

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: **MAY 03 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

The petitioner describes itself as a developer and implementer of computer information systems and applications. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concluded that the petitioner failed to establish that the beneficiary possessed the requisite education for the position as of the priority date.

The record shows that the appeal is properly filed 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.

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 February 8, 2013, the AAO sent the petitioner a Notice of Intent to Dismiss (NOID)/Request for Evidence (RFE) with a copy to counsel of record. The NOID/RFE analyzed the beneficiary's educational background based on the record of proceeding and outside sources and asked the petitioner to submit evidence of its intent regarding the educational requirements for the proffered position. The NOID/RFE also asked the petitioner to provide evidence demonstrating its ability to pay the beneficiaries of all of its Form I-140 petitions from the priority date onward. The NOID/RFE allowed the petitioner 30 days in which to submit a response. The AAO informed the petitioner that failure to respond to the NOID/RFE would result in a dismissal of the appeal.

As of the date of this decision, the petitioner has not responded to the AAO's NOID/RFE. 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). Since the petitioner failed to respond to the NOID/RFE, the appeal will be summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13)(i).

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 8 C.F.R. § 103.2(a)(1). 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).

Beyond the decision of the director,² the petitioner failed to demonstrate that it has had the ability to pay the proffered wage from the priority date of June 8, 2007 and subsequently. *See* 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.* The beneficiary has not yet obtained lawful permanent residence.

In its February 8, 2013 NOID/RFE, the AAO asked the petitioner to submit annual reports, federal tax returns, or audited financial statements for each year from 2007 through 2011. The AAO noted that the record of proceeding contains copies of IRS Forms W-2, which the petitioner issued to the beneficiary in 2007 and 2008. The AAO asked the petitioner to submit any Forms W-2 or 1099 issued to the beneficiary by its organization for 2009, 2010, and 2011.

In addition, according to USCIS records, the AAO notified the petitioner that its organization had filed multiple I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year, starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

Accordingly, the AAO asked the petitioner to provide the following information for each beneficiary for whom its organization has filed a Form I-140:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by the petitioner's organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn.

² 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).

denied, or that the beneficiary obtained lawful permanent residence.

- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

As previously noted, the petitioner failed to respond to the AAO's February 8, 2013 NOID/RFE. Accordingly, the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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 summarily dismissed as abandoned.