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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: TEXAS SERVICE CENTER

Date: **JUL 23 2010**

IN RE:

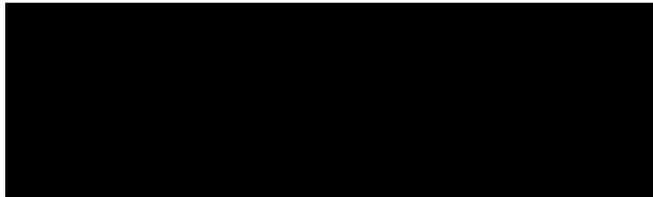
Petitioner:

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:



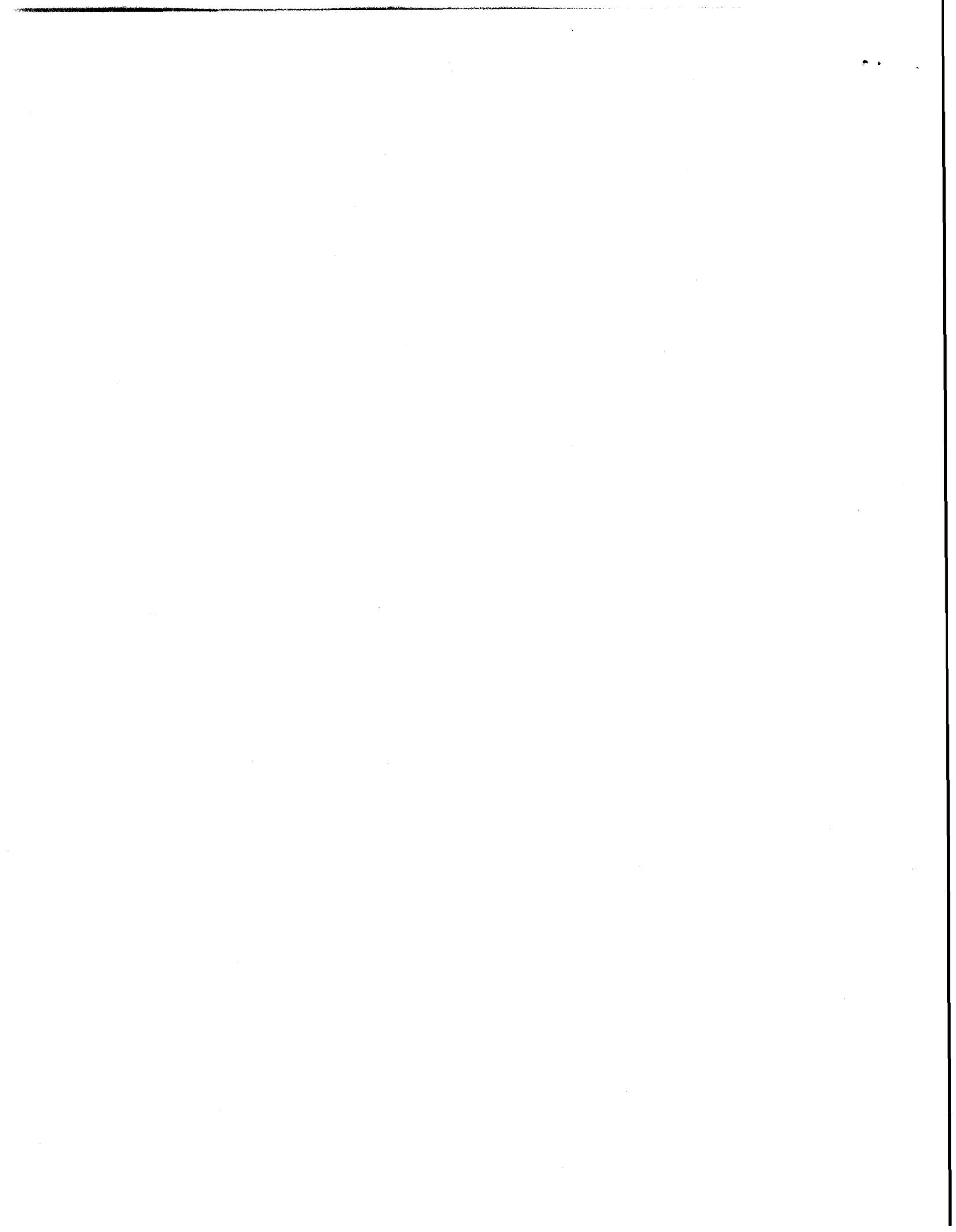
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office



**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded to the director for further action and consideration.

The petitioner's business is the operation and management of care facilities. It seeks to employ the beneficiary permanently in the United States as a care giver. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The proffered wage as stated on the ETA Form 9089 is \$7.58 per hour (\$15,766.40 per year) with a priority date of March 14, 2007. The petitioner submitted its Form 1120 federal tax return for 2005, and its 2006 business checking statements. The director issued a Notice of Intent to Deny (NOID) and requested additional evidence of the petitioner's ability to pay the proffered wage. In response, counsel submitted a letter, the petitioner's Form 1120 federal tax return for 2006<sup>1</sup> as well as bank business investment account statements for three months in 2007.<sup>2</sup> Additionally, counsel submitted ten banking checking statements for the months of July and October 2007, and January 2008.

The director denied the petition based primarily upon petitioner's 2006 Form 1120. A tax return submitted for a year prior to the priority date has little probative value in the determination of the ability to pay from the priority date.

On appeal, counsel submits a legal brief dated April 22, 2008; the petitioner's federal income tax return (Form 1120) for 2007; the petitioner's unaudited financial statements dated December 31, 2007; a promissory note dated April 15, 2008; and a personal financial statement dated April 16, 2008.<sup>3</sup>

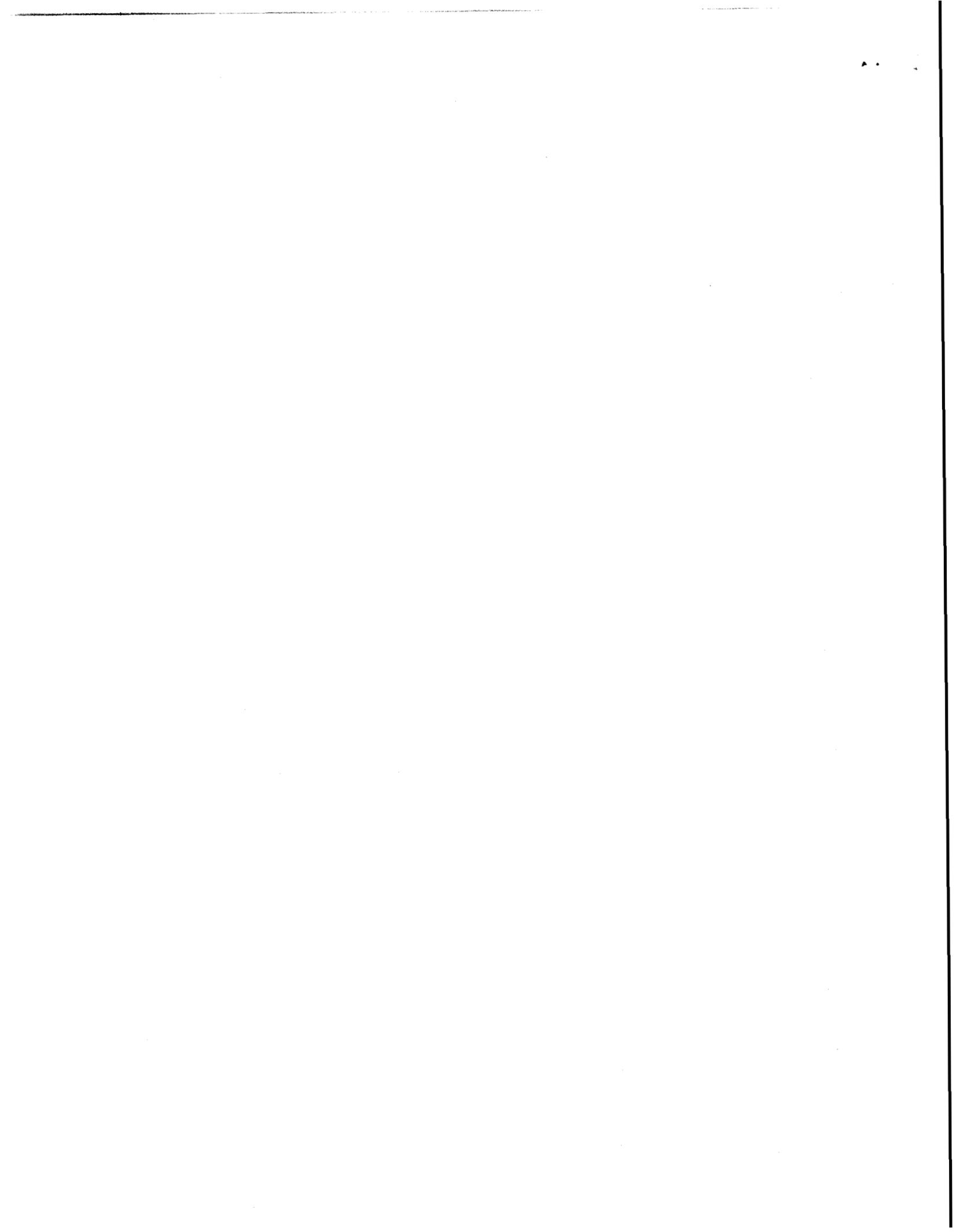
Upon review, the petitioner's 2007 Form 1120 indicates that it had \$25,552.00 in net income in that year (e.g. Line 28 of Form 1120). As the priority date is March 14, 2007, and the record closed on

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<sup>1</sup> The 2006 tax return stated a negative net income of <\$54,504.00> and net current assets of \$5,793.00.

<sup>2</sup> The ending balances of the account were in March 2007 - \$1,456.89; May 2007 - \$1,457.62, and in August 2007 - \$2,478.73.

<sup>3</sup> Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).



April 29, 2008, with the AAO's receipt of the petitioner's brief and supporting evidence, it appears more likely than not the petitioner had the ability to pay the proffered wage as of that date based on an analysis of its income. Accordingly, the director's decision is withdrawn.

The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position as a care giver. The petitioner has also not established its continuous ability to pay the proffered wage in 2008 and 2009.

The ETA Form 9089 identifies the job title as care giver requiring three months of experience. In the labor certification signed by the beneficiary on April 14, 2007, the beneficiary stated she was employed as a caregiver/nursing attendant in Nazareth House, an adult care facility, in Victoria, Australia, from October 30, 2001, to December 28, 2003.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

As the only evidence of the beneficiary's qualifications, the petitioner submitted a statement dated November 15, 2001, by [REDACTED], of Nazareth House. The brief statement describes the position, its hours, and the prospective dates of the beneficiary's term of employment, from October 30, 2001, to December 28, 2003. The statement does not contain any information concerning the beneficiary's education, training or experience in the position.

Therefore, there is insufficient evidence in the record to demonstrate that the beneficiary has three months of job experience since the statement was made within 15 days from the beginning of the beneficiary's reputed employment, or sufficient evidence that the beneficiary acquired the work experience at [REDACTED]. The statement is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) were submitted by the petitioner.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Furthermore, the record is devoid of evidence of the petitioner's ability to pay the proffered wage in 2008 and 2009. Therefore, this matter will be remanded for further consideration. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.



**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

