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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

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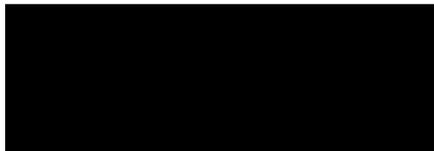
Date: **JAN 04 2012** Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
 Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a freight transportation company. It seeks to employ the beneficiary permanently in the United States as an operations manager. 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 the beneficiary possessed a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application. The director denied the petition accordingly.

The AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE) to counsel and the petitioner on October 3, 2011, informing the parties that a review of the website at <http://www.sunbiz.org/search/> revealed that the petitioner, [REDACTED], was administratively dissolved on September 24, 2010 for failure to file an annual report and that the petitioner's status is listed as "inactive."

The AAO informed the petitioner and counsel that if the petitioner was no longer an active business, the petition and its appeal to this office have become moot.¹ In which case, the appeal shall be dismissed as moot. Therefore, the AAO requested that the petitioner provide evidence such as invoices, recent bank statement, recent federal or Florida quarterly wage reports, etc., demonstrating that the petitioning business is not inactive and had current business activity for 2010 and 2011. Furthermore, the AAO requested that the petitioner submit copies of any licenses or permits issued to the petitioner to operate by the state of Florida or municipal subdivision thereof, as applicable.

In addition, the AAO requested that the petitioner submit evidence to establish that the beneficiary possessed a U.S. bachelor's degree or foreign degree equivalent as required by the terms of the labor certification application. The AAO noted that in Part H of the ETA Form 9089, the petitioner listed a requirement of a bachelor's degree in "Administration," and did not indicate that it will accept a combination of education and experience as an alternative method to meet the requirements for the proffered position.

The AAO further noted that the evidence in the record of proceeding as currently constituted creates ambiguity concerning the actual minimum requirements of the proffered position. Therefore, the AAO requested that the petitioner submit evidence of its intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while

¹ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Specifically, the AAO requested that the petitioner provide correspondence with the DOL, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

In addition, the AAO requested that the petitioner submit evidence that it prepared, *at the time it submitted to the DOL its ETA Form 9089 application and attachments*, the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. See 20 C.F.R. §§ 656.21(b) or 656.17(e) and (g). Specifically, the AAO asked the petitioner to provide a complete copy of its recruitment efforts, including the notice of the filing, job order, advertisements in newspapers or professional journals and additional recruitment efforts for a professional job, and the recruitment report to establish that the petitioner intended to delineate an equivalency to the bachelor degree requirement as set forth in Part H items 1-13 of the ETA Form 9089 to a combination of lesser degrees, certificates and/or other educational experiences as the actual educational minimum requirement in the instant labor certification application during the labor market test.

Furthermore, although not noted by the director in denying the petition, the record does not contain sufficient evidence demonstrating that the petitioner has the continuing ability to pay the proffered wage to the beneficiary since the priority date. 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).

The AAO also informed the petitioner that the evidence in the record did not establish that the petitioner has the ability to pay the proffered wage.² The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

² 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 priority date in the instant case is February 3, 2006, and therefore, the petitioner must establish the ability to pay the beneficiary the proffered wage of \$71,926.40 per year from that date until the beneficiary obtains lawful permanent residence. The AAO noted that the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Return, for 2004, 2005, and 2006, as well as a Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner in 2006. Consequently, the AAO requested that the petitioner submit its complete federal tax returns or audited financial statements for 2007, 2008, 2009, and 2010, as well as Form W-2 statements or Forms 1099-MISC issued to the beneficiary by the petitioner in 2007, 2008, 2009, and 2010.

In the NDI/RFE, the AAO specifically alerted the parties that failure to respond to the NDI/RFE 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).

Because counsel and the petitioner failed to respond to the NDI/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.