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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 04 2009

WAC 06 037 53909

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center as the petition was not properly filed with a valid labor certification and is now before the Administrative Appeals Office (AAO) on appeal. As the petition was not properly filed with a valid Form ETA 750, the AAO lacks jurisdiction to decide the appeal. The appeal will be rejected.

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. Beyond and notwithstanding the decision of the director,[1] the petition in this matter can not be reviewed or approved because is not accompanied by an approved Form ETA 750 Application for Alien Employment Certification, as required by 8 C.F.R. § 204.5(l)(3)(i).

8 C.F.R. § 103.1(f)(3)(iii) states, in pertinent part:

> *Appellate Authorities.* In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on:
>
> (B) Petitioner for immigrant visa classification based on employment or as a special immigrant or entrepreneur under §§ 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act.

Without information only found in the Form ETA 750 labor certification, if one was issued, it is not possible for either U.S. Citizenship and Immigration Services (USCIS) or the AAO to either fairly review or adjudicate this matter. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) 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 regulation at 8 C.F.R. § 204.5 (1)(3) states in pertinent part.

> *Initial evidence* –(i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

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[1] 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*, 229 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 petitioner has not provided an original or duplicate original of a certified Form ETA 750. According to prior counsel's letter dated July 22, 2005, *the petitioner never received the labor certification* although there is a letter from DOL dated May 4, 2004, providing its case number. That letter does not state that a labor certification was issued. No priority date was provided in DOL's letter. The director stated in her decision that she requested a duplicate original labor certification from DOL but was told that no such labor certification existed. A second request by the director to DOL was not answered. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The petition was improperly filed. The petitioner has the burden of proof in these proceedings. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

ORDER: The appeal is rejected. As the petition was improperly filed under 8 C.F.R. § 204.5(1)(3), the AAO lacks jurisdiction to decide the appeal.