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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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 1 5 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

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, 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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner claims to be a residential care facility. It seeks to permanently employ the beneficiary as a caregiver. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1] As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the Department of Labor (DOL).

The director denied the petition on September 11, 2008. As is set forth in the decision, at issue in this case is whether the petitioner has the ability to pay the proffered wage and whether the beneficiary is qualified to perform the duties of the offered position. In addition, counsel argues on appeal that the director erred by denying the petition without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In order to obtain classification in this employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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. Comm. 1977). The regulation 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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also establish that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1]Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The priority date of the instant petition is October 22, 2004. The proffered wage stated on the labor certification is $1,233.60 per month ($14,803.20 per year). The labor certification states that the position requires four years of high school education.

On the petition, the petitioner claimed to have been established in 2004, and to employ two workers.[2] The petitioner did not answer the questions on Form I-140, Immigrant Petition for Alien Worker, pertaining to its gross annual income or net annual income. In addition, the petitioner did not submit any tax returns, annual reports or audited financial statements with the petition, as required by 8 C.F.R. § 204.5(g)(2).

Further, the record does not contain sufficient evidence to establish that the beneficiary meets the educational requirements of the offered position. If a petition is for an unskilled worker, it must be accompanied by evidence that the alien meets the educational, training and experience requirements set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(D). There is a document in the record that appears to be a high school diploma from the Philippines, but no translation was provided. Any document in a foreign language must be accompanied by a certified English translation. 8 C.F.R. § 103.2(b)(3).

On appeal, counsel does not provide any evidence of the petitioner's ability to pay the proffered wage, nor does counsel submit a translated copy of the beneficiary's high school diploma. Instead, counsel asserts that the director's denial of the instant petition without first issuing an RFE or NOID violated the petitioner's due process rights under the U.S. Constitution. Other than generally citing the U.S. Constitution, counsel provides no legal authority for her argument that the director's failure to issue a RFE or NOID prior to denying the petition is a violation of the petitioner's due process rights.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states that the AAO "shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." Counsel fails to specifically identify why the director's decision was factually or legally erroneous. Consequently, the appeal must be summarily dismissed.[3]

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. The petitioner has not met this burden.

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[2]According to California state corporate records, the petitioner's corporate status in California has been "suspended." Since the petitioner has lost all rights and powers to transact business, it can no longer be considered a legal entity in the United States. This also calls into question whether the job offer is *bona fide* and whether the petitioner can pay the proffered wage. Accordingly, if this appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner's continued eligibility for the benefit sought.

[3]Even if counsel identified an erroneous conclusion of law or statement of fact, the appeal would still have been dismissed. Counsel provided no evidence on appeal to overcome the grounds of the director's denial.

ORDER: The appeal is summarily dismissed.