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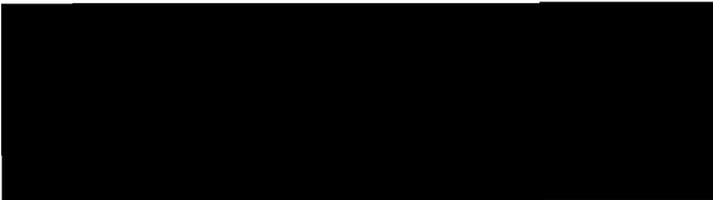
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

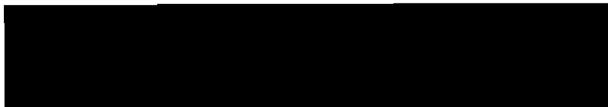
Date:

LIN-07-209-53068

FEB 17 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 was before the Administrative Appeals Office (AAO) on appeal. The AAO dismissed the appeal. Upon subsequent receipt of additional evidence submitted by the petitioner, the AAO is reopening the matter on its own motion, making a new decision with full consideration of the evidence submitted to support the appeal.¹ The appeal will remain dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide (caregiver). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

A Form I-290B, Notice of Appeal or Motion, was timely filed without additional supporting documents. Counsel indicated that she would submit a separate brief and/or additional evidence to the AAO within 30 days. On October 5, 2009, the AAO dismissed the appeal based on the evidence in the record because no further correspondence from counsel had been provided, despite the fact that more than 12 months had passed since 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. On October 6, 2009, one day after the AAO issued its decision, counsel submitted additional supporting documents. It is noted that the correspondence was dated October 1, 2009, before the AAO dismissed the appeal based on the evidence in the record. Therefore, this office is opening the matter on its own motion and will make a new decision upon full consideration of the evidence submitted with the October 1, 2009 correspondence.

Upon a complete and careful review and examination of all documents submitted by counsel with her October 1, 2009 correspondence, the AAO finds no new evidence has been submitted. All documentation provided by counsel on October 1, 2009 had already been contained in the record of proceeding, and thus had been fully evaluated and considered when the AAO adjudicated the instant appeal on October 5, 2009. No additional evidence was newly submitted to the record of proceeding with the October 1, 2009 correspondence. Consequently, the October 1, 2009 correspondence does not qualify for consider as a motion to reopen under 8 C.F.R. § 103.5(a)(2) because the petitioner is not providing new facts not previously submitted.

Therefore, the AAO will reaffirm its decision dated October 5, 2009 for the instant appeal and the petition must remain denied.

ORDER: The previous decision of the AAO dated October 5, 2009 is affirmed, the appeal remains dismissed and the petition remains denied.

¹ See 8 C.F.R. § 103.5(a)(5)(i).