

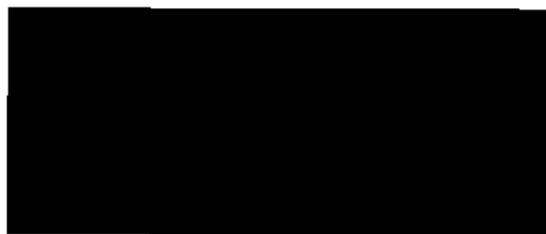
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **SEP 05 2012** Office: NEBRASKA SERVICE CENTER

FILE:

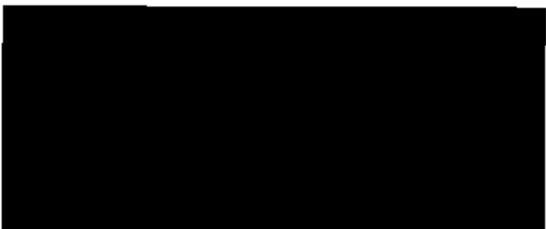


IN RE: Petitioner:
 Beneficiary:



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 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, Nebraska Service Center, denied the immigrant visa petition as well as a subsequent motion to reopen. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner was a bed and breakfast inn. It sought to employ the beneficiary permanently in the United States as a maintenance repairer and to classify him as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). 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 its continuing ability to pay the proffered wage to the beneficiary since the priority date. The director further determined that the petitioner had not established that the beneficiary met the minimum requirements for the offered job as listed on the Form ETA 750. Therefore, the director denied the petition and subsequent motion to reopen accordingly. The petitioner filed a timely appeal.

The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to counsel and the petitioner on June 22, 2012, informing them that [REDACTED] is both the employer listed at Part 4., of the Form ETA 750 and the petitioner listed at Part 1., of the Form I-140 petition. Both the Form ETA 750 and Form I-140 petition list the petitioner's Federal Employer Identification Number or [REDACTED]. The record contains the Forms D-30, Unincorporated Business Franchise Tax Return, for the District of Columbia of the business entity, [REDACTED] with [REDACTED], for 2000, 2001, 2002, 2003, 2004, and 2005. However, the record also contains Forms W-2, Wage and Tax Statement, reflecting that the business entity, [REDACTED] with [REDACTED], paid wages to the beneficiary from 2001 to 2006, [REDACTED], paid wages to the beneficiary in 2006 and 2008, and A-1 [REDACTED] with [REDACTED], paid wages to the beneficiary in 2006 and 2007.

The AAO informed counsel and the petitioner that a review of the website at [REDACTED] (accessed on June 11, 2012) revealed that the petitioner, [REDACTED], was no longer an active business as its status had been "revoked" in the District of Columbia. In addition, this same website reflected that the business entity, [REDACTED], was no longer an active business as its status had been "revoked" in the District of Columbia as well. Therefore, the AAO requested that the petitioner provide a current certificate of good standing or other evidence demonstrating that the petitioning business is not inactive and had current business activity for 2010 and 2011.

The AAO noted that the record is absent any credible evidence to establish the nature of the relationships between the different business entities listed above. Therefore, counsel and the petitioner were asked to provide evidence reflecting the specific nature of any relationship between the business entities, [REDACTED] with [REDACTED] [REDACTED] with FEIN [REDACTED]

██████████ with ██████████ Professional Employer II, LLC with FEIN ██████████, or any other business entity claiming a relationship to the petitioner.

The AAO acknowledged that the petition is accompanied by a Form ETA 750 certified by the DOL. The priority date of the petition is April 27, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$16.46 per hour or \$34,236.80 annually.

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.

As the priority date in the instant case is April 27, 2001, the petitioner must establish the ability to pay the beneficiary the proffered wage of \$34,236.80 from that date until the beneficiary obtains lawful permanent residence. The AAO noted that the petitioner submitted Form D-30 tax returns of the business entity, ██████████ with FEIN ██████████, from 2000 to 2005 and the unaudited monthly financial statements of ██████████ for 2006 and 2007 in an attempt to demonstrate its continuing ability to pay the proffered wage. However, the regulation at 8 C.F.R. § 204.5(g)(2) clearly states that “[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” Therefore, the AAO requested that petitioner submit its complete federal tax returns or audited financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011. In addition, the AAO noted that record contains Form W-2 statements that reflect that the business entity, ██████████ LLC with FEIN ██████████ paid wages to the beneficiary from 2001 to 2006, ██████████ with FEIN ██████████ paid wages to the beneficiary in 2006 and 2008, and A-1 ██████████ LLC with FEIN ██████████ paid wages to the beneficiary in 2006 and 2007. Consequently, the AAO asked the petitioner to provide copies of any Form W-2 statements or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary or any other business entity in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011.

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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO’s *de novo* authority is well recognized by the federal courts).

The regulation at 20 C.F.R. § 656.30(c)(2) states in pertinent part:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and for the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750)....

Area of intended employment is limited by definition in 20 C.F.R. § 656.3 as “the area within normal commuting distance of the place (address) of intended employment.” *See Matter of* [REDACTED] (change of area of intended employment).

In the instant case, the petitioner indicated that the primary worksite for the offered job was the [REDACTED], in Washington D.C., at Part 7. of the Form ETA 750. The DOL subsequently certified this location as the area of intended employment. The fact that the petitioner’s status has been revoked by the District of Columbia and the petitioner cannot conduct business in the District of Columbia means that a valid job opportunity no longer exists. Consequently, the labor certification is no longer valid for the job opportunity, and the visa petition may not be approved. The AAO informed counsel and the petitioner in the NOID/RFE that it intended to dismiss the appeal for this additional reason.

The petitioner and counsel were given 30 days to respond to the NOID/RFE. The AAO specifically alerted the petitioner and counsel that failure to respond to the NOID/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).

While the record reflects that the NOID/RFE mailed to petitioner at its business address was returned by the United States Postal Service as undeliverable, the NOID/RFE mailed to counsel was not returned. More than 30 days have passed since the NOID/RFE was issued, and the AAO has received no response from the either the petitioner or counsel. Therefore, the appeal will be dismissed.

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

ORDER: The appeal is dismissed.