

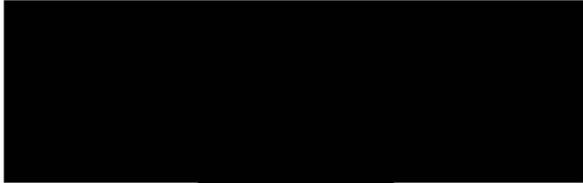
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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FILE:

SRC 07 182 53208

Office: TEXAS SERVICE CENTER

Date:

SEP 11 2009

IN RE:

Petitioner:

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:



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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner claims to be a home care facility. On May 24, 2007, the petitioner filed a petition seeking to permanently employ the beneficiary as a licensed vocational nurse. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).<sup>1</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

On October 3, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence of its ability to pay the proffered wage starting from January 12, 2004 priority date, including "copies of bank account records, payroll records, or profit-loss statements." In response, counsel submitted two personal investment account statements of the petitioner's owner.

The director denied the petition on December 20, 2007. The decision stated that the evidence submitted by the petitioner failed to establish its ability to pay the proffered wage.

Counsel filed the instant appeal on January 22, 2008. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states the following as the basis for the appeal:

[The petitioner] is demonstrating [that it] has the ability to pay the [beneficiary's] salary. [We] have attached a Wells Fargo bank account statement print out to show that [the petitioner] has \$123,772.26 in the account. We will be submitting additional documentation as evidence of ability to pay proffered wage within 30 days.

Counsel submitted a letter from the petitioner's bank with the appeal. The letter, dated January 18, 2008, states that the petitioner has a bank account balance of \$123,772.26

On Part 2 of Form I-290B, counsel indicates that a brief and/or additional evidence would be submitted to the AAO within 30 days. However, as of the date of this decision, counsel has not submitted a brief or additional evidence.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has

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<sup>1</sup>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.

been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on 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 in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

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." Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed.<sup>2</sup>

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.

**ORDER:** The appeal is summarily dismissed.

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<sup>2</sup>Even if the evidence submitted on appeal was considered, the appeal still would have been dismissed. The petitioner must establish its ability to pay the proffered wage from the priority date to the present. A letter stating the petitioner's bank account balance on one day is not sufficient to establish the petitioner's continuing ability to pay the proffered wage. Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. The amount of funds in an account on a given date does not show a company's sustainable ability to pay a proffered wage. In addition, the petitioner has not demonstrated why its tax returns are inapplicable or otherwise paint an inaccurate financial picture. Further, the submitted letter was prepared after the issuance of the RFE and the denial of the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).