



**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **APR 29 2014**

OFFICE: NEBRASKA SERVICE CENTER

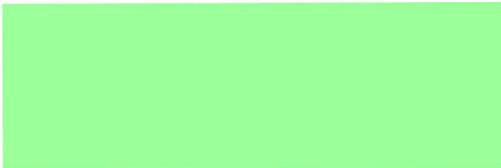
FILE: 

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. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on September 20, 2012. The petitioner filed two motions to the Nebraska Service Center: a motion to reopen and reconsider on October 17, 2012, and a motion to reconsider on December 12, 2012. The director dismissed the motion to reopen and reconsider on November 15, 2012 and dismissed the motion to reconsider on April 26, 2013. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded in accordance with the following.

The petitioner, [REDACTED] describes itself as an “IT Consulting Service.” It seeks to employ the beneficiary permanently in the United States as a “Programmer Analyst” pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), filed under the employer’s name, [REDACTED] that was approved by the United States Department of Labor (DOL). The director determined that the petition was submitted without a labor certification from the DOL for the petitioner, [REDACTED]. The director denied the petition accordingly and the petitioner filed a motion to reopen and reconsider. The director dismissed the petitioner’s motion to reopen and reconsider, stating that the petitioner had not demonstrated that the DOL had certified a labor certification in the petitioner’s name. The director also clarified that the director had not previously invalidated the labor certification. The petitioner filed a motion to reconsider and the director upheld the previous denial, stating that the petitioner had not provided any new evidence or established that the decision was incorrect based on the evidence in the record at that time.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), 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.

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. In addition, the DOL regulation at 20 C.F.R. § 656.3¹ states:

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

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

United States or the authorized representative of such a person, association, firm, or corporation.

(Emphasis added). The record reflects that [REDACTED] is the CEO and “authorized representative” of [REDACTED]. Accordingly, both ‘ [REDACTED] ’ and [REDACTED] individually meet the definition of “employer” under 20 C.F.R. § 656.3. However, the specific question at issue is whether the instant petition is supported by a valid labor certification where the name of the employer on the Form I-140 is the corporation, [REDACTED] and the name of the employer on the ETA Form 9089 is the corporation’s authorized representative, [REDACTED].

In the course of considering this issue in the instant appeal, the AAO submitted an inquiry with the DOL regarding the validity of the ETA Form 9089. On April 1, 2014, the DOL responded to the AAO and stated that it “was aware of the error [regarding the name listed as the employer on the ETA Form 9089, ‘ [REDACTED] ’ prior to certification, but could not alter the name once the application had been submitted into the system.”

In the instant matter, counsel references the DOL Board of Alien Labor Certification Appeals (BALCA) case, *HealthAmerica*, 2006-PER-00001 (July 18, 2006), for the proposition that typographical errors on the labor certification are not lawful grounds for denying certification of the ETA Form 9089. As stated above, the record reflects that the DOL was aware of the inadvertent mistake made on the ETA Form 9089 prior to certification. The ETA Form 9089 stated the same Federal Employer Identification Number (FEIN) as stated on the Form I-140, and the record reflects that this FEIN belongs to the petitioner, [REDACTED]. An employer must have a valid FEIN, which the DOL uses to verify whether an employer is a bona fide business. *See* 69 FR 77326, 77329 (Dec. 27, 2004). The record also demonstrates that the Form 9141, Application for Prevailing Wage Determination, the Job Order, and the advertisements submitted during the recruitment for the position offered were in the name of [REDACTED]. Therefore, potentially qualified candidates were apprised of the actual employer’s name. Both the ETA Form 9089 and the Form I-140 listed the same address as the employer’s address, and both forms list [REDACTED] as the President and CEO of the corporation. Therefore, the record reflects that the instant petition is supported by a valid labor certification as verified by the DOL.

However, the petitioner must also demonstrate its ability to pay the beneficiary’s proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The priority date in this matter is March 9, 2012.

In determining the petitioner’s ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the

² *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*,

petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record before the director closed on October 17, 2012 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return was not yet due, and the director did not address the petitioner's ability to pay the beneficiary's proffered wage. Therefore, the petition is remanded to the director for consideration of this issue. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director.³ Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The previous decisions of the director, dated September 20, 2012, November 15, 2012, and April 26, 2013 are 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 for issuance of a new, detailed decision.

736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

³ The AAO notes that the record contains an unaudited profit and loss statement for 2011, which precedes the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.