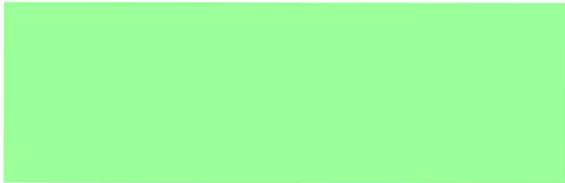




U.S. Citizenship
and Immigration
Services

(b)(6)



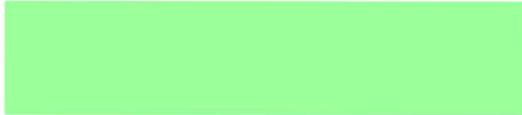
Date: **AUG 09 2013**

Office: NEBRASKA 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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting 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 beauty supply firm. It seeks to employ the beneficiary permanently in the United States as a buyer. 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 establish that the labor certification supported the visa classification sought.

The AAO conducts appellate review¹ 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).

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.

The determination of whether a worker is a professional 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.² 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 H of the ETA Form 9089 sets forth the minimum requirements of the certified position as only a high school education and twenty-four month (two years) of experience in the job offered or in a related occupation defined as retail clerk or business manager. As the visa classification sought on the Form I-140 petition designated the professional category (paragraph e), the Form I-140 petition is not

¹ 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.

² 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.

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.

On appeal, the petitioner submits another Form I-140, Immigrant Petition for Alien Worker and asserts that the original designation requested for a third preference professional was a typographical error. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. The AAO cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner which, as noted above designated a third preference professional. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under a lesser classification.

Based on the foregoing, the record failed to establish that the labor certification supports the visa classification sought.³

Beyond the decision of the director, the record contains no evidence of the petitioner's ability to pay the proffered wage covering the May 1, 2012, priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires the submission of federal tax returns, audited financial statements, or annual reports. The petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date,⁴ 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); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). For this additional reason, the appeal will be dismissed. In any further filings, the petitioner must submit evidence of its ability to pay the proffered wage from the priority date onward.

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.

³ It is noted that the beneficiary and the petitioner's president share the same surname. Although a common name in the beneficiary's country of origin, the petitioner should make clear in any further filings whether there is a familial relationship by blood or marriage to any degree. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Cal. 2001); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts.)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.