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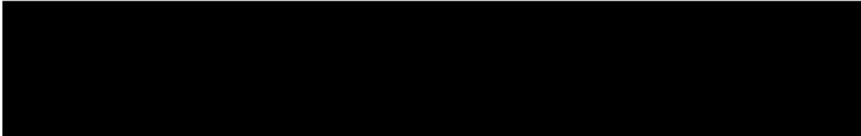
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington DC 20529-2090



U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 28 2010

IN RE: Petitioner: [REDACTED]  
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:



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 your 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 employment based 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 [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a certified nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification<sup>1</sup> approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director denied the petition on November 14, 2008.

On appeal, the petitioner, through counsel, asserts that the designation of the visa classification actually reflected the requirements advertised that DOL approved, but a former staff development director erroneously completed the Form ETA 750. Counsel asserts that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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)(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(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

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

of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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

(ii) *Other documentation*—

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The Immigrant Petition for Alien Worker (Form I-140) was filed on September 19, 2007. 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.

In this matter, the minimum requirements for the certified position of a nursing assistant are set forth on Item 14 of Part A of the ETA 750. They appear as follows:

**EDUCATION**                      Grade School    High School    College    College Degree Required



NA

Major Field of Study

Management

**TRAINING**                      No. Yrs.              No. Mos.              Type of Training

0

3

Nurse Aid

**EXPERIENCE**                      Job Offered              Related Occupation              Related Occupation (Specify)

Yrs.    Mos.

Yrs.    Mos.

9       6

9       6

Certified Nursing Assistant

Thus, the petitioner's minimum requirements are shown as five years of college in the field of study of management, plus three months of training as a nurse's aid at a certified wage of \$10.00 per hour. Additionally, the applicant must have nine years, six months of work experience in the job offered as a certified nursing assistant or nine years, six months of work experience in a related occupation, also defined as a certified nursing assistant.

Citing 8 C.F.R. § 204.5(l)(2), the director determined that 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

Form ETA 750 must require less than two years of training or experience. As Item 14 of the labor certification establishes that the certified position's minimum requirements exceed the minimum requirements of the unskilled worker visa designation, the labor certification does not support the visa classification sought on the I-140 petition. The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years training or experience.

On appeal, counsel submits a statement from the current staff development director, [REDACTED]. She believes that a former staff development director misinterpreted the requirements of the ETA 750 and erroneously completed it according to the beneficiary's actual qualifications rather than stating the minimum requirements of the job offered.<sup>2</sup> Counsel maintains that the recruitment advertisements demonstrate the offered position's actual requirements, which is only a certified nursing assistant [REDACTED]. This requirement is not stated on the labor certification. He states that DOL certified the labor certification using this requirement. Counsel contends that the petition should be approved for the visa classification of unskilled worker as designated on the Form I-140.

The AAO does not concur. First, counsel's assertions that DOL approved a change in the terms of the labor certification is not shown on the approved Form ETA 750 submitted to the record, regardless of how the job was advertised by the petitioner. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The labor certification as certified before us clearly states that five years of college in management is required, as well as three months of training as a nursing aid, and nine years and six months of experience as a certified nursing assistant. Second, the AAO does not have jurisdiction to change the terms of the labor certification that involve any items related to the test of the labor market.

Based on a review of the underlying record and the argument submitted on appeal, it is not concluded that the petitioner established that the certified position required less than two years training or experience in order to approve the petition for the visa classification sought.

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<sup>2</sup> It is noted that [REDACTED] name also appears on the ETA 750 as the employer signatory, changed from a prior employee as a correction approved by DOL on July 26, 2007.

Beyond the decision of the director, and noting that even if the designated visa classification on the Form I-140 petition was consistent with the labor certification's minimum requirements, the petition would not be approvable. The petitioner failed to submit any evidence of its ability to pay the proffered wage and failed to submit evidence of the beneficiary's training or employment experience.<sup>3</sup> As set forth on Part A of the ETA 750, the proffered wage is stated as \$10.00 per

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<sup>3</sup> It is noted that the approved labor certification submitted with the Form I-140 petition shows the employer to be [REDACTED]". The Form I-140 petition was filed by [REDACTED]". Any future Form I-140 filings should be consistent with the employer shown on the labor certification and clarification should be submitted that clearly identifies the relationship of both entities, including pertinent copies of fictitious business name statements. If multiple beneficiaries are sponsored for employment-based petitions, the petitioner must demonstrate its continuing ability to pay the proffered wage for all beneficiaries as of his/her respective priority date.

With respect to the petitioner's ability to pay the proffered wage, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [(USCIS)].

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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 (1<sup>st</sup> 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);

hour, which amounts to [REDACTED]. Pursuant to the regulatory requirements, the petitioner must demonstrate this continuing ability beginning as of the priority date.<sup>4</sup> As the record contains no evidence of the petitioner's continuing financial ability to pay the proffered wage, the petition is not approvable on this basis. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the Form ETA 750 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, the priority date is November 29, 2004.

As set forth above, the certified position requires five years of college in [REDACTED] three months of training as a [REDACTED] and nine years, six months of experience as a certified [REDACTED]

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*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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at \*6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

<sup>4</sup> In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although in some circumstances, other factors 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 this case, such consideration is not necessary because the record lacks any financial documentation.

assistant. As the record contains no evidence that these requirements were fulfilled pursuant to 8 C.F.R. § 204.5(1)(3)(ii), the petition is also not approvable for this reason.

This office notes that a petition which 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority well recognized by federal courts.)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.