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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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

B6

Date:

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

JUN 08 2011

IN RE:

Petitioner: [REDACTED]

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:

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 \$630. 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private individual. She seeks to employ the beneficiary permanently in the United States as a general housekeeper. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that there was a bona fide job offer because of the existence of a familial relationship between the beneficiary and the petitioner that had not been disclosed to the DOL. As a result, the director concluded that the petitioner failed to establish that the job opportunity was available to qualified U.S. workers as had been certified to the DOL on the Form ETA 750. The director denied the petition accordingly.

The AAO issued a Notice of Derogatory Information, Notice of Intent to Deny, and Request For Evidence (NDI/NOID/RFE) on March 16, 2011, stating that the Form I-140 petition contained in the record was incomplete as information relating to both the petitioner and beneficiary necessary for the adjudication of the petition had not been provided. Consequently, the AAO provided a copy of the original Form I-140 petition to the petitioner and requested that the petitioner provide the necessary information to complete the petition.

Part 14 of the Form ETA 750 reflects that the proffered job requires three years of experience as a general housekeeper. However, the AAO noted that the record was absent sufficient credible evidence establishing that the beneficiary possessed the required three years of experience as a general housekeeper as of the November 29, 2004 priority date of the labor certification. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The AAO informed the petitioner of its intent to deny the petition on this additional basis.<sup>1</sup>

In addition, the AAO stated that the record did not contain sufficient evidence to determine whether the petitioner possessed the continuing ability to pay the proffered wage since the priority date of November 29, 2004. According to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. The instant petition is pending with the AAO and the beneficiary has not obtained her lawful permanent residence yet. Therefore, the AAO requested that the petitioner submit copies of annual federal tax returns for 2008, 2009, and 2010, as well as any Forms W-2, Wage and Tax Statement, or Forms 1099-MISC issued to the beneficiary in those years.

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<sup>1</sup> The AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. The AAO's *de novo* authority has been long recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO further noted that the record contained the Schedule A of the petitioner's Form 1040, U.S. Individual Income Tax Return, for 2005, which reflected that the petitioner had paid mortgage interest and other expenses totaling \$129,486.00, and that one of the recipients of these expense payments was the beneficiary's husband, [REDACTED]. Accordingly, the AAO asked for an explanation of the reason for these payments, and if such payments were based upon a loan transaction or a secured transaction, a copy of the loan and security instruments involved.

Parts 6 and 7 of the Form ETA 750 indicate that the petitioner's address is [REDACTED] in Agua Dulce, California and that the beneficiary will work at this same address. However, the AAO noted that a review of the website at [REDACTED] reflected that the home at this address was up for sale subject to a "short sale" condition. The AAO stated that the "short sale" of the petitioner's home indicated that the petitioner's financial prospects were in decline. The AAO requested that the petitioner clarify whether the beneficiary would perform the certified job at [REDACTED] California, and if not, the petitioner's current address where the beneficiary will work.

As previously discussed, part 14 of the Form ETA 750 reflects that the proffered job requires three years of experience as a general housekeeper. Accordingly, based on the labor certification requirements, the petitioner could only file the I-140 petition under the 2 "e" category for a "skilled worker" requiring a minimum of two years of training or experience. However, the petitioner requested the other worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The AAO informed the petitioner of its intent to deny the petition on this additional basis.

In the NDI/NOID/RFE, the AAO specifically alerted the petitioner that failure to respond to this notice would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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).

As of the date of this decision, neither counsel nor the petitioner has submitted a response to the NDI/NOID/RFE issued by the AAO on March 16, 2011. Therefore, the record must be considered complete.

Because the petitioner failed to respond to the NDI/NOID/RFE, the AAO is dismissing the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.