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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 2 3 2014

OFFICE: TEXAS 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 (AAO) 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,

Elizabeth M'Cormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn and the case remanded for further consideration and a new decision by the Director.

The petitioner describes itself as a custom computer programming company. It seeks to employ the beneficiary permanently in the United States as a business analyst and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This statutory provision provides for the granting of immigrant classification to aliens of exceptional ability[1] and members of the professions holding advanced degrees[2] or their equivalent whose services are sought by an employer in the United States.

The Form I-140, Immigrant Petition for Alien Worker, was filed on September 13, 2012. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the U.S. Department of Labor (DOL) on May 2, 2012, and certified by the DOL on August 22, 2012 (labor certification). The petitioner also submitted copies of the beneficiary's educational credentials and its last three pay statements to the beneficiary to establish its ability to pay the proffered wage.

On September 25, 2012, the Director issued a Request for Evidence (RFE). In the RFE the Director incorrectly stated that the priority date of the instant petition was January 29, 2007.[3] In accordance with the regulation at 8 C.F.R. § 204.5(k)(2) which requires the petitioner to establish its ability to pay the proffered wage from the priority date onward, the Director requested the petitioner to submit either (1) its federal income tax returns, or (2) its annual reports, or (3) its audited financial statements, for every year from 2007 up to the present. The Director also requested copies of the Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, or pay vouchers issued by the petitioner to the beneficiary, for any and all years he was employed from 2007 up to the present. In

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[1] In this case the petitioner is requesting a visa for the beneficiary as an advanced degree professional, not as an alien of exceptional ability.

[2] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

[3] The priority date of a petition is the date the underlying labor certification application was received for processing by the DOL.

addition, the Director requested proof of the beneficiary's work experience in the form of letter(s) from current or previous employer(s).

On November 15, 2012, the petitioner responded to the RFE with a letter from counsel, dated September 28, 2012, and additional evidence. Counsel stated that the priority date of the instant petition is May 2, 2012, not January 29, 2007, which was the date a previous labor certification application was filed on behalf of the beneficiary by a previous petitioner – In addition, counsel stated that the beneficiary worked for from June 2004 to August 2011.[4] In November 2011 the beneficiary started working for the instant petitioner, which filed its own labor certification application on May 2, 2012 (that supports the instant petition. The priority date in this proceeding is May 2, 2012. Counsel correctly asserted that the petitioner should not be required to submit evidence of its ability to pay the proffered wage ($71,490 per year) before that date. Nevertheless, the petitioner submitted copies of the Forms W-2 the beneficiary received from for each of the years 2007-2011, as well as the beneficiary's last three pay statements from the instant petitioner in 2012. In addition, the petitioner submitted a letter from the president of stating that the beneficiary was employed by as a business analyst from June 1, 2004 to October 30, 2011.

On November 29, 2012, the Director issued a decision denying the instant petition. After stating once again that the priority date of the instant petition is January 29, 2007, the Director denied the petition on the ground that "the petitioner did not submit one of the three required types of initial evidence enumerated in 8 C.F.R. § 204.5(k)(2) [annual reports, federal tax returns, or audited financial statements]" to establish its ability to pay the proffered wage "for 2012."

The petitioner filed a timely appeal on December 24, 2012, which was supplemented by a brief from counsel and supporting materials. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The priority date of the instant petition is May 2, 2012, not January 29, 2007. Therefore, the petitioner is required to submit evidence of its ability to pay the proffered wage since that date in 2012. The regulation at 8 C.F.R. § 204.5(k)(2) identifies annual reports, federal tax returns, and audited financial

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[4] filed a Form I-140 petition on August 30, 2007 (Receipt No. seeking EB-3 (professional) classification for the beneficiary as a junior market analyst. The petition was approved on August 30, 2008. On February 19, 2013, the Director revoked the approval of the petition, and invalidated the labor certification, on the ground that the petitioner and the beneficiary failed to reveal the beneficiary's status as an officer of during the labor certification process, which constituted willful misrepresentation of a material fact. On March 25, 2013, filed a Form I-290B, Notice of Appeal or Motion, which was treated as an appeal and forwarded to the AAO. On September 4, 2014 sent a letter to the AAO requesting that its appeal be withdrawn since it no longer has any relationship with the beneficiary. In accordance with this request, s appeal of the revocation decision is being dismissed in a separate decision.

statements as the primary types of evidence that should be submitted as evidence of ability to pay. These documents were not available in this case because the petitioner's response to the RFE was submitted before the end of the year – on November 15, 2012.

While the prescribed evidence must be submitted, if available, the director should also examine whether the petitioner employed and paid the beneficiary. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner indicates that it employed the beneficiary throughout 2012 and the record contains copies of the pay statements that the petitioner issued to the beneficiary from June through October 2012. The director did not consider this documentation.

Therefore, the Director's decision of November 29, 2012, will be withdrawn, and the case will be remanded for further consideration of the petitioner's ability to pay the proffered wage. At his discretion, the Director may also consider other issues deemed relevant, such as the beneficiary's educational and experience qualifications for classification as an advanced degree professional. The Director may request additional evidence, if needed, and afford the petitioner a reasonable time period for response. The Director will then review the entire record and enter a new decision.

ORDER: The Director's decision of November 29, 2012 is withdrawn. The petition is remanded for further consideration, in accordance with the foregoing discussion, and the entry of a new decision.