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



U.S. Citizenship
and Immigration
Services

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DATE: **MAY 27 2011**

OFFICE: TEXAS SERVICE CENTER

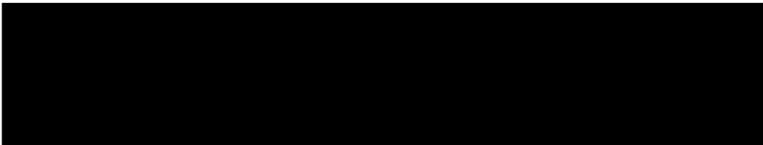
FILE: A88 094 838
SRC 08 123 51441

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 \$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 Director, Texas Service Center denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a decorative paint (murals) company. It seeks to employ the beneficiary permanently in the United States as a decorative painter pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a labor certification approved by the U.S. Department of Labor accompanied the petition.

The director denied the petition on February 12, 2009. The decision concludes that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage beginning on the priority date of the petition as required by 8 C.F.R. § 204.5(g)(2). The petitioner appealed the decision to the AAO on March 18, 2009.

The record shows that the appeal is properly filed and timely. 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 AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On March 1, 2011, the AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE), informing the petitioner that there was a discrepancy between its 2004 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, and IRS Form 1099, Miscellaneous Income, issued to the beneficiary, which called into doubt the veracity of the petitioner's claims. The AAO requested the petitioner to provide independent objective evidence to resolve this inconsistency, and to provide all schedules and attached statements for all Forms 1120S for the years 2003 through 2008, as well as a complete copy of its 2009 Form 1120S. The AAO also noted that the Forms I-140 and ETA 750, as well as the IRS Forms 1120S and 1099, submitted in support of the petition, showed the petitioner's address as [REDACTED]

[REDACTED] However, a new address, as listed on a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner on March 6, 2009, and submitted by counsel on appeal, showed the address of the petitioner as [REDACTED] However, an internet search of [REDACTED] revealed that there is a restaurant at that location. Therefore, the petitioner was also requested to explain specifically where its business is located and what business operation associated with it is located at the [REDACTED] address.

¹ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The NDI/RFE afforded the petitioner 45 days in which to provide a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The NDI/RFE advised the petitioner that, if it did not respond, the AAO would dismiss the appeal without further discussion.

To date the AAO has not received a response to the NDI/RFE. 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 AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in the NDI/RFE.

Thus, the petitioner failed to establish that it has possessed the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

CC:

