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 15 2009
LIN-07-219-52720

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:

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 is a residential care facility. It 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 a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 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 a separate brief and/or additional evidence to the AAO within 30 days. However, to date, more than 11 months later, counsel has not submitted any brief or additional evidence to support the instant appeal. 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 Form ETA 750 was filed and continues 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. Furthermore, in the absence of an RFE or NOID, counsel should have submitted all the evidence of eligibility on appeal. However, counsel did not submit any additional evidence, and failed to provide a brief more than one year after the petition was denied.

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. Although counsel claimed that the director never issued a RFE or NOID before the denial, he did not submit any evidence to establish the petitioner's eligibility for the benefits sought. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's September 11, 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.