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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

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**OCT 02 2009**



FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:  
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:

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).

John F. Grissom  
Acting 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 Mexican food restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican specialty cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted the original ETA 750 with the I-140, Immigrant Petition for Alien Worker. The director further 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 educational, training, or experience requirements set forth on the Form ETA 750 and denied the petition accordingly.

On appeal, former counsel<sup>1</sup> submits the original Form ETA 750 and requests that the decision to deny the petition be reconsidered.

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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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(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.

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<sup>1</sup> The petitioner will be treated as representing itself. Former counsel was suspended for one year from the practice of law before the Board of Immigration Appeals and the United States Citizenship and Immigration Services (USCIS), effective February 27, 2009.

The regulation at 8 C.F.R. § 204.5(1)(3) further provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled 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.

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 the continuing ability to pay the proffered wage beginning on the priority date, 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, as noted above, the Form ETA 750 was accepted for processing on April 30, 2001, which establishes the priority date. It was certified by DOL on October 4, 2007. Part B of the Form ETA 750, signed by the beneficiary on April 19, 2001, lists the petitioner as the beneficiary's "prospective employer" but does not indicate that she has worked for the petitioner.

The proffered wage is set forth on the labor certification application as \$33.00 per hour, which amounts to \$68,640 per year. The Form ETA 750 requires that the applicant have two years of work experience in the job offered of Mexican specialty cook.

The visa preference petition was filed on January 29, 2008. Part 5 of the petition indicates that the petitioner was established on July 1, 1995 and claims to employ forty-two workers. In the spaces allotted in part 5 for the petitioner to identify its gross annual income and net annual income, "see attached" appears. However, no documents were attached to the I-140 relating to the petitioner's annual gross or net income and nothing was submitted on appeal.

The petitioner submitted the I-140 with a copy of the Form ETA 750. The director denied the petition on April 16, 2008, concluding that: 1) the petitioner had failed to submit an original Form ETA 750 with the I-140; 2) that the petitioner had failed to submit evidence establishing its continuing financial ability to pay the proffered wage; and 3) that the petitioner had failed to submit evidence establishing that the beneficiary met the requirements set forth on the Form ETA 750.

The only evidence submitted on appeal by former counsel is the original labor certification. No explanation was offered for the reason that this document was not submitted with the initial filing. No evidence was provided in support of the petitioner's ability to pay the proffered

wage or in support of the beneficiary's claimed two years of qualifying experience as a Mexican specialty cook.

The AAO concurs that the director properly denied the petition for each of the three reasons cited. The regulation at 8 C.F.R. § 103.2(b)(4) provides that forms such as "labor certifications," Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, "must be submitted in the original unless previously filed with the Service." The regulation at 8 C.F.R. § 204.5(g)(1) provides that acceptable initial supporting evidence for the employment-based immigrant classification consists of the original labor certification certified by DOL. It further states that initial evidence consisting of employment verification of a beneficiary's qualifying experience shall be in the form of current or former letters from employer or trainer(s) that identify the author and specifically describe the experience or training that a beneficiary has received. Additionally, 8 C.F.R. § 204.5(g)(2) requires evidence that the petitioner can pay the proffered wage.

As noted by the director the regulation at 8 C.F.R. § 103.2(b)(1) requires that the application or petition must be completed by evidence as applicable and 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.

Based on a review of the record, the AAO finds that the director properly denied the petition based on the lack of initial evidence of an original labor certification and other required documentation related to the petitioner's ability to pay and the beneficiary's experience. *See* 8 C.F.R. § 103.2(b)(4); 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 103.2(b)(8)(ii). Despite submitting the labor certification on appeal, the petitioner failed to provide evidence of the petitioner's continuing financial ability to pay pursuant to 8 C.F.R. § 204.5(g)(2) or the beneficiary's qualifying experience required by 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii)(A), and 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.