



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: [Redacted]  
LIN 06 182 51861

Office: NEBRASKA SERVICE CENTER

Date: **APR 21 2008**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. On March 3, 2008, the AAO reopened the matter for the purpose of withdrawing one of its findings. On that date, the AAO afforded the petitioner 30 days in which to respond according to 8 C.F.R. § 103.5(a)(5)(ii). In response, the petitioner advised that it wished to rely on the current record. The AAO affirms its initial decision dismissing the appeal while withdrawing one of its adverse findings.

The petitioner is a software consultancy firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submitted a brief and additional evidence. In a decision dated January 4, 2008, the AAO found that the 2006 tax return submitted on appeal, not available to submit to the director, did not demonstrate the petitioner's ability to pay the proffered wage as of the priority date in this matter in addition to the other nonimmigrants and immigrants for whom the petitioner has petitioned. The AAO further concluded that the record does not contain the official academic records of the beneficiary's degrees. Finally, the AAO concluded that the record does not resolve whether the beneficiary is related to the petitioner's shareholder with the same last name.

On March 3, 2008, the AAO reopened the matter for the purpose of withdrawing the finding that the petitioner had not resolved whether there is a family relationship between the beneficiary and one of the petitioner's shareholders. As the petitioner's response to our March 3, 2008 decision does not responded to our other findings, we reaffirm those findings and incorporate them into this decision by reference. Those findings are summarized below.

Specifically, 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, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the ETA Form

9089 was accepted for processing on March 2, 2006. The proffered wage as stated on the ETA Form 9089 is \$79,539 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 2005. The procedural history before the director was recounted in our January 4, 2008 decision.

In a filing supplementing the appeal, the petitioner submitted its 2006 IRS Form 1120S tax return. The return reflects net income of \$39,338 and current assets that exceed current liabilities by \$49,293. Thus, the AAO was able to conclude that in 2006, the petitioner showed a net income that was slightly more than the difference between the wages paid and the proffered wage (\$29,522.43). Nevertheless, the AAO noted that the petitioner had filed 11 nonimmigrant petitions in 2006 for aliens other than the beneficiary in this matter. Only two of the aliens for whom those petitions were filed are reflected on the Forms 941 for 2006 in the record. The petitioner also filed 13 nonimmigrant petitions and one immigrant petition in 2007. While a nonimmigrant petition need not be supported with evidence of the petitioner's ability to pay, the number of nonimmigrant petitions is relevant when considering an ability to pay the beneficiary of an immigrant petition. The record does not resolve the petitioner's need to demonstrate an ability to pay the proffered wage for the beneficiary in this matter in addition to paying all of the prospective employees represented by the other nonimmigrant petitions filed by the petitioner.

Thus, the AAO concluded that the petitioner had failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage to the beneficiary in light of the additional prospective employees the petitioner seeks to hire and for whom it must demonstrate an ability to pay. **We now reaffirm that conclusion.**

Moreover, the AAO's review of the record revealed another issue that prevented the petition from being approvable at that time. As noted in the January 4, 2008 decision, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) provides that the evidence required to demonstrate that the beneficiary holds the requisite degree is an "official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." On the ETA Form 9089, Part J, the petitioner indicated that the beneficiary has a Master's degree in computer science. The petitioner did not include a copy of this degree with the initial submission. On October 5, 2006, the director requested the official academic record and an evaluation of the beneficiary's education. In response, the petitioner submitted an evaluation concluding that the beneficiary's foreign Master's degree was equivalent to a U.S. Master's degree. The petitioner, however, did not submit a copy of the official academic record for this degree. The director could have denied the petition based on this failure, but did not do so. As noted by the AAO in the January 4, 2008 decision, this petition is not approvable without this document. We reaffirm that conclusion.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.