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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**

B6

Date: Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

FEB 29 2012

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:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the petitioner appealed this denial to the Administrative Appeals Office (AAO). The AAO initially rejected the appeal and then subsequently *sua sponte* reopened the matter. The matter is again before the AAO on appeal. The appeal will be dismissed.

The petitioner is a metal fabricator and producer. It seeks to employ the beneficiary permanently in the United States as a metal fabricator and powder coater. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

The record reflects that the petitioner appealed the denial of the petition to the AAO, and the AAO rejected the appeal on January 24, 2010, based upon the erroneous determination that the appeal had been filed by an unauthorized representative when in fact the petitioner's president filed the appeal. This case was subsequently reopened on August 30, 2011, pursuant to the regulations at 8 C.F.R. § 103.5(a)(5) which provide that the AAO may of its own volition (*sua sponte*) reopen or reconsider its own prior decision.

The AAO issued a Request for Evidence (RFE) to the petitioner on December 20, 2011, informing the petitioner that the record did not contain sufficient evidence demonstrating the petitioner's continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.

The priority date in the instant case is March 5, 2009, and therefore, the petitioner must establish the ability to pay the beneficiary the proffered wage of \$10.15 per hour or \$21,112.00 annually from that date until the beneficiary obtains lawful permanent residence. The AAO noted that the petitioner had only submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2009, and requested that the petitioner provide its complete federal tax return or audited financial statement for 2010. The AAO also requested that the petitioner submit all Forms W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary in 2009 and 2010.

In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information

requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner failed to respond to the RFE, the AAO is dismissing the appeal.

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.