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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 04 2010

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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 that the petitioner had not established that the beneficiary satisfied the experience requirements set forth on the ETA Form 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's July 10, 2008 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary had obtained the experience required by the ETA Form 9089 as of the priority date.

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.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on June 5, 2006. In general, ordinary legible photocopies of initial supporting documents for various employment-based immigrant classifications (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. 8 C.F.R. § 204.5(g)(1). The record in this instance, does not contain the original labor certification on blue security paper. The petitioner claimed that it submitted the original ETA Form 9089. The director noted the absence of the original labor certification in his decision. The record does not contain the original labor certification. The petitioner did not send this document on appeal, or explain its absence. This forms an additional basis for the petitioner's denial, which will be discussed later in the decision. The proffered wage as stated on the ETA Form 9089 is $11.89 per hour ($24,731.20 per year). The ETA Form 9089 states that the position requires one year of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089 signed by the beneficiary, 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 Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, United States Citizenship and Immigration Services (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 Sonegawa*, 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

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006 or subsequently.

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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at 6 (E.D. Mich. 2010). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term

tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 29, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. The petitioner, however, did not submit any other regulatory prescribed evidence for that year. Therefore, the petitioner's income tax return for 2006 was the most recent return available. The 2007 tax return, however, was submitted by the petitioner on appeal and will be considered in these proceedings. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income[3] of $48,503.00.
- Net income for 2007 cannot be determined because the tax return provided does not contain a complete copy of its Schedule K. The tax return states ordinary income of $73,356.00, which exceeds the proffered wage. That sum, however, will not establish the ability to pay the wage because the portion of schedule K containing credits, deductions and other adjustments was not submitted with the tax return.

The stated net income for 2006 would be sufficient to pay the proffered wage. It must be noted, however, that the 2006 tax return shows no gross receipts or sales, no salaries paid, and no officer compensation paid as a care facility. The reported net income comes entirely from rental income and wages paid appear related to the rental property. This brings into question whether the job offer is bona fide as it does not appear that the petitioner was operational in 2006. The petitioner's 2005 federal tax return reflects the same. As noted above, the petitioner's 2007 net income cannot be

[3] 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 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, 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 income, credits, deductions or other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its 2006 tax return. The petitioner's 2007 tax return shows ordinary business income on page one of its Schedule K, but return does not include page two of the Schedule K which would show other credits, deduction or adjustments. The petitioner additionally sent its 2005 form 1120S, which is before the priority date. This return showed no gross receipts on page one and its net income appeared on Schedule K, which makes the petitioner's 2007 complete schedule K and tax return necessary to review.

determined as a complete copy of its Schedule K was not provided. Under these circumstances, the petitioner has not established its ability to pay the proffered wage in 2006 or 2007 based upon its net income. As noted above, the petitioner did not submit any other regulatory prescribed evidence to show the petitioner's ability to pay in 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2006, the Form 1120S stated net current assets of ($20,305.00).
- In 2007, the Form 1120S stated net current assets of ($13,346.00).

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage. Again, and as stated above, the 2005 and 2006 tax returns show no gross receipts or sales, and no officer compensation paid related to the petitioner's business as a care facility. This brings into question whether the job offer is bona fide as it does not appear that the petitioner was operational in 2006.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts on appeal that the director erred in denying the petition by failing to take into consideration the tax form 8825S noting rental income in 2006 of $54,032.00. Counsel further

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[4]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

submitted profit and loss statements for 2006 and 2007 and a partial copy of its 2007 tax return and states that the petitioner has established its ability to pay the proffered wage.

Counsel is correct when stating that the director failed to consider the rental income noted on the form 8825S. The rental income is included on line 2 of Schedule K and factored into the equation when arriving at the petitioner's net income. The AAO has considered the rental income above. The profit and loss statements submitted are of little evidentiary value as they are not audited statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner 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. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

As stated above, the 2006 tax return shows no gross receipts or sales, and no officer compensation paid. The reported net income comes entirely from rental income. This brings into question whether the job offer is bona fide as it does not appear that the petitioner was operational in 2006. The petitioner's 2005 federal tax return reflects the same. The petitioner's 2007 return is the first evidence that reflects that the petitioner has gross receipts rather than rental income. The record contains no evidence to establish that the petitioner's reputation in the industry is such that it would be more likely than not that the petitioner would have the continuing ability to pay the proffered

wage. The record is insufficient to establish the petitioner's net income in 2006 because of deficiencies previously discussed with the petitioner's tax return. No explanation was given as to why the petitioner reported no receipts or the payment of wages in 2006. The 2007 return did not contain a complete copy of its Schedule K. Using information available, the petitioner appears to have negative net current assets in 2006 and 2007. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Additionally, the director determined that the petitioner had not established that the beneficiary met the experience requirement for the offered position set forth on the ETA Form 9089. Specifically, the director noted that an experience letter provided by the petitioner failed to "specifically state the job duties the beneficiary performed and if they led to more complex and responsible duties." The position requires 12 months experience as a cook. First, there is no requirement that the duties performed by the beneficiary lead to more complex and responsible duties. The petitioner need only establish that the beneficiary had 12 months experience as a cook at the time the ETA Form 9089 was filed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in part:

> (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 submitted an experience letter signed by [redacted] Graceland Estate and Country Club, Ground Floor IDC Centre, Kalayaan Avenue, Makati City, Philippines which states that the beneficiary was employed by that organization as a cook from February of 2000 until March of 2002. [redacted] then listed a menu detailing the types of food that the beneficiary prepared as a cook. As set forth on the ETA Form 9089, the beneficiary's duties for the petitioner would be to "cook food for residents in a residential care facility[,] bake bread and pastries[,] plan and prepare menu[s] according to instruction and approved menu[,] [and to] keep kitchen equipment/utensils clean." The food preparation as a cook detailed by [redacted] includes the duties to be performed by the beneficiary as a cook for the petitioner. While the experience letter provided meets the requirements of the applicable regulation and would establish the beneficiary's prior experience, the director requested evidence of pay to verify the beneficiary's experience in the RFE. 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). While the

petitioner supplements the letter, the petitioner did not submit any independent corroboration such as requested by the director. For the beneficiary's experience to be accepted in any further filings, the petitioner should submit independent pay information to corroborate the experience as the record contains conflicting information regarding the beneficiary's prior experience.[5]

Another issue beyond the decision of the director is that the record in this case lacks an original certified ETA Form 750 labor certification.

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

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> *Initial evidence.* (1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. *In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval.* However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

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[5]The beneficiary indicated in a signed statement that she was a retired senior police officer in an interview conducted and resulting in a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act on November 24, 2007 at the Los Angeles, California airport port of entry. This is potentially inconsistent with her claim to be a cook in the Philippines. Additionally, in a non-immigrant visa application in May 2002 the beneficiary stated that she had worked three years as a sales person with a real estate company. This information also potentially conflicts with the dates of claimed experience as a cook. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. 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, 591-592 (BIA 1988).

(Emphasis added.)

The regulation at 8 C.F.R. § 103.2(b)(4) states:

> *Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, 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 USCIS.

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 AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "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." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). However, in this case, there is a labor certification in the record of proceeding, but it is a copy and an original is required.

The regulation at 20 C.F.R. § 656.30(e) states:

> *Duplicate labor certifications.*
>
> 1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
> 2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Officer or DHS tracking number.

In the instant case, the record does not contain any information that indicates that the petitioner requested the director to obtain the original labor certification or that the petitioner was unable to provide the original labor certification. Therefore, for this additional reason, the petition is not approvable.

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.