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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  
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Services

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FILE:

[REDACTED]  
LIN 08 051 51259

Office: NEBRASKA SERVICE CENTER

Date: OCT 26 2009

IN RE:

Petitioner:  
Beneficiary: [REDACTED]

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)

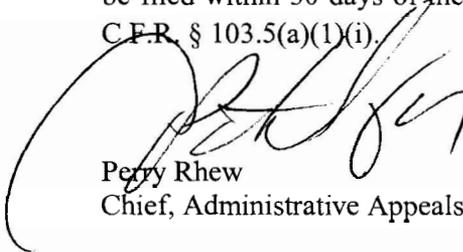
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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 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 commercial carpet cleaning firm. It seeks to employ the beneficiary permanently in the United States as a commercial carpet cleaner. A copy of an Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted the evidence establishing that it had the continuing ability to pay the beneficiary the proffered wage or that the beneficiary possessed the requisite work experience for the certified position.

On appeal, the petitioner<sup>1</sup> submits an employment verification letter signed by the petitioner's owner as well as a copy of the petitioner's 2007 federal income tax return, contending that the petition should 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). 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, at 1002 n. 9.

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<sup>1</sup> As a Notice of Appearance as Attorney or Representative (Form G-28) was submitted only on behalf of the beneficiary, the petitioner will be treated as representing itself. It is noted that [REDACTED] filed a G-28 on behalf of the beneficiary and claims to be an accredited representative. It is noted that under 8 C.F.R. § 292.1 and 1292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. The rules respecting qualification of organizations, requests for recognition, withdrawal of recognition, and accreditation of representatives, may be found at 8 C.F.R. § 292.2 and 1292.2. [REDACTED] does not appear on the roster. See <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed 10/21/09).

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.

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.

The regulation at 8 C.F.R. § 204.5(l)(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.

(B) *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.

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 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 copy of Part A of the ETA 750 reflects that it accepted for processing on April 30, 2001. The proffered wage is stated as \$10.26 per hour, which amounts to \$21,340 per year.

The Immigrant Petition for Alien Worker (Form I-140) was filed on December 4, 2007. Part 5 of the petition indicates that the petitioner was established on October 1, 1988, claims a gross annual income of \$632,717, a net annual income of \$34,366 and employs five workers.

The director denied the petition on December 10, 2008, finding that the petitioner had failed to submit evidence of the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2) and failed to submit evidence of the beneficiary's experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii).

On appeal, it is merely claimed that the original evidence was provided with the initial I-140 and that "maybe it was lost in the mail." Another certified labor certification is claimed to have been requested.

Beyond the decision of the director, and as noted above, the petitioner filed the I-140 with a copy of Part A of the ETA 750 and what appears to be a copy of Part B of an ETA 750 that was signed on March 15, 2007 by the petitioner's owner and on March 18, 2007 by the beneficiary. Additionally, the second page of Part A of the ETA 750 was signed on March 15, 2007 by the petitioner's owner. The regulation at 8 C.F.R. § 103.2(a)(4) requires that the labor certification must be submitted in the original unless previously filed with the U.S. Citizenship and Immigration Services (USCIS). There is no indication from the petitioner or in USCIS electronic records that the original labor certification was previously filed with USCIS. Thus, the I-140 is deniable on its face because it is not supported by an original approved labor certification establishing that a *bona fide* job opportunity has been offered.

It is further noted that the date that the original ETA 750 was accepted for processing by DOL was April 30, 2001, but the copy of Part B of the Form ETA 750 and the second page of Part A of the ETA 750 was signed six years later by the petitioner and the beneficiary. Although the DOL certification stamp indicates a validity date of July 31, 2007, the reliability of the information contained on the second page of Part A and the information on Part B must be questioned as the original ETA 750 was supposed to have been submitted in 2001. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582 at 591.

With regard to the employment verification letter submitted by the petitioner on appeal, until the original ETA 750 or a properly issued duplicate from DOL is provided in support of a properly filed I-140, such a verification cannot be accepted as demonstrating that the

beneficiary has satisfied the work experience requirements set forth on the ETA 750, which consist of two years of experience in the job offered.

The same rationale applies to the determination of whether the petitioner has demonstrated its ability to pay the proffered wage of \$21,340 per year. Until the original labor certification is provided or a properly issued duplicate from DOL is submitted in support of a properly filed I-140, the petitioner will not be deemed to have demonstrated its ability to pay the proffered wage.<sup>2</sup>

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<sup>2</sup> According to the Form 1120 federal income tax return submitted on appeal, the petitioner appears to be a C corporation. Its net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Alternative means of demonstrating a petitioner's ability to pay a certified salary may be shown by its net current assets as derived from Schedule L of the corporate tax returns or whether a petitioner employed and paid wages to a beneficiary beginning as of the priority date. In this case, the petitioner's net income was reported as \$35,032 on the tax return whose fiscal year was reported to run from October 1, 2007 to September 30, 2008. Net current assets calculated from the result of current assets of \$48,494 shown on line(s) 1 through 6 of Schedule L minus \$10,784 in current liabilities shown on line(s) 16 through 18, yield \$37,710 in net current assets. No evidence of wages paid to the beneficiary from April 30, 2001 forward, were provided. Although either the petitioner's net income or net current assets as shown on the tax return support its ability to pay the proffered wage during the fiscal year covered by the tax return, no other evidence of the ability to pay was provided. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage beginning as of the priority date, which in this case is April 30, 2001. The petitioner failed to submit any regulatory prescribed evidence for the years 2001, 2002, 2003, 2004, 2005, 2006 and January 1<sup>st</sup> to October 2007. As the record does not contain such evidence, or the original labor certification as noted above, the petitioner failed to demonstrate its continuing ability to pay.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the overall magnitude of the petitioner's business activities, its historical growth, uncharacteristic losses and expectations of increasing business and profits overcome evidence of small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or

Additionally, this petition is not approvable because the petitioner failed to establish that the requirements set forth on the approved labor certification were consistent with the visa classification sought.

The regulation at 8 C.F.R. § 204.5(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act.

According to the regulation at 8 C.F.R. § 204.5(l), in order to classify the alien as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, the certified position as set forth on the ETA 750 must require less than two years of training or experience. As Item 14 of the labor certification establishes that the position's minimum requirements are two years of experience in the job offered, the beneficiary can only be classified as a "skilled worker" under section 203(b)(3)(A)(i).

The regulation at 8 C.F.R. § 103.2(b)(8)(ii), clearly allows the denial of an application or petition, notwithstanding any lack of required 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 the missing evidence. It is noted that neither the law nor the regulations require

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successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, one tax return submitted on appeal does not demonstrate a framework of profitability as indicated in *Matter of Sonegawa*. No evidence of reputation or other unique circumstances analogous to *Sonegawa* have been provided. The petitioner failed to demonstrate its continuing ability to pay the proffered wage of \$21,340 based on the documentation provided.

consideration of other classifications if the petition is not approvable under the classification requested. There are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. The petition is also deniable on this basis.

Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the petitioner failed to submit the original certified ETA 750 that would establish a *bona fide* job opportunity exists for the beneficiary identified in the I-140. For this reason and for the reasons hereinabove noted, it also failed to demonstrate its continuing ability to pay the proffered wage and that the beneficiary had the requisite experience set forth on the labor certification by the priority date. Further, the petitioner failed to establish that the requirements set forth on the approved labor certification were consistent with the visa classification sought. 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)).

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.