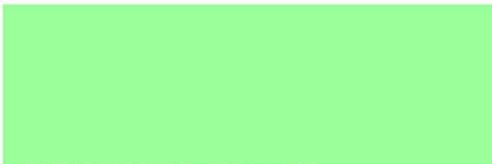


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)



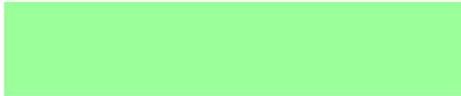
DATE: **AUG 30 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a terrazzo worker and finisher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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. 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 June 8, 2009 denial, an issue in this case is 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.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on June 9, 2003. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120 per year based on forty hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered as a terrazzo worker and finisher.

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.¹

On appeal, counsel submits a brief; copies of the petitioner's U.S. Income Tax Return for an S Corporation for 2003, 2004, 2005, 2006, 2007 and 2008; a copy of the denial notice; a copy of Form ETA 750; an excerpt from 8 C.F.R. § 103.2(b)(8); and copies of the petitioner's business checking account statements for all twelve months of 2003, all twelve months of 2005, January through May of 2007, and January through June of 2008.

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 currently to employ six 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 Benjamin Caballero Padilla on April 28, 2003, this individual claimed to have worked for the petitioner since February 2000.²

¹ 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). For reasons discussed below, 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).

² Form I-140 was filed on behalf of [REDACTED]. According to Part 3 of Form I-140, [REDACTED] date of birth is February 10, 1967. Form ETA 750 was filed on behalf of [REDACTED] ([REDACTED]). According to Part B, Section 4 of Form ETA 750, [REDACTED] date of birth is October 10, 1968. The record of proceeding contains two birth certificates, neither of which is accompanied by an English translation.

8 C.F.R. § 103.2(b)(3) requires that any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

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 (BIA 1988).

That the petitioner did not provide English translations of the two birth certificates casts doubts upon its claims of the identity of the beneficiary.

On appeal, counsel asserts that the instant petition was denied in error. Counsel asserts that though the director claims to have issued a request for evidence (RFE), asking for numerous financial documents, neither counsel nor the petitioner ever received the RFE. Therefore, on appeal, counsel provided the evidence identified in both the RFE and the denial and asks that USCIS issue a favorable decision based upon the evidence provided with the appeal.

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'l Comm'r 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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

However, one of the birth certificates is issued for [REDACTED] and the other is issued for [REDACTED]. With the initial petition submission, counsel for the petitioner supplied a list of exhibits one of which is labeled "Exhibit G" and is a Form I-797 Receipt Notice for Form I-130, Immigrant Petition for Relative, Fiance (e) or Orphan. On the list of exhibits, in referring to Form I-130, counsel states that [REDACTED] real name is ([REDACTED]) [REDACTED].

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record of proceeding suggests that the beneficiary of the instant petition, [REDACTED], and the beneficiary of the certified Form ETA 750, [REDACTED], are not the same individual. Each has a different date of birth and a separate birth certificate. Further, according to USCIS electronic records, each individual has his own alien number (A#). Additionally, in his list of exhibits, counsel explained that [REDACTED] had a Form I-130 filed on his behalf. According to USCIS electronic records, [REDACTED] was approved on July 19, 2002, one year after Form ETA 750, bearing the name of [REDACTED] was filed. Form I-130 conferred a priority date of April 30, 2001 upon [REDACTED]. Therefore, based upon the inconsistencies identified above, the petitioner has not demonstrated the true identity of the beneficiary in the instant matter.

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. With the initial petition submission, the petitioner provided no evidence of wages paid to the beneficiary. However, on Form ETA 750, [REDACTED] claims to have worked for the petitioner since February 2000. In his brief which accompanied the instant appeal, counsel states, "Please note that the petitioner, [REDACTED] is not yet employed by [REDACTED]. Therefore, Form W-2, Form 1099, and pay vouchers are not available."³

Therefore, based upon the evidence in the record, the petitioner has not demonstrated that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 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*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

³ In his list of exhibits which counsel supplied with the initial petition submission, counsel stated [REDACTED] real name is [REDACTED]. Thus, counsel is claiming that this is the same individual. Counsel's statement that the beneficiary was not employed with the petitioner cannot be reconciled with information on Form ETA 750B. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 118. “[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).

As evidence of the ability to pay, the petitioner initially submitted only the first page of its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2003, 2004, 2005 and 2006. The petitioner also supplied copies of its Employer’s Quarterly Federal Tax Return (Form 941) for four quarters of 2006, and its Quarterly Wage and Withholding Report for the State of [REDACTED] for the third and fourth quarters of 2006. Additionally, the petitioner supplied copies of its business checking account statement for all twelve months of 2006 and the first five months of 2007. On February 12, 2009, the director, in his RFE, requested the petitioner to submit all of the schedules for the petitioner’s tax returns for 2003, 2004, 2005 and 2006, since these were not included in the initial petition submission. The director also requested evidence of the petitioner’s ability to pay for 2007 and 2008 in the form of annual reports, federal income tax returns or audited financial statements and noted that the petitioner could also submit additional evidence such as profit and loss statements, bank account records and personnel records in addition to one of the three required forms of evidence. The director also requested evidence of any wages paid to the beneficiary in the form of IRS Form W-2, Wage and Tax Statement, and the beneficiary’s most recent pay voucher. On June 8, 2009, the director denied the I-140 petition, determining that the petitioner has not responded to his RFE.

On appeal, counsel for the petitioner submits all of the evidence which the director requested in his RFE. Generally, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). However, in this case, on appeal, counsel for the

petitioner asserts that neither he nor the petitioner received a copy of the director's request. A review of USCIS' electronic records does not reveal that the director's request was ever issued to the petitioner. The AAO will, therefore, consider the petitioner's evidence submitted on appeal.

Therefore, the record before the AAO closed on July 10, 2009 with the receipt by the AAO of the instant appeal and the associated evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003, 2004, 2005, 2006, 2007 and 2008, as shown in the table below.

- In 2003, the Form 1120S stated net income⁴ of \$23,982.00.
- In 2004, the Form 1120S stated net income of \$42,426.00.
- In 2005, the Form 1120S stated net income of \$19,124.00.
- In 2006, the Form 1120S stated net income of \$34,239.00.
- In 2007, the Form 1120S stated a net loss of \$93,733.00.
- In 2008, the Form 1120S stated a net loss of \$42,158.00.

Therefore, for the years 2003, 2005, 2007 and 2008, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner did, however, demonstrate sufficient net income to pay the proffered wage in 2004 and 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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

⁴ 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 21, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions and other adjustments shown on its Schedule K for 2003, 2004, 2005, 2006, 2007 and 2008, the petitioner's net income is found on Schedule K of its tax returns.

⁵ 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.

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 for 2003, 2005, 2007 and 2008, as shown in the table below.

- In 2003, the Form 1120S, Schedule L stated net current liabilities of \$49,108.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$3,299.00.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$1,278.00.
- In 2008, the Form 1120S, Schedule L stated net current liabilities of \$93,485.00.

Therefore, for the years 2003, 2005, 2007 and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition to the petitioner's federal income tax returns, counsel provided the petitioner's business checking account statements for 2003, 2005, 2007 and 2008 and asked the USCIS taken these into considering in evaluating the petitioner's ability to pay.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L which was considered above in determining the petitioner's net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had 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, with the exception of 2004 and 2006.

On appeal, counsel asserts that the I-140 petition had been denied in error, indicating that neither he nor the petitioner ever received the RFE which the director issued. Therefore, counsel submitted the evidence which was initially requested, as articulated in the denial and asked that the AAO consider such evidence and the rendering of a new favorable decision.

The AAO concurs with counsel's assertion and has considered the evidence submitted on appeal since USCIS' electronic records do not show that the director's RFE was ever sent to the petitioner or counsel. The AAO has, therefore, considered all of the evidence submitted on appeal and has set forth our analysis above.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

In the instant case, the petitioner provided financial documentation for six years of business operations. Between 2003 and 2008, the petitioner's gross sales have decreased by more than 55 percent. Throughout the relevant period, with the exception of 2006 and 2007, the petitioner paid no salaries or wages. Instead, the petitioner compensated sub-contractual labor and the funds paid to these workers remained consistent. The petitioner has not established the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

Beyond the decision of the director,⁶ the petitioner has not demonstrated that the Form I-140 was submitted on behalf of the beneficiary of the labor certification approved by DOL. As noted above,

⁶ 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*, 229 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) (noting that the AAO conducts appellate review on a *de novo* basis).

Form ETA 750 was submitted on behalf of [REDACTED] and Form I-140 was submitted on behalf of [REDACTED]. Although counsel asserts that both names belong to one individual, the beneficiary, inconsistencies in the evidence submitted does not support this conclusion. Counsel submitted two birth certificates, neither with a translation. The birth certificates provide two different names and two different dates of birth, indicating that each birth certificate was issued to a separate individual. Further, statements by counsel that the beneficiary was not employed with the petitioner cannot be reconciled with the beneficiary's attestation on Form ETA 750B that he was employed by the petitioner since February 2000. 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 (BIA 1988). This issue must be resolved with any further filings.

If the individual named as the beneficiary on Form I-140 is not the same as the individual named as the beneficiary on Form ETA 750, this case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case postdates the rule, substitution will not be allowed for the present petition.

If the individual named as the beneficiary on Form I-140 is not the same as the individual named as the beneficiary on Form ETA 750, and this case involves a request for substitution of the beneficiary after the DOL's final rule, the record lacks an original Form ETA 750 for the instant beneficiary. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

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

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 [USCIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: “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.” (emphasis added). Counsel has not provided any authority permitting USCIS to substitute the instant beneficiary with the beneficiary named on the ETA 750. Therefore, even if the petitioner’s evidence had established the petitioner’s ability to pay the proffered wage during the relevant period, the evidence would not support an approval of the Form I-140 petition unless an original of the Form ETA 750 labor certification for the instant beneficiary had first been obtained.

As the filing of the instant case was after July 16, 2007, the petitioner is not able to substitute the beneficiary. The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO 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.).

As alien labor certification substitution is no longer permitted and the petition is not accompanied by a valid labor certification, this office lacks jurisdiction to consider an appeal from the director’s decision.

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.