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

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 27 2009

LIN-07-219-52211

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner seeks to employ the beneficiary permanently in the United States as a home health aide pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application), approved by the Department of Labor (DOL). The director noted that the petition was filed without all of the required initial evidence, and therefore, denied the petition.

A Form I-290B, Notice of Appeal or Motion, was filed on timely basis by counsel indicating that she would be submitting her brief and/or additional evidence to the AAO within 30 days. On October 6, 2009, the AAO received a correspondence from counsel with a copy of the beneficiary's diploma and a copy of Form 1040 U.S. Individual Income Tax Return filed by [redacted] for 2006 and 2007 as evidence to establish the petitioner's continuing ability to pay the proffered wage from the priority date to the present. However, it is noted that the correspondence was dated September 25, 2009, more than 11 months after the appeal was filed. The regulations do not allow an applicant or petitioner an open-ended or indefinite period in which to supplement a brief once an appeal has been filed. 8 C.F.R. § 103.3(a)(2)(i) provides that: "The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision." The record does not contain any evidence showing that counsel ever requested for extension of the period within which a brief or additional evidence would be submitted or such an approval was ever issued by the AAO. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence in the director's decision and has been given a 30 day period to respond to that deficiency, the AAO will not accept evidence offered for the first time submitted 11 months after the appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents within the 30 days required. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted 11 months later. Consequently, the appeal will be dismissed. Furthermore, counsel did not submit any new evidence to establish the petitioner's ability to pay the proffered wage with her late brief. The record contains a copy of the petitioner's 2006 and 2007 tax returns.

Counsel did not make a specific allegation of error in law or fact in the director's ground of denial. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The instant appeal does not meet these applicable requirements, and therefore, must be dismissed. 8 C.F.R. § 103.5(a)(4).

On appeal, counsel asserts that the director failed to issue a request for evidence (RFE) or notice to intent to deny (NOID) before he denied the instant petition. The regulation at 8 C.F.R. § 103.2 states in pertinent part:

> (b) *Evidence and processing* – (1) *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the request benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

8 C.F.R. § 103.2(b)(8) states in pertinent part:

> (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny6 the application or petition for lack of initial evidence or for ineligibility ...

In the instant case, the record does not contain all required initial evidence to establish that the petitioner had the ability to pay the proffered wage on the date the ETA Form 9089 was filed and continue to have such ability to the present, that the job offered to the beneficiary by the petitioner is a *bona fide* job offer and the beneficiary possessed the qualifications for the proffered position prior to the priority date. The AAO finds that the director appropriately exercised his discretion authorized by the regulation. On the petition, the petitioner claimed that it is a residential care facility and seeks to employ the beneficiary permanently in the United States as a home health aide. However, the ETA Form 9089 in the instant case was approved by DOL for a position of Helper-Painters, Paperhangers, Plasterers, and Stucco Mason with the petitioner, a construction company. As the petitioner failed to file the petition with a statutorily required labor certification, the petition cannot be approved.

As previously mentioned, the record contains copies of Form 1040 U.S. Individual Income Tax Return for 2006 and 2007 filed by the petitioner's owner. However, the adjusted gross income is not sufficient to pay the beneficiary the proffered wage of $18,699.20 per year.[1] The beneficiary did not claim to have worked for the petitioner, and the petitioner did not submit any W-2 forms, 1099 forms or other documents as *prima facie* proof of the petitioner's ability to pay the proffered wage. The record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore, the petitioner had not established that it had the continuing ability to pay the

[1] For a sole proprietorship, USCIS considers net income to be the figure shown as Adjusted Gross Income on the owner's Form 1040 U.S. Individual Income Tax Return. The owner's adjusted gross income for 2007 is $494.00. The owner's tax return for 2006 is not necessarily dispositive since the priority date in this case is June 11, 2007.

beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets.

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's September 22, 2008 decision. The petitioner failed to establish its eligibility for the benefits sought with a preponderance of evidence. Therefore, the petition cannot be approved, the director's decision is affirmed and the appeal must be summarily dismissed.

ORDER: The appeal is dismissed.