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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

DATE: **SEP 26 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a law firm. It seeks to permanently employ the beneficiary in the United States as a microcomputer support specialist. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The director's decision denying the petition concluded that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date.

The record shows that the appeal is properly filed 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on September 14, 2004. The proffered wage as stated on the Form ETA 750 is \$18.75 per hour (\$39,000 per year based on a 40 hour work week).

On March 17, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit:

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

evidence to establish that the petitioner had the financial ability to pay the proffered wage as of September 14, 2004, the priority date, and continues to have such ability. Such evidence must include annual reports, U.S. federal tax returns, or audited financial statements. In addition to the above, you may also include additional evidence such as profit/loss statements, bank account records, personnel records. If you employ 100 workers or more, you may also submit a statement from a financial officer of the organization.

The petitioner's response to the RFE contained the following:

- Form 1120S, U.S. Income Tax Return for an S Corporation for 2004.
- Florida UCT-6, Employer's Quarterly Report, for each quarter of 2004.
- Florida UCT-6, Employer's Quarterly Report, for each quarter of 2008.
- Form 941, Employer's Quarterly Federal Tax Return, for each quarter of 2008.

On May 13, 2009, the director denied the petition. The decision states that the petitioner failed to submit initial evidence of its ability to pay the proffered wage as required by 8 C.F.R. 204.5(g)(2).² The only tax return, annual report or audited financial statement in the record was the petitioner's 2004 federal tax return. The petitioner did not submit any evidence for the years 2005, 2006 and 2007 despite the fact that it was requested in the RFE. Thus, the director concluded that the petitioner failed to provide the evidence required to establish its continuing ability to pay the proffered wage from the priority date, and denied the petition accordingly.

On appeal, the petitioner submitted its Forms 1120S for 2004, 2005, 2006, 2007 and 2008.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, the petitioner should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The evidence before the director did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and the petition was therefore correctly denied.

² On appeal, the petitioner claims that it had submitted its 2004 Form 1120S with the petition when it was originally filed. However, the evidence in the record indicates that the tax return was not submitted until the RFE response and again on appeal.

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In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met this burden.

ORDER: The appeal is dismissed.