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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: SRC07 174 51875 Office: TEXAS SERVICE CENTER Date: **MAR 15 2010**

IN RE: Petitioner: [Redacted]
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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 a newspaper media. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director also determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage in 2004. The director denied the petition accordingly.

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

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 Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.² The Immigrant Petition for Alien Worker (Form I-140) was filed on May 18, 2007.

The job qualifications for the certified position of office manager are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Clerical duties may be assigned in accordance with the office procedures of individual establishments and may include a combination of bookkeeping, typing, stenography, office machine operation, and filing. Work with business details by scheduling appointments, giving information to callers, taking dictation, composing and typing routine correspondence, reading and routing incoming mail, filing correspondence and other records, and other assigned clerical duties.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	2
College Degree Required	Associate's Degree or equivalent
Major Field of Study	Administrative Office

Experience:

Job Offered	1 year, 3 months
(or)	
Related Occupation	Officer Manager, Senior Secretary

Block 15:

Other Special Requirements	Typing, Word Processing, Business Necessity Spanish Language
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As set forth above, the proffered position requires 2 years of college culminating in an Associate's Degree or equivalent in Administrative Office and 1 year and 3 months of experience in the job offered or the related occupation of Officer Manager, Senior Secretary.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed her prior education as having received her Associate's Degree from Benjamin Franklin College in Mexico City, Mexico where she was in attendance from September 1988 to June 1990, and as having received her Completion Certificate from the University Autonoma De Mexico where she was in attendance from September 1992 to February 1993.

The Form ETA 750B also reflects the beneficiary's experience as follows:

CNN Noticero, Bilingual Secretary, December 1996 to January 1998
NBC News, Bilingual Editor, November 1995 to November 1996

In support of the beneficiary's educational qualifications, the record contains a statement, dated November 20, 2007 and a grade transcript, dated September 4, 1990 from the Benjamin Franklin School. The statement indicates that according to the prior records in the archives of the school, the beneficiary obtained an Associate's Degree as she fulfilled the requirements and was certified in the qualifying courses. The grade transcript states that the beneficiary obtained a certificate as a bilingual secretary. The record does not contain a copy of the beneficiary's diploma or a credentials evaluation.

The director denied the petition on October 25, 2007. He determined that the beneficiary's certificate does not indicate that any degree was awarded to the beneficiary by the Benjamin Franklin School and that the only evidence that has been submitted is that the beneficiary has a certificate as a bilingual secretary.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel asserts that the beneficiary obtained an Associate's Degree as the statement from the Benjamin Franklin School proves.

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 169.167-034 and title Manager, Office, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=169.167-034&g=Go> (accessed February 9, 2010) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Three requiring Medium Preparation Needed for the occupation type closest to the proffered position.

According to DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. DOL assigns a standard vocational preparation (SVP) range of 6-7 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." See <http://online.onetcenter.org/link/summary/11-3011.00> (accessed February 9, 2010). Additionally, DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a skilled worker. Based upon DOL's requirements, the proffered position could be classified as a professional, however, the AAO can only view the proffered position as a skilled worker because the petitioner requires less than a bachelor's degree.

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) states the following:

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 above regulation requires that the alien meet the requirements of the labor certification.

As previously noted, the record fails to contain a diploma or credential evaluation for the beneficiary. Counsel's assertion that the statement from the Benjamin Franklin School proves the beneficiary obtained an Associate's Degree is without merit. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)). Furthermore, even if the beneficiary had obtained an Associate's Degree from the Benjamin Franklin School, there is no credential evaluation included in the record which concludes that the degree is equivalent to an Associate's Degree in the United States. As such, we cannot conclude that the beneficiary has the foreign equivalent to a United States associate degree. Thus, the beneficiary fails to meet the requirements of the labor certification, and does not qualify for preference visa classification under section 203(b)(3) of the Act.

The preference visa petition was also denied by the director for the petitioner's inability to establish that it could pay the beneficiary the proffered wage in 2004.

On appeal, counsel asserts the petitioner paid the beneficiary wages in 2004 that were not considered in the analysis. Counsel submits a W-2 Form for the beneficiary in support of this assertion.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.71 per hour (\$26,436.80 per year).

The evidence in the record of proceeding shows that the petitioner in 2004 is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 1, 1992 and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an 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 proffered wage is an essential element 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). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, according to the W-2 Form for

2004, the petitioner paid the beneficiary \$36,849.17. As such, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2004.

Although the AAO finds the evidence to have established that the petitioner had the continuing ability to pay the proffered wage in 2004, it notes that the petitioner has failed to establish that the beneficiary meets the educational requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.