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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: APR 14 2005  
EAC-04-005-51317

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

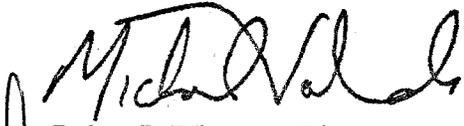
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a geriatric care company. It seeks to employ the beneficiary permanently in the United States as a manager, geriatric/home attendant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 denied the petition accordingly.

On appeal, counsel states that counsel never received proper notice of a request for evidence which had been issued in the case, despite having submitted properly completed G-28 Notices of Entry of Appearance as Attorney or Representative.

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 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:

*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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$14.81 per hour, which amounts to \$30,804.80 annually. On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 2, 2003. On the petition, the petitioner claimed to have been established in November 2003, and to have four current employees. The items for gross annual income and for net annual income were left blank on the petition.

In support of the petition, the petitioner submitted no evidentiary documentation other than the Form ETA 750, parts A and B. Apparently also submitted with the petition were two original Form G-28 Notices of Entry of Appearance as Attorney or Representative dated July 24, 2003, signed by counsel and co-signed on behalf of the petitioner with a signature which appears similar to that of the petitioner's president on the I-140

petition. Those Form G-28's are now found on the non-record side of the file. Those Form G-28's and other Form G-28's submitted later will be discussed in more detail below.

On the same day as the I-140 petition was submitted, October 2, 2003, the beneficiary submitted a Form I-485 Application to Register Permanent Resident or Adjust Status. With that application were submitted two original Form G-28 Notices of Entry of Appearance as Attorney or Representative, one dated April 2, 2001 and the other dated August 6, 2003, each signed by counsel and co-signed by the beneficiary, who is the applicant on the Form I-485 application.

In a request for evidence (RFE) dated December 29, 2003, the director requested evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and evidence to establish that the beneficiary possessed the qualifications required on the ETA 750. Concerning the representation of the petitioner by counsel, the RFE stated the following:

It appears you wish to be represented in this matter. If so, have your representative complete and submit Form G-28. Specifically, the Form G-28 that you submitted for the I-140 petition is incomplete. The section concerning the name and address for the beneficiary has been left blank and must be completed. As such, you will need to submit another Form G-28 that reflects the name and address for both the petitioner and the beneficiary.

(RFE, December 29, 2003, page 2).

The RFE was mailed to the petitioner. No record of any mailing to counsel appears in the record, either of the RFE or of any other document.

After the RFE was issued, counsel submitted to the director a letter dated February 4, 2004. In that letter, counsel stated that he had submitted on January 3, 2004 a request for a new RFE, since the RFE issued by the director had been received neither by counsel's office nor by the employer. Attached to the letter dated February 4, 2004 were the following documents: a copy of a U.S. Post Office certified mail receipt dated December 31, 2003 with a copy of a delivery receipt for that certified mail package showing receipt on January 3, 2004 by the Center Director, Vermont Service Center; a copy of a letter dated December 16, 2003 to the Vermont Service Center stating that counsel had never received a notice of receipt for the instant I-140 petition and requesting the issuance of a new notice of acceptance of the I-140 for processing; copies of the two Form G-28 Notices of Entry of Appearance as Attorney or Representative dated July 24, 2003, described above; copies of two canceled checks dated August 29, 2003 payable to CIS drawn on an account of counsel, one in the amount of one hundred thirty five dollars and the other in the amount of one thousand five hundred thirty five dollars; photocopies of photographs of the beneficiary; and duplicate copies of the I-140 petition, the I-485 application and supporting documentation.

Counsel's letter dated February 4, 2004 and attached documents were received by CIS on February 6, 2004. The letter and the attached documents are found on the non-record side of the file. The file contains no original of the letter from counsel dated December 16, 2003, which was allegedly mailed on December 31, 2003 and allegedly received by CIS on January 3, 2004.

In response to the RFE, counsel submitted a letter dated March 24, 2004 and the following evidence: a copy of a letter dated June 6, 2002 from the Ministry of Health, Grodnensky District, Belarus, stating the beneficiary's employment as a geriatric care manager from March 20, 1985 through April 23, 1987, with a certified English translation; and copies of statements for an account of the petitioner at Sovereign Bank for

the months of January 2003 through November 2003. Apparently submitted with the foregoing documents was an original Form G-28 Notice of Entry of Appearance as Attorney or Representative dated January 20, 2004, signed by counsel and co-signed on behalf of the petitioner with a signature which appears similar to that of the petitioner's president on the I-140 petition. That G-28 is found on the non-record side of the file. The petitioner's submissions in response to the RFE were received by CIS on March 25, 2004.

In a decision dated July 7, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and the following documents: a copy of counsel's Form G-28 dated July 24, 2003 on behalf of the petitioner; a copy of counsel's Form G-28 dated August 6, 2003 on behalf of the beneficiary; and a copy of the I-140 petition.

Counsel states on appeal that counsel never received proper notice of a request for evidence which was issued in the case, despite having submitted properly completed G-28 Notices of Entry of Appearance as Attorney or Representative. Counsel requests that the case be reopened, that counsel be recognized as the petitioner's representative, and that the RFE be reissued.

Since no new evidentiary documents are submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has been employed by the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence does not indicate that the petitioner is a corporation, a partnership or any other legal entity. Therefore it will be assumed that the petitioner is a sole proprietorship. For a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. However, in the instant petition, no tax returns of the petitioner's owner

or of any other individual or entity were submitted. Nor did the petitioner submit any annual reports or audited financial statements, which are two alternative forms of acceptable evidence specified in the regulation at 8 C.F.R. § 204.5(g)(2) quoted above.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

On the petitioner's bank statements the ending balances are as follows:

2003: \$535.45 for January; \$1,328.29 for February; \$1,149.09 for March; \$1,140.09 for April; \$1,727.09 for May; \$1,718.09 for June; \$2,043.01 for July; \$2,034.01 for August; \$2,025.01 for September; \$2,016.01 for October; and \$3,232.81 for November.

No bank statements for 2001 or 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

No other financial evidence was submitted for the record. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly analyzed the petitioner's bank statements and correctly concluded that the petitioner's evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

Concerning the representation of the petitioner, the director's decision stated as follows:

It is noted that your attorney contends that their office did not receive this Service's request for further documentation even though there was a Form G-28 filed by the attorney. A review of the record reveals that the Form G-28 was not properly completed initially, and as such, could not be recognized by this Service. The initial Form G-28 that was submitted in relation to the I-140 petition contained only the name of the petitioner and not the beneficiary. The Form G-28 must contain the name and address of both the petitioner and the beneficiary in order for this Service to recognize the attorney. In any event, the notice requesting further documentation was sent directly to the petitioner. The problem with the incomplete Form G-28 was also mentioned in this notice.

You were granted the normal period of time mentioned above to submit the requested documentation. It must be further noted that your attorney as again failed to properly complete the Form G-28 in relation to the I-140 petition. This newly submitted Form G-28 again only contains the name of the petitioner and not the beneficiary.

(Decision of the Director on the I-140 petition, July 7, 2004, page 1).

Concerning representation, the regulation at 8 C.F.R. § 103.2(a) states in pertinent part as follows:

(3) *Representation.* An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. A beneficiary of a petition is not a recognized party in such a proceeding. . . .

The regulation at 8 C.F.R. § 1.1(f) states:

The term attorney means any person who is a member in good standing of the bar of the highest court of any States, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law.

The regulation at 8 C.F.R. § 292.5 states in pertinent part as follows:

(a) *Representative capacity.* Whenever a person is required by any of the provisions of this chapter to give or be given notice; to serve or be served with any paper other than a warrant of arrest or a subpoena; to make a motion; to file or submit an application or other document; or to perform or waive the performance of any act, such notice, service, motion, filing, submission, performance, or waiver shall be given by or to, served by or upon, made by, or requested of the attorney or representative of record, or the person himself if unrepresented.

The regulation at 8 C.F.R. § 299.1 states in pertinent part as follows:

The forms listed below are hereby prescribed for use in compliance with the provisions of subchapter A and B of this chapter. . . . [Form No.:] G-28 [Edition date:] 10-25-79 [Title:] Notice of Entry of Appearance as Attorney or Representative . . . .

The Form G-28 requires a signature by the representative, and a notice at the bottom of the Form G-28 requires a signature of the represented person consenting to disclosure of CIS records to the representative. Both the block for the printed name of the person consenting and the block for the signature of that person use the word "person" in the singular, indicating that the signature of only one person is expected. Below the signature line for the person consenting, the form states "(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)"

Beneficiaries of I-140 petitions generally are not persons required to sign the Privacy Act disclosure consent on the Form G-28, since nearly always they are neither citizens of the United States nor aliens lawfully admitted for permanent residence. In rare instances, a beneficiary of an I-140 petition might presently be a lawful permanent resident who achieved permanent residence on some basis other than an employment-based petition but who for

procedural reasons, usually relating to family members, might wish to formally abandon his or her permanent residence and then again seek a new grant of permanent residence following approval of an employment-based petition. But the vast majority of beneficiaries are neither citizens of the United States nor lawful permanent residents. Therefore, they are not required to sign the Privacy Act disclosure consent section of the Form G-28.

Guidelines apparently issued by the CIS service center national office state that the service centers require signatures of all applicants and petitioners on Form G-28's, without regard to whether those persons are citizens of the United States or lawful permanent residents. On the CIS public Internet Web site, the following statements appear:

#### USCIS Service Centers: National Information

Notices of Appearance – Form G-28: Attorneys and other approved representatives of applicants/petitioners must file a Form G-28, Notice of Appearance. The G-28 must be properly completed and signed by the affected party. The term "affected party" refers to the petitioner or the applicant depending on the type of request. The signed G-28 should be stapled to the top of the form being filed. If multiple applications are submitted for other family members or for different applicants/petitioners, make sure that a separate G-28 is submitted for each affected party. To minimize the potential for error, the G-28 should be attached to each and every application and petition filed.

#### General Tips on Assembling Applications for Mailing

8. A form G-28 is not acceptable unless signed by the authorized representative and the petitioner (re: petitions) or the applicant (re: applications). Facsimile signature stamps are acceptable for the signature of the representatives. However, applicants/petitioners must live sign the initial Form G-28 submitted with the application/petition. Any subsequent Form G-28 relating to the same case may be a photocopy of the original, which should be already attached to the relating case.

CIS, *Services Field Offices Addresses and Information, USCIS Offices by State, Service Centers, USCIS Offices by State, Vermont Service Center, General Tips on Assembling Applications for Filing*, <http://uscis.gov/graphics/fieldoffices/scnational/index.htm#H> (Accessed April 4, 2005)

The guidelines quoted above give no authority for the requirement that all Form G-28's be signed by petitioners or applicants, without regard to whether those persons are citizens of the United States or lawful permanent residents. But in any event, the guidelines contain no requirement that all Form G-28's be signed by the beneficiaries of immigrant petitions.

The file containing the instant petition contains the following original Form G-28's.

- Form G-28, 7/24/03, on behalf of the petitioner, filed on the non-record side.
- Form G-28, 7/24/03, on behalf of the petitioner, filed on the non-record side.
- Form G-28, 8/6/03, on behalf of the beneficiary, filed on the record side.
- Form G-28, 1/20/04, on behalf of the beneficiary, filed on the non-record side.
- Form G-28, 7/12/04, on behalf of the beneficiary, filed on the non-record side.
- Form G-28, 7/12/04, on behalf of the petitioner, filed on the record side.
- Form G-28, 7/12/04, on behalf of the petitioner and the beneficiary, filed on the record side.

Each of the forgoing G-28's is signed by counsel and co-signed either by the petitioner's owner or by the beneficiary, and one of them is co-signed by both persons. The file also contains copies of several of the above Form G-28's, submitted by counsel as evidence that the originals had been submitted previously to CIS.

When the file was reviewed by the AAO on appeal, each of the four Form G-28's on the non-record side was found filed face down, a manner of filing apparently intended to indicate that those Form G-28's were not considered valid by the director's office.

The two original Form G-28's dated July 24, 2003, filed on the non-record side of the file, were apparently submitted with the I-140 petition. Each of those forms identifies present counsel as the representative and indicates that he is a member of the Pennsylvania Supreme Court. Each form is signed by counsel and by the petitioner's owner. Each of those Form G-28's complies fully with the regulations quoted above. Each of the other G-28's filed in the instant case also complies fully with the regulations quoted above. One of the Form G-28's dated July 12, 2004 is co-signed both by the petitioner and by the beneficiary, apparently in response to repeated requests from the director for a G-28 signed in that manner.

No requirement exists in the regulations for a Form G-28 on behalf of a petitioner and co-signed by the petitioner to be also co-signed by the beneficiary of that petition. In fact, the regulation at 8 C.F.R. § 103.2(a) explicitly states "A beneficiary of a petition is not a recognized party in such a proceeding."

In the instant petition, counsel fully complied with all requirements for a proper entry of appearance on behalf of the petitioner when he submitted two original Form G-28's co-signed by the petitioner's owner with the initial submission of the I-140 petition. The director therefore was required to send all notices pertaining to the petition to counsel. 8 C.F.R. § 292.5(a).

The record in the instant case contains no copy of an I-797 acknowledgment of receipt notice pertaining to the I-140 petition, but the statements of the director in the RFE and in his decision on the I-140 petition quoted above indicate that the director sent all notices directly to the petitioner, with no copy to counsel. Both the RFE and the director's decision on the I-140 were addressed to the petitioner, at the petitioner's address shown on the I-140 petition.

The record therefore indicates that the director failed to comply with the regulatory requirement to serve all notices on counsel. The director further erred by stating in his decision that the Form G-28's submitted by counsel were improperly filed.

Counsel's assertions on appeal rely exclusively on the alleged procedural errors of the director in failing to accept the validity of the G-28's submitted by counsel and in then failing to send counsel the request for additional

evidence which he would be entitled to receive as the representative of the petitioner. However, counsel makes no assertions concerning the harm suffered by the petitioner as a result of the director's procedural errors. Notably, counsel makes no proffer of the evidence which could have been submitted had the director properly sent to counsel the RFE of December 29, 2003. As noted above, counsel submits no additional evidence on appeal.

The absence of evidence of prejudice to the petitioner raises the issue of whether the director's procedural errors alone require the director's decision to be overturned, or whether the petitioner on appeal must also establish that the director's procedural errors caused prejudice to the petitioner.

Federal circuit courts of appeal have sometimes taken different approaches to the issue of harmless error in immigration proceedings. The petitioner's address is in West Hartford, Connecticut, which is in the jurisdiction of the United States Court of Appeals for the Second Circuit. In *Waldron v. INS*, the Second Circuit held that a procedural error in an immigration-related proceeding at the administrative level, without any showing of prejudice, is not alone sufficient reason to overturn a decision, unless the procedural error affected fundamental constitutional or statutory rights. 17 F.3d 511, 517 (2d Cir. 1994). The facts in *Waldron* involved a deportation proceeding in which the respondent had not been notified of his right to contact diplomatic officials of his native country, and had not been informed that at an earlier stage of the proceedings in the case the Board of Immigration Appeals (BIA) had ordered that any decision be certified to the BIA for review. Each of those actions was required by a regulation, but the Second Circuit held that neither of those regulations affected a fundamental constitutional or statutory right. *Id.* at 518. Therefore the court held that the deportation decision should not be reversed, absent a showing of prejudice to the respondent, which the record in that case failed to establish. Other federal courts of appeal have made similar holdings involving procedural errors in deportation proceedings and removal proceedings. See *United States v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002); *Delgado-Corea v. INS*, 804 F.2d 261 (4th Cir. 1986); *United States v. Calles-Pineda*, 627 F.2d 976, 977 (9th Cir. 1980).

In the instant case, the record indicates that counsel participated fully in the preparation of the I-140 petition. Counsel's name and signature appear on the I-140 petition, and counsel submitted two original Form G-28's along with the I-140 petition. As discussed above, the director erred in failing to recognize the Form G-28's submitted by counsel as valid. The practical result of this error was the failure of the director to send to counsel an acknowledgement of receipt of the I-140 petition and to send counsel the RFE dated December 29, 2003, as the director was required to do by the regulation at 8 C.F.R. § 292.5(a). Rather, the director sent those documents directly to the petitioner.

The deadline for the petitioner's response to the RFE was March 25, 2004. That date was twelve weeks after the date of the RFE, as specified by regulation, and no extension was allowable under the regulation. See 8 C.F.R. § 103.2(b)(8). Counsel's letter dated February 4, 2004 indicates that he had become aware of the issuance of the RFE by at least January 3, 2004, and that he had submitted to the director a request for a new RFE on January 3, 2004. Counsel's letter dated February 4, 2004 appears to state that the RFE was received neither by counsel's office nor by the petitioner.

Counsel then responded to the RFE with a letter dated March 24, 2004, accompanied by additional evidence. The submissions were timely received by CIS on March 25, 2004. In counsel's letter dated March 24, 2004 counsel states the following:

Please note that the DHS RFE was forwarded directly to the petitioner, and not to the attorney-representative despite the G-28 duly submitted with the I-140. The employer was out of immediate reach and did not contact the attorney-representative until the last minute before the RFE deadline. Therefore, I respectfully request to issue [sic] another RFE to allow additional time to provide the requested documentation.

(Letter from counsel dated March 24, 2004, page 1).

Counsel apparently correctly understood that no extension of time could be granted to respond to the RFE of December 29, 2003, and that the issuance of a new RFE would have the effect of giving the petitioner more time to submit evidence. *Cf.* 8 C.F.R. § 103.2(b)(8). However, counsel's letter does not indicate when counsel received the RFE from the petitioner, nor the nature of the documentation which could be submitted if another RFE were issued.

In the instant appeal, counsel submits no additional evidence, and fails to indicate the nature of any additional evidence which the petitioner wishes to submit.

Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, documents which were not specifically requested by the director but which are submitted on appeal to the AAO may be considered on appeal. Moreover, in the instant case, since the RFE was not mailed to counsel as required, the record would lack a sufficient basis to exclude any relevant documents newly-submitted on appeal.

The regulation at 8 C.F.R. § 103.3 governing appeals to the AAO makes no explicit provision for submitting evidence on appeal. That regulation specifies that an appeal must be made on the Form I-290B. *See* 8 C.F.R. § 103.3(a)(2)(i). The only document permitted by the regulation to be submitted with the Form I-290B is a brief. *See* 8 C.F.R. § 103.3(a)(2)(vi). However, the regulation at 8 C.F.R. § 103.2(a)(1) incorporates by reference the instructions on CIS forms, and the instructions to the Form I-290B do allow the submission of evidence on appeal.

The instructions to the Notice of Appeal Form I-290B state in pertinent part as follows:

You may submit a brief, statement, and/or evidence with this form. Or you may send these materials to the AAU within 30 days of the date you sign this form. Or you may send these materials to the AAU within 30 days of the date you sign this form. You must send any materials you submit after filing the appeal to:

Administrative Appeals [Office]  
[Citizenship and Immigration Services]  
425 Eye Street, N.W.  
Washington, D.C. 20536.

If you need more than 30 days, you must explain why in a separate letter attached to this form. The AAU may grant more time only for good cause.

Form I-290B, Instructions, Section 4.

Since the instructions to the Form I-290B explicitly allow the submission of additional evidence on appeal, any relevant documents may be submitted to the AAO on appeal, except any document which is precluded

from consideration under *Matter of Soriano*, 19 I&N Dec. 764. But, as noted above, on the record of the instant case, no basis would exist to exclude any relevant evidence from consideration on appeal, since the RFE was not mailed to counsel as required by regulation.

The procedural errors by the director in the instant petition did not affect fundamental constitutional or statutory rights. See *Waldron v. INS*, 17 F.3d 511. The petitioner was not denied the right to the assistance of counsel of his own choosing, but merely the regulatory right to have notices and other papers served on counsel, rather than directly on the petitioner himself. For this reason, the director's procedural errors do not alone require a reversal of the director's decision. To warrant a reversal, the petitioner must establish some prejudice to the petitioner as a result of those errors, but the petitioner has not done so. Nor has the petitioner availed itself of the opportunity to cure any evidentiary deficiencies in the record by submitting the needed evidence on appeal.

In conclusion, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Moreover, notwithstanding the procedural errors of the director in failing to recognize counsel as the petitioner's representative in this case, counsel's submissions on appeal fail to provide any basis for concluding that evidence exists which would tend to establish the petitioner's ability to pay the proffered wage during the relevant time period. Counsel's assertions on appeal therefore fail to overcome the decision of the director.

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