period. In this case, there is no evidence of such employment.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007).

In this case, the petitioner reported losses in net income in every year except 2006 when it reported $12,141 in net income. Its net current assets, however, during all of the relevant years was substantial and appeared to be able to cover the beneficiary's proposed wage offer of $60,000. It is observed, however, that USCIS electronic records show that the petitioner has filed 117 petitions in the last several years. Most are I-129s, with approximately 47 filed since 2002. It is not clear whether or how much the respective prevailing wages amounted to in each case or whether some of these beneficiaries' were sponsored during the same time as the instant petition, but it is noted that a petitioner must establish its continuing ability to pay the respective proffered or prevailing wages for all sponsored beneficiaries as of their respective priority dates.

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[5] Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Here, although this was not part of the director's denial, we find that until this issue is cleared up, the petition is not eligible for approval as the record currently stands.

Finally, as to the beneficiary's educational credentials, we would observe that Item 14 of Part A of the Form ETA 750 requires the certified position of programmer analyst to be filled by an applicant who attended four years of college and obtained a Bachelor's or equivalent degree in computer science. The beneficiary's diploma from Gulbarga University, India, and corresponding statement of marks indicate that he obtained a four-year Bachelor of Engineering (Mechanical) on January 24, 2000, having passed the examination in March 1998. This documentation does not establish that his degree was in computer science or qualify him as a professional under the section 203(b)(3)(A)(ii) of the Act.[6] The beneficiary also possesses a 1998 certificate from the Lakhotia Computer Centre, India. The certificate describes the study completed as a post-graduate diploma in computer applications. The statement of marks indicates a first semester completed, dated March 9, 1998. Another marks transcript representing the second semester is dated September 4, 1998. However, a credential evaluation, dated December 12, 2000, from the International Credentials Evaluator, Inc. indicates that the beneficiary's course of study at the Lakhotia Computer Centre is the U.S. equivalent of "one semester of post-secondary education. . ." *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is noted that additional information would have to be provided to establish how this certificate could represent a two- semester post-graduate diploma, rather than one semester of post-secondary studies and whether the petitioner's intent to fill this position through a combination of diplomas and/or certificates rather than a four-year bachelor's degree in computer science, has ever been clearly communicated in the recruitment process during DOL's

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[6] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an *official college or university record* showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

(Emphasis added.)

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification in an immigrant petition sets forth the requirement that a beneficiary must produce one degree from a college or university that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

certification of the labor certification application. Until that is resolved for the petitioner, as the record currently stands, the petition is additionally not approvable in the skilled worker category under section the section 203(b)(3)(A)(i) of the Act.[7]

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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[7] For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

> *Skilled Workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.