

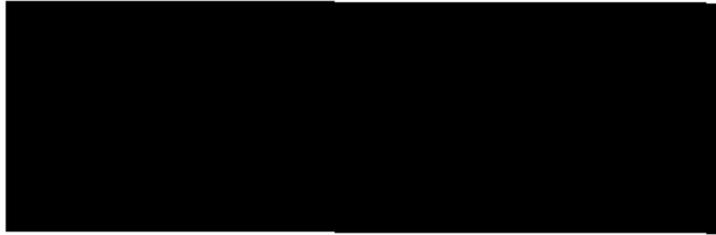
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



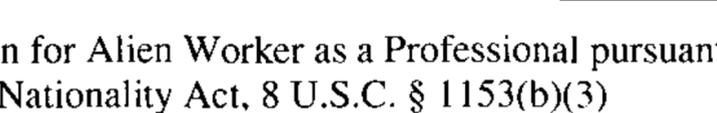
**U.S. Citizenship
and Immigration
Services**



B6

Date: **AUG 08 2012**

Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional pursuant to Section 203(b)(3) of the
Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a fiscal technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to demonstrate that it had the continuing financial ability to pay the proffered wage and denied the petition, accordingly.¹

The AAO conducts appellate review² on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Beyond the decision of the director, the AAO will dismiss this appeal because the labor certification does not support the visa classification sought. The determination of whether a worker is a professional

¹The 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

On appeal, the petitioner, through counsel, asserts that the ability to pay the proffered wage has been established. Counsel also requested an additional thirty (30) days to submit additional evidence and/or a brief. Counsel specifically requested to supplement the record with the petitioner's 2009 federal income tax return. The appeal was dated July 12, 2010. The 2009 and 2010 federal tax returns were submitted more than 22 months later. Because the appeal will be dismissed for the reason set forth above, substantial review of the petitioner's ability to pay the proffered wage has not been conducted. It is noted that the petitioner appears to be structured as a limited liability company and has submitted copies of partnership returns for 2009 and 2010 (Form 1065). Although Schedule B-1 lists two members owning 50% or more of the entity (75% each), it is unclear how the two listed individuals could own collectively 150%. Further, Schedule K-1 of both returns lists three limited partners sharing a 50%, 25% and 25% share of the entity's profit, loss, and capital. In future filings, the petitioner should clarify this arrangement.

² The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

or skilled worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.³ The regulation at 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part that the “job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.”

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), also provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section H of the ETA Form 9089 sets forth the minimum requirements of the certified position as only two years of experience in the job offered⁴ or in a related occupation as one with auditing duties. No

³ The regulation at 8 C.F.R. § 204.5(l) also states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

⁴ The Form I-140, Immigrant Petition for Alien Worker was filed on April 19, 2010. Part 5 of the petition indicates that the petitioner was established in 1999 and employs 80 workers. There is no indication that the petitioner has employed the beneficiary. The ETA Form 9089 states that the position of fiscal technician requires 24 months (2 years) of work experience in the job offered or 24 months in an alternate occupation defined as “positions with auditing duties.” The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides that any requirements for training or experience must be supported by letters from trainers or employers identifying the trainer or employer by name, title and address and providing a description of the training or experience received.

It is noted that Part K of the ETA Form 9089 requests that all employment for the past three years be listed, as well as any experience that qualifies the alien for the position for which the petitioner is seeking certification. The first prior employer is that of [REDACTED] in Boca Raton, Florida, for which the beneficiary states that he is the [REDACTED]. He also claims that this employment began on April 1, 2007 and has not terminated. Part K of the ETA Form 9089 where this employment is listed claims that the beneficiary is employed at his company 40 hours per week. This raises a question as to the intent of the beneficiary and the petitioner as to whether the position of “fiscal technician” as presented in the ETA Form 9089 is actually a *bona fide* full-time, permanent job offer. The petitioner should address this issue in any further filings.

The other prior job listed on Part K of the ETA Form 9089 states that the employer was [REDACTED] located in Deerfield Beach, Florida. It is claimed that the

formal education or training is required. As the visa classification sought on the Form I-140 petition designated the professional category (paragraph e), the Form I-140 petition is not approvable because it is not supported by the appropriate ETA Form 9089. In order to be classified as a professional, the ETA Form 9089 must require a minimum of a baccalaureate degree pursuant to section 203(b)(3)(A)(ii) of the Act.

Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

beneficiary was employed by this entity and was its [REDACTED] from March 1, 2002 to April 1, 2007. This employment is claimed to be the source of the beneficiary's qualifying two years of full-time experience as a fiscal technician or in an alternate occupation as "position with auditing duties." The description of this position, which is self-employment, is set forth on the ETA Form 9089 as involving customer service, as well as accounting duties. The beneficiary's employment verification letter is provided by his accountant in a letter dated December 29, 2009. Although the letter states that the beneficiary was employed 40 hours per week, it is unclear, particularly since he was involved in "all aspects of the business" including work schedules of the employees and customer service, whether this self-employment fulfilled the two full-time years of experience as a fiscal technician or in a position with auditing duties. In view of the certified job opportunity, the AAO takes this to mean an alternate occupation where auditing duties were the predominant duties of the position. The petitioner should address this issue in any further filings.