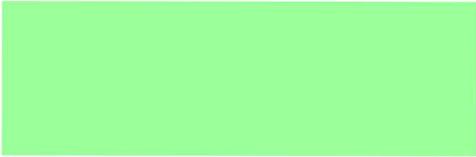




U.S. Citizenship  
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Services

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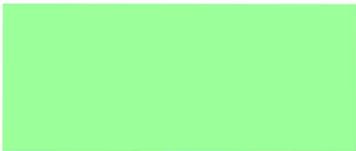


DATE: **JAN 14 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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.

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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a dairy farming business. On November 9, 2007 it filed a Form I-140, Immigrant Petition for Alien Worker, seeking to permanently employ the beneficiary in the United States as a director of livestock, and to classify him as an alien of exceptional ability, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, which was filed with the U.S. Department of Labor (DOL) on January 10, 2007, and certified by the DOL on February 9, 2007.

Section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A), provides that:

Visas shall be made available . . . to qualified immigrants . . . who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, arts, or business:

- (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
- (C) A license to practice the profession or certification for a particular profession or occupation;
- (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
- (E) Evidence of membership in professional associations; or
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If a petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the antecedent regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 596 F.3d at 1119-20. Only aliens whose achievements demonstrate "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian*, 596 F.3d at 1119-22.

While *Kazarian* involved a different classification than the one at issue in this proceeding, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian*, 596 F.3d at 1221, *citing Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

In the instant proceeding, the Chief Financial Officer (CFO) of [REDACTED] a subsidiary of the petitioner, submitted a letter with the Form I-140 petition, dated October 26, 2007, claiming that the beneficiary qualifies as an alien of exceptional ability because he satisfies at least three of the evidentiary categories listed under 8 C.F.R. § 204.5(k)(3)(ii). According to this letter, the beneficiary meets the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (D) because he has a series of diplomas and certificates that are equivalent to a bachelor of science degree in agricultural management from a U.S. college or university; over ten years of experience in the occupation of dairy farming; and a salary from the petitioner that exceeds by nearly \$10,000 the prevailing wage for the proffered position as determined by the DOL.

On March 31, 2008, the Director issued a Request for Evidence (RFE) in which the petitioner was requested to submit additional documentation to establish that the beneficiary meets three or more of the criteria under 8 C.F.R. § 204.5(k)(3)(ii) and thus qualifies for classification as an alien of exceptional ability. The petitioner responded with a brief from counsel and additional documentation addressing the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). In addition to the previous claims that the beneficiary fulfilled three of these criteria – (A), (B), and (D) – the petitioner asserted that the beneficiary also meets the other three criteria under 8 C.F.R. § 204.5(k)(3)(ii) – (C), (E) and (F) – because he has a license from the [REDACTED] and several letters from public and private sector individuals recognizing the beneficiary's work in dairy farming.

On June 23, 2008, the Director issued a decision denying the petition on two grounds: (1) The ETA Form 9089 does not demonstrate that the proffered position requires an alien of exceptional ability, and (2) the evidence of record does not establish that the beneficiary meets at least three of the antecedent criteria under 8 C.F.R. § 204.5(k)(3)(ii) to qualify for classification as an alien of exceptional ability.

With respect to first ground for denial, the Director noted that the ETA Form 9089 required either (a) a bachelor's degree in agricultural management (or a foreign educational equivalent) and five years of experience in the job offered or in the alternative occupation of dairy farm manager or owner, or (b) 16 years of experience and no education. Under these alternative scenarios the ETA Form 9089 required that an individual fulfill one of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (B), but not both. The Director also noted that the labor certification did not require any of the other criteria of "exceptional ability" set forth at 8 C.F.R. § 204.5(k)(3)(ii)(C) through (F). The Director concluded, therefore, that an alien of exceptional ability was not required for the proffered position under the terms of the labor certification. With respect to the second ground for denial, the Director determined that the documentation of record failed to establish that the beneficiary fulfilled any of the criteria of "exceptional ability" set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F).

The record shows that the appeal is properly filed, timely, and makes specific allegations of error in law and/or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal counsel cites a 1998 decision by the AAO in which a dairy farmer was found to be an alien of exceptional ability based on credentials similar to those of the beneficiary in this proceeding. In the 1998 case the petitioner and the beneficiary were one and the same – a self-employed dairy farmer seeking classification as an alien of exceptional ability and a waiver of the job offer requirement (and thus a labor certification) in the national interest. While the national interest waiver was denied, counsel notes that the dairy farmer was found to be an alien of exceptional ability based on three of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii). In particular, the dairy farmer had more than ten years of experience in the occupation; a permit from a state Department of Health allowing him to do business with dairy products; and several awards from government and industry organizations recognizing his achievements in the field. According to counsel, the beneficiary in the instant proceeding meets more of the criteria of "exceptional ability" under 8 C.F.R. § 204.5(k)(3)(ii) than the dairy farmer who met that classification in the AAO's decision in 1998.

The AAO is not bound in the instant proceeding by its 1998 decision discussed above. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions (like the one cited by counsel) are not similarly binding.<sup>1</sup> The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from the circuit where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Thus, the AAO's 1998 decision on the "exceptional ability" petition cited by counsel is not a precedent decision and is not binding on the AAO.

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<sup>1</sup> Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).

Instead, for the reasons previously discussed, the AAO will apply the test set forth in *Kazarian* in reviewing the Director's decision as to whether the beneficiary qualifies for classification as an alien of exceptional ability. In addition, the AAO must decide the threshold question of whether the terms of the labor certification require an alien of exceptional ability to perform the job.

**Does the Labor Certification Require an Alien of Exceptional Ability?**

The regulation at 8 C.F.R. § 204.5(k)(4) states, in pertinent part, that "the job offer portion of the individual labor certification . . . must demonstrate that the job requires . . . an alien of exceptional ability." In this case, the job offer portion of the labor certification is Part H of the ETA Form 9089, which sets forth the minimum education, training, and experience required for the proffered position.

- Boxes 4, 4-B, 6, 9, 10, 10-A, and 10-B state that a bachelor's degree in agricultural management or a foreign educational equivalent, plus five years of experience in the job offered (director of livestock) or the alternative occupation of dairy farm manager or owner, are required.
- Alternatively, Boxes 8 and 8-C state that no education and 16 years of experience are acceptable.
- Box 5 states that no training is required.
- Box 11 describes the job duties as follows: "Manages dairy farm: Plans, develops, and implements policies, procedures, and practices for operation of dairy farm to ensure compliance with company's or owner's standards for farm production, propagation of herd, and regulations of regulatory agencies. Directs and coordinates, through subordinate supervisory personnel, farm activities, such as breeding and rearing livestock, feeding and milking of cows, storage of milk, and sterilizing and maintaining facilities and equipment. Reviews breeding and milk production records to determine cows that are unproductive and should be sold. Inspects facilities and equipment to ensure compliance with sanitation standards, and to determine maintenance and repair requirements. Authorizes, requisitions, or purchases supplies and equipment, such as feed, disinfective and sanitation chemicals, and replacements for defective equipment. Secures services of veterinarian for treatment of herd or when cows are calving. Prepares farm activity reports for evaluation by management or owner."
- Box 14 (Specific skills or other requirements) states that five years of experience are required in (1) livestock nutrition, (2) manure and nutrients, (3) reproduction and herd health, and (4) facilities and equipment, and that "any suitable combination of education, experience and training will be acceptable to meet the minimum experience or educational requirements."

As discussed by the Director in his denial decision, the alternative minimum combinations of education and experience specified on the ETA Form 9089 (a bachelor's degree and five years of experience or 16 years of experience alone) satisfy just one, not two, of the six criteria utilized to determine "exceptional

ability" under 8 C.F.R. § 204.5(k)(3)(ii) – either (A) or (B). The ETA Form 9089 does not specify that any of the other criteria under 8 C.F.R. § 204.5(k)(3)(ii) – from (C) through (F) – are required for the job. On its face, therefore, the labor certification does not require the beneficiary to meet at least three of the criteria listed under 8 C.F.R. § 204.5(k)(3)(ii) to show that he qualifies for classification as an alien of exceptional ability.

Furthermore, the job duties described in Box 11 do not seem out of the ordinary for the occupation of livestock director. In fact, they dovetail closely with the information about Farmers, Ranchers, and Agricultural Managers in the DOL's Occupational Outlook Handbook (OOH), 2008-09 edition, which describes the "nature of the work," in pertinent part, as follows:

*Agricultural managers* manage the day-to-day activities of one or more farms, ranches . . . or other agricultural establishments. Their duties and responsibilities . . . focus on the business aspects of running a farm . . . .

. . . . Livestock, dairy, and poultry farmers and ranchers feed and care for animals and keep barns, pens, coops, and other farm buildings clean and in good condition. They also plan and oversee breeding and marketing activities. Both farmers and ranchers operate machinery and maintain equipment and facilities, and both track technological improvements in animal breeding and seeds, and choose new or existing products.

. . . .  
Agricultural managers usually do not plant, harvest, or perform other production activities; instead, they hire and supervise farm and livestock workers, who perform most daily production tasks. Managers may establish output goals; determine financial constraints; monitor production and marketing; hire, assign, and supervise workers; determine crop transportation and storage requirements; and oversee maintenance of the property and equipment.

OOH, 2008-09 Edition, pp. 46-47.

Since the foregoing description of farmers and agricultural workers in the OOH closely parallels the job duties described in the ETA Form 9089, the AAO concludes that the director of livestock position does not require "a degree of expertise significantly above that ordinarily encountered in the . . . business" of dairy farming, within the meaning of 8 C.F.R. § 204.5(k)(2). Therefore, the job offer portion of the labor certification is not in accord with 8 C.F.R. § 204.5(k)(2) because it does not demonstrate that the job requires an alien of exceptional ability. On this ground alone, the petition cannot be approved.

**Does the Beneficiary Qualify for Classification as an Alien of Exceptional Ability?**

As previously discussed, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) lists six different categories of evidence to show that an alien has exceptional ability in the sciences, arts, or business, and specifies that the alien must satisfy at least three of them to qualify for an immigrant visa based on exceptional ability in one of the fields.

**1. Does the evidence of record meet the plain language requirements of the regulations?**

8 C.F.R. § 204.5(k)(3)(ii)(A): An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The record shows that the beneficiary has a series of diplomas and certificates from agricultural vocational institutions in [REDACTED]. This documentation is qualifying evidence that meets the plain language requirements of the above regulation.

8 C.F.R. § 204.5(k)(3)(ii)(B): Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The record includes letters from former employers of the beneficiary – including one from the co-owners of the [REDACTED] dated April 19, 2008, and one from [REDACTED] in [REDACTED] dated April 20, 2008 – which show that the beneficiary has more than ten years of experience in dairy farming. This documentation is qualifying evidence that meets the plain language requirements of the above regulation.

8 C.F.R. § 204.5(k)(3)(ii)(C): A license to practice the profession or certification for a particular profession or occupation.

The record includes the photocopy of a [REDACTED] issued to the beneficiary by the [REDACTED] April 5, 2008, valid until July 5, 2008. Counsel asserts that the Director erroneously rejected the evidentiary weight of this license. The AAO does not agree. The beneficiary's license is not qualifying evidence because it does not meet the plain language requirements of the above regulation.

The license is narrow in scope, applying to three specific functions of milk production. The regulation, on the other hand, requires a license or certificate much broader in scope that authorizes an individual to practice a profession or work in an occupation. Furthermore, the beneficiary's license was only a 90-day temporary license, not a permanent license. It was not acquired by the beneficiary until after the immigrant visa petition was filed in November 2007, and it expired before the instant appeal was filed on July 23, 2008. For all of these reasons, the beneficiary's temporary license fails to meet the plain language requirements of 8 C.F.R. § 204.5(k)(3)(ii)(C).

8 C.F.R. § 204.5(k)(3)(ii)(D): Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

In his previously mentioned letter of October 26, 2007, submitted with the petition, the CFO of [REDACTED] claimed that the beneficiary had a current salary of \$76,211.00, which exceeded the prevailing wage of \$67,579 per year for Level 4 (highest paid) farmers, ranchers and other agricultural managers in the same geographical area. The documentation of record, however, does not corroborate the beneficiary's alleged salary. Photocopies of the beneficiary's Forms W-2, Wage and Tax Statements, for the years 2005-2007 show that he received "wages, tips, other compensation" of

\$22,394.25 in 2005 (for just under half a year's work, since he was hired on July 6, 2005), \$55,130.00 in 2006, and \$56,277.00 in 2007. The 2007 figure is approximately \$20,000 below the salary the CFO claimed to be paying the beneficiary that year.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

As reflected in his Wage and Tax Statements, the beneficiary's compensation figures for 2006 and 2007 (which represented full work years) averaged \$55,703.50. This figure was approximately \$12,000 below the prevailing wage for the highest paid farm managers in the beneficiary's geographical area. As evidence of the beneficiary's exceptional ability, therefore, the Wage and Tax Statements are fundamentally defective. Since they do not even show that the beneficiary was paid the prevailing wage of top tier farm managers, they cannot possibly demonstrate his exceptional ability. Thus, the Wage and Tax Statements in the record do not meet the plain language requirements of 8 C.F.R. § 204.5(k)(3)(ii)(D).

8 C.F.R. § 204.5(k)(3)(ii)(E): Evidence of membership in professional associations.

The record includes photocopies of the beneficiary's annual membership cards in the [REDACTED] for the years 2004 through 2007. The [REDACTED] is not a professional association within the meaning of the regulations applying to aliens of exceptional ability, 8 C.F.R. § 204.5(k). The applicable regulation defines "profession" as follows:

*Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

8 C.F.R. § 204.5(k)(2). The occupations listed in section 101(a)(32) of the Act include architects, engineers, lawyers, physicians, surgeons, and teachers in elementary and secondary schools, colleges, academies, and seminaries. Farmers are not included in that statutory list. Nor is a U.S. or foreign baccalaureate degree the minimum requirement for entry into the occupation of farming. While some farmers have such degrees, others do not. *See* the DOL's Occupational Outlook Handbook (OOH), 2008-09 Edition, p. 45, indicating that 2- and 4-year degrees were increasingly important for farm managers, but not yet standard, around the time the instant petition was filed.

Thus, a baccalaureate degree is not generally required to enter the occupation of farming, and there is no evidence that the [REDACTED] requires its members to have such a degree. The AAO concludes, therefore, that the [REDACTED] is not a professional association. Accordingly, the beneficiary's membership cards in that organization are not qualifying evidence because they do not meet the plain language requirements of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E).

8 C.F.R. § 204.5(k)(3)(ii)(F). Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The record includes letters to the beneficiary from a company, a state university, and a student organization thanking him for hosting tours of his dairy farm and praised his work in the industry, as well as from a veterinary clinic that provided services to the beneficiary and commended his business success. This documentation is qualifying evidence that meets the plain language requirements of the above regulation.

Thus, the petitioner has submitted qualifying evidence in three of the six categories in 8 C.F.R. § 204.5(k)(3)(ii) – (A), (B), and (F).

**2. Does the qualifying evidence establish that the beneficiary is an alien of exceptional ability?**

The AAO will now analyze the qualifying evidence in the respective categories, in accordance with 8 C.F.R. § 204.5(k)(2), to determine whether it demonstrates that the beneficiary has "a degree of expertise significantly above that ordinarily encountered in the . . . business" of dairy farming.

8 C.F.R. § 204.5(k)(3)(ii)(A): An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The evidence of record consists of 11 credentials awarded to the beneficiary, all in [REDACTED] during a 25-year time period from 1973 to 1998. They include (1) a diploma for a mechanical milking course from a practical school for stock and pasture farming in [REDACTED] dated March 21, 1973, which was part of a six-course program (the others were milking hygiene, beef herd observation, claw care-taking, calf raising, and rope and leather processing) completed by the beneficiary during the week of March 19-23, 1973; (2) a diploma for a course in herd delivery from the [REDACTED], dated February 8, 1979; (3) a diploma for herd obstetrician studies from a [REDACTED] in [REDACTED] dated February 15, 1983; (4) a diploma for competency on delivery of spraying in the agricultural sector from the Examining Organization of Organized Agriculture in 's [REDACTED], dated May 27, 1983; (5) a certificate from the State Continuing Agricultural Education in Zutphen, dated February 17, 1981, confirming that the beneficiary had completed a course in pasture land exploitation and feeding; (6) a certificate from the [REDACTED] dated March 21, 1989, confirming that the beneficiary had completed a course on housing and health management for meat pigs; (7) a diploma for passing the final exams of [REDACTED] [REDACTED] dated June 8, 1972; (8) a diploma for courses in welding for agricultural and yard building from the [REDACTED] dated March 9, 1978; (9) a diploma for a course in claw caretaking from the [REDACTED] [REDACTED] dated January 23, 1979; (10) a second certificate for another course in pasture land exploitation and feeding from the [REDACTED] [REDACTED] dated February 16, 1983; (11) a certificate from the [REDACTED] [REDACTED] for a two-week course in Intro Fertilization for Cattle Herds during the time period of November 10 to December 11, 1998.

According to an Academic Evaluation from The Trustforte Corporation (Trustforte) in New York City, dated April 22, 2008, the first six credentials listed above are equivalent to a bachelor of science degree in agricultural management from a U.S. college or university. The Trustforte evaluation assigns a U.S. credit equivalent to each course listed on the beneficiary's diplomas and certificates, the sum total of which is 123 credits. Trustforte notes that 120 credits is the minimum requirement for a four-year bachelor's degree program in agricultural management at a U.S. college or university.

However, there is no corroborating evidence, either on the credentials themselves or in other documentation such as official academic records, that the U.S. credit equivalents assigned by Trustforte to each course have any basis in fact. None of the credentials included in the Trustforte evaluation provides any information as to how long the various courses lasted, though two of the documents not specifically addressed by Trustforte indicate that the courses were quite short – a day or two in one case, two weeks in another. There is no evidence that the courses included in the Trustforte evaluation, even if augmented by the courses not included in the evaluation, added up to four years worth of studies, which is the standard length of U.S. baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Moreover, it does not appear that any of the institutions at which the beneficiary earned his diplomas and certificates is a college or university that grants academic degrees. All of the institutions appear to be vocational schools for agriculture.

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons discussed above, the AAO determines that the Trustforte evaluation has little probative value. It is not persuasive evidence that the beneficiary's agricultural credentials from vocational institutions in The Netherlands are equivalent to a bachelor of science degree in agricultural management from a U.S. college or university.

The OOH, published by the DOL's Bureau of Labor Statistics, stated the following about the educational requirements for farmers and agricultural managers in its 2008-09 Edition, published in January 2008 (two months after the instant petition was filed):

[T]he completion of a 2-year associate degree or a 4-year bachelor's degree at a college of agriculture is becoming increasingly important for farm managers and for farmers and ranchers who expect to make a living at farming. A degree in farm management or in business with a concentration in agriculture is important.

. . . . All State university systems have at least one land-grant college or university with a school of agriculture. Common programs of study include agronomy, dairy science, agricultural economics and business, horticulture, crop science, and animal science . . . .

Agricultural colleges teach technical knowledge of crops, growing conditions, and plant diseases. They also teach prospective ranchers and dairy farmers the basics of veterinary science and animal husbandry. Students also study how the environment is

affected by farm operations, for example, how the various pesticides affect local animals.

OOH, 2008-09 Edition, pp. 45-46.

As indicated above, self-employed farmers and agricultural managers in the United States often have academic degrees from colleges and universities. Therefore, even if the beneficiary's credentials were considered equivalent to a U.S. baccalaureate degree, or an associate's degree, they would not indicate an "exceptional ability" in the field of agriculture, or dairy farming in particular, because such degrees are increasingly common. In reality, the beneficiary has a series of vocational diplomas and certificates that would appear to be fairly standard credentials for dairy farmers in The Netherlands. As such, they do not indicate "a degree of expertise significantly above that ordinarily encountered in the . . . business," within the meaning of 8 C.F.R. § 204.5(k)(2), and they are not persuasive evidence that the beneficiary is an alien of exceptional ability in the field of dairy farming, in accordance with 8 C.F.R. § 204.5(k)(3)(ii)(A).

8 C.F.R. § 204.5(k)(3)(ii)(B): Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The letter in the record from [REDACTED] describes the beneficiary's work experience as follows:

For over twenty years, [REDACTED] worked 40 hours a week, fulltime, on our farm as Herdsman and Substitute Manager. His approximate dates of employment at our dairy were from May 1, 1974 until September 17, 1996.

[REDACTED] had many responsibilities during his time here. He managed the general care of a 180 cow dairy-herd and was responsible for its state of health, which he accomplished with careful attention to the herd's nutritional requirements and seeing that these were met. He managed their feeding, nutrients, water, herding, and grazing, as well as assigning other workers to help with these tasks. [REDACTED] watched the herd carefully for any signs of injury or illness, which he was then responsible for reporting to the owner or a veterinarian. He also managed the breeding and reproduction activities of the herd with efficiency and care. It was also his responsibility to make sure the buildings and facilities, including all equipment, of the farm were well kept and maintained.

. . . . Other important facts are that he managed to deliver Grade A milk, and the milk yield per cow has increased from 13,200 [to] 19,800 pounds.

The letter in the record from [REDACTED] describes the beneficiary's work experience as follows:

From February 16, 2001 until July 15, 2005, [the beneficiary] was self-employed full-time, by [REDACTED] and held the title of Owner / Manager of Operations during his tenure.

As the Owner / Manager of Operations, [REDACTED] oversaw and held ultimate responsibility for all dairy farm operations. His management of the dairy farm included the planning, developing, and implementing of policies, procedures, and practices for the operation of the dairy farm to ensure compliance with the company's standards for farm production, propagation of herd, and regulations of regulatory agencies. He also prepared farm activity reports and made production, financial, and marketing decisions.

To effectively manage personnel, [REDACTED] had authority to hire, fire, and promote the farm's employees. [He] directed and coordinated, through subordinate supervisory personnel, farm activities such as breeding and rearing livestock, heifer raising, feeding and milking of cows, storage of milk, and sterilization and maintenance of both the farm's equipment and all facilities. In addition, [REDACTED] reviewed breeding and milk production records to determine which cows were unproductive and should be sold.

His management of the herd extended to the nutrition of the livestock, as well as its nutrients and manure. Reproduction of the herd and its health were also managed by [REDACTED]. He inspected and managed facilities and equipment to ensure compliance with sanitation standards, as well as determined maintenance and repair requirements. He also authorized requisitions or purchased supplies and equipment, such as feed, medicine, disinfectant and sanitation chemicals, and replacements for defective equipment. In addition, [REDACTED] secured the services of veterinarians for cows with extended calving difficulties.

The duties and responsibilities described above, exercised by the beneficiary at two dairy farms, do not seem out of the ordinary for the occupation of farmer and/or agricultural manager. In fact, they dovetail closely with the previously discussed information about Farmers, Ranchers, and Agricultural Managers in the OOH's 2008-09 edition, which describes the "nature of the work," in pertinent part, as follows:

*Farmers and ranchers own and operate mainly family-owned farms. . . . Agricultural managers manage the day-to-day activities of one or more farms, ranches . . . or other agricultural establishments. Their duties and responsibilities . . . focus on the business aspects of running a farm . . . .*

Farmers, ranchers, and agricultural managers make many managerial decisions . . . . [They] monitor the constantly changing prices for their products . . . .

. . . . Livestock, dairy, and poultry farmers and ranchers feed and care for animals and keep barns, pens, coops, and other farm buildings clean and in good condition. They also plan and oversee breeding and marketing activities. Both farmers and ranchers operate machinery and maintain equipment and facilities, and both track technological improvements in animal breeding and seeds, and choose new or existing products.

. . . .

Agricultural managers usually do not plant, harvest, or perform other production activities; instead, they hire and supervise farm and livestock workers, who perform most daily production tasks. Managers may establish output goals; determine financial constraints; monitor production and marketing; hire, assign, and supervise workers; determine crop transportation and storage requirements; and oversee maintenance of the property and equipment.

OOH, 2008-09 Edition, pp. 46-47.

Since the foregoing description of farmers and agricultural workers in the OOH closely parallels the beneficiary's work experience at the [REDACTED] and the [REDACTED] the AAO concludes that the beneficiary's experience does not indicate "a degree of expertise significantly above that ordinarily encountered in the . . . business," within the meaning of 8 C.F.R. § 204.5(k)(2). Therefore, the beneficiary's experience is not persuasive evidence that he is an alien of exceptional ability in the field of dairy farming, in accordance with 8 C.F.R. § 204.5(k)(3)(ii)(B).

8 C.F.R. § 204.5(k)(3)(ii)(F): Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

As previously mentioned, the evidence of record includes four letters from a variety of entities. The first letter, dated August 30, 2001, is from [REDACTED]

[REDACTED] The letter thanked the beneficiary and his wife for the visit they hosted on August 27<sup>th</sup>, and stated that the company, whose core business is evaporated milk, was impressed by the "attention paid to protecting the quality of the milk" and "the good care of the facilities." The second letter, dated June 12, 2002, is from [REDACTED]

[REDACTED] The letter thanked the beneficiary and his wife for the recent tour they gave to the school's dairy science/production students, who "learned new concepts, reinforced old concepts," and were afforded the opportunity to "learn and experience the broader dairy industry." The third letter, dated February 6, 2003, is from the [REDACTED]

[REDACTED] It thanked the beneficiary and his wife for their recent tour, which "was the first time many of us had been on a large, modern dairy farm" and for the other more experienced participants "gave us additional insight into the dairy business." The fourth letter, dated April 28, 2008, is from [REDACTED]

[REDACTED] The letter stated that [REDACTED] had known the beneficiary since he came to the United States in February 2001, that the beneficiary had been a valued client over the years, and that the beneficiary had run a profitable dairy business.

The foregoing letters, while praiseworthy of the beneficiary, do not recognize any particular achievements or significant contributions to the dairy industry by the beneficiary. The tours of his farm, as described in the letters, appear to have been fairly standard and routine. The veterinarian's letter described the beneficiary's business as profitable. But there is no evidence that profitability represents a singular achievement by the beneficiary, or distinguishes his dairy farm in any particular way from others in the business. In the final analysis, the letters in the record do not indicate that the beneficiary has "a degree of expertise significantly above that ordinarily encountered in the . . . business," within the meaning of 8 C.F.R. § 204.5(k)(2). As such, they are not persuasive evidence

that the beneficiary is an alien of exceptional ability in the field of dairy farming, in accordance with 8 C.F.R. § 204.5(k)(3)(ii)(F).

Based on the foregoing analysis of the qualifying evidence, the AAO concludes that it fails to establish that the beneficiary meets the substantive criteria of exceptional ability under any of the three categories – (A), (B), or (F) – under 8 C.F.R. § 204.5(k)(3)(ii).

Thus, the petitioner has not established that the beneficiary meets any of the substantive criteria of exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F). Since the regulations require that the beneficiary meet at least three of these criteria to qualify for classification as an alien of exceptional ability in the sciences, arts, or business under section 203(b)(2) of the Act, the instant petition must be denied on this ground as well.

**Who is the Beneficiary's Intended Employer?**

Beyond the decision of the Director, the evidence of record raises a question as to whether the petitioner is the beneficiary's intended employer. While the ETA Form 9089 and the Form I-140 were both filed in 2007 by [REDACTED] and the ETA Form 9089 states that the beneficiary began working for [REDACTED] in July 2005, the three Wage and Tax Statements (Forms W-2) issued to the beneficiary for the years 2005, 2006, and 2007 all identify the beneficiary's employer as [REDACTED]. The companies have separate Federal Employer Identification Numbers (FEINs): [REDACTED]. In an "Independent Auditor's Report" by the certified public accounting firm [REDACTED]

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(2)... of the Act." The DOL regulation at 20 C.F.R. § 656.3 defines "employer" as follows:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, while [REDACTED] is the petitioner and claims to have hired the beneficiary more than two years before the petition was filed, the record shows that the beneficiary's actual employer throughout that time period was a subsidiary company. All of the beneficiary's wages were paid by the subsidiary, not the petitioner. Based on the evidence of record, therefore, the AAO concludes that the petitioner has failed to establish that it will be the beneficiary's employer. For this additional reason the petition cannot be approved.

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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, *supra*.

**Conclusion**

The petition is deniable on three grounds:

1. The labor certification, ETA Form 9089, does not demonstrate that the proffered position requires an alien of exceptional ability.
2. The record does not establish that the beneficiary meets at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) to qualify for classification as an alien of exceptional ability.
3. The petitioner has failed to establish that it intends to be the beneficiary's employer.

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