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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**



B5

Date: JUN 05 2012

Office: TEXAS SERVICE CENTER



IN RE:

Petitioner:



Beneficiary:

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:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a structural engineer. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

As set forth in the director's October 20, 2010 denial, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 "priority date" is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. 8 C.F.R. § 204.5(d).

In this matter, the priority date is June 16, 2010, the day the DOL accepted the ETA Form 9089 for processing. The DOL certified the ETA Form 9089 on August 11, 2010. The petitioner filed the Form I-140 on September 13, 2010. The director denied the petition on October 20, 2010, and the petitioner filed an appeal on November 18, 2010. Consequently, the record of proceeding does not contain any tax returns, audited financial statements, or annual reports pertaining to 2010 or to any time period thereafter because it is more likely than not that such evidence was unavailable at the time the director adjudicated the petition. The director based his denial on evidence predating the priority date which does not comply with 8 C.F.R. § 204.5(g)(2).

Therefore, the AAO will withdraw the decision and remand the case to the director to request and consider evidence of the petitioner's ability to pay the proffered wage, such as federal tax returns, audited financial statements, or annual reports from 2010 and 2011. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director of for issuance of a new, detailed decision.