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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

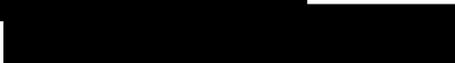


**U.S. Citizenship
and Immigration
Services**



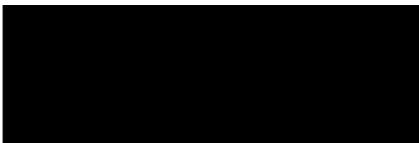
B6

DATE: **JUN 19 2012** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the employment-based immigrant visa petition. The director also dismissed the petitioner's subsequent motion to reopen and reconsider the decision. The petition 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 The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.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 an advertising and communications business. According to the petition, the petitioner seeks to employ the beneficiary permanently in the United States as a bookkeeper. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ An ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL), accompanied the petition.

The director's decisions denying the petition and dismissing the motion concluded 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 petition.

The record shows that the appeal is properly filed 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on September 12, 2005. The proffered wage as stated on the ETA Form 9089 is \$27,685 per year.

The record indicates the petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065.³ On the petition, the petitioner claimed to have been established in 2003 and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on June 7, 2006, the beneficiary did not claim to have worked for the petitioner.

Upon review of the entire record, including new evidence submitted on appeal and in response to the AAO's Request for Evidence, and considering the totality of the circumstances in the instant case,⁴ the AAO concludes that the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Accordingly, the director's decision on this issue is withdrawn.

However, beyond the decision of the director, it appears that the petitioner no longer intends to employ the beneficiary in the offered position. As is noted above, the instant petition is for a bookkeeper with a proffered wage of \$27,685 per year. The labor certification states that the offered position only requires 24 months of experience. The assigned O*NET code for the offered position is 43-3031.00, Bookkeeping, Accounting, and Auditing Clerks. The petitioner paid the beneficiary \$19,676.00 in 2008 and then \$102,199.92 in 2009 and \$101,271.70 in 2010. This is over three times the proffered wage. The petitioner is currently employing the beneficiary in H-1B status as an Accounting Business Analyst at a wage of \$120,000 per year. The job description on the Form I-129 states that the beneficiary manages the company's financial matters. The petitioner has also filed a new labor certification and petition for the beneficiary for the position of Accounting and Business Analyst, O*NET code 13-2011.00, Accountants and Auditors. The offered position requires a bachelor's degree and 24 months of experience. The requested preference classification is for a professional.

³ An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

⁴ *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Therefore, it appears that the petitioner no longer intends to employ the beneficiary in the position of bookkeeper. If this is the case, then the petition is moot, and the petitioner's new petition should be adjudicated.

The AAO will withdraw the decision and remand the case to the director to determine whether or not the petition is moot and to 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.