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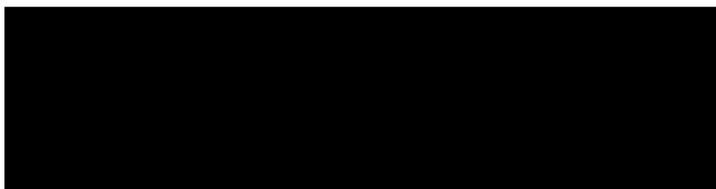
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: LIN-07-165-52538

Office: NEBRASKA SERVICE CENTER

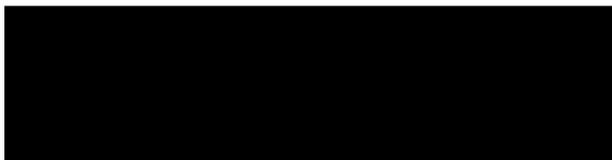
Date: FEB 05 2010

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 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 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 an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 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, issued a request for evidence (RFE) dated June 27, 2008. In response to the RFE, counsel failed to submit the tax return for the priority year to establish the petitioner's ability to pay the proffered wage and did not submit a statement regarding whether there is a family relationship between the petitioner and the beneficiary. The director denied the petition accordingly.

A Form I-290B, Notice of Appeal or Motion, was timely filed by counsel indicating that she would be submitting her brief and/or additional evidence to the AAO within 30 days. On October 19, 2009, the AAO received correspondence from counsel with a copy of the Form I-290B, Receipt Notice, Form G-28 and the director's September 30, 2008 denial. However, it is noted that the correspondence was dated October 12, 2009, almost 12 months after the appeal was filed. The regulations do not allow an applicant or petitioner an open-ended or indefinite period in which to supplement a brief once an appeal has been filed. 8 C.F.R. § 103.3(a)(2)(i) provides that: "The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision." The record does not contain any evidence showing that counsel requested an extension of the period within which a brief or additional evidence would be submitted. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence in the director's decision and has been given a 30 day period to respond to that deficiency, the AAO will not accept evidence offered for the first time submitted 12 months after the appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents within the 30 days required. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted 12 months later. Furthermore, counsel did not submit any new evidence to establish the petitioner's ability to pay the proffered wage with her late brief.

In the instance case, the director noted that the petitioner's family name and the beneficiary's middle name are the same, and therefore, requested a statement regarding the family relationship between the petitioner and the beneficiary. In response to the request for evidence (RFE), counsel states that the beneficiary is not a co-owner or even a partner of the petitioner in the business, however, the statement requested by the director regarding the family relationship between the petitioner and the beneficiary was not provided. Accordingly, the director denied the petition. "[T]he question was not regarding ownership in the business, but about the family relationship between the petitioner and the beneficiary." *The Director's September 30, 2008 Decision*.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, counsel declined to provide a statement regarding the family relationship between the petitioner and the beneficiary. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The petitioner’s failure to submit these documents cannot be excused. 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). The record does not contain sufficient evidence to establish that the job offered to the beneficiary by the petitioner is a *bona fide* job offer. The AAO finds that the director appropriately exercised his discretion authorized by the regulation.

On appeal, counsel asserts that the director denied the I-140 petition purely based on the conclusion that the beneficiary is a part owner of the business because she has the same name as the petitioner. However, as quoted above, the director denied the petition because counsel failed to submit a requested statement regarding the family relationship between the petitioner and the beneficiary. 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). Therefore, the instant appeal does not meet these applicable requirements, and therefore, must be dismissed. 8 C.F.R. § 103.5(a)(4).

Beyond the director’s decision and counsel’s assertions on appeal, the AAO also notes that the record does not contain sufficient evidence to establish the petitioner’s continuing ability to pay the proffered wage from the year of the priority date to the present. The record before the director closed on August 6, 2008 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the petitioner’s federal tax return for 2007<sup>1</sup> was not available yet because the petitioner filed a six month auto extension. However, the record contains no documentary evidence showing that the beneficiary was employed and paid by the petitioner at the level of the proffered wage in 2007 and consequent years. The petitioner did not submit any regulatory-described documentary evidence in the form of other than tax return for 2007 and later years. The record of proceeding does not contain any documents showing the sole proprietor’s liquid assets, such as cash balances in

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<sup>1</sup> USCIS must examine the petitioner’s federal tax return for 2007 in determining whether the petitioner has established its continuing ability to pay the proffered wage from the priority date while the 2006 tax return is not necessarily dispositive since the priority date in this case is February 7, 2007.

accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses in 2007. Therefore, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets. Furthermore, counsel did not submit the petitioner's tax return(s) for 2007 and available later year(s) on appeal. 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). The petitioner must establish that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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. 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.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's September 30, 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.