



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **MAY 20 2013** Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) denied the employment-based immigrant visa petition and dismissed the petitioner's motion to reopen and motion to reconsider. The petitioner has appealed that decision to the Administrative Appeals Office (AAO). The appeal will be sustained and the petition will be approved.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. He denied the petition accordingly.

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

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is April 26, 2010, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d). The Form I-140, Immigrant Petition for Alien Worker, was filed on December 10, 2010.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. It is supported by counsel's brief, the petitioner's 2010 and 2011 federal tax returns, and the beneficiary's Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements for 2010 and 2011 and his earnings statements for the period 2010 to 2012.

As set forth in the director's decision of May 25, 2012 and his subsequent dismissal of the petitioner's motions to reopen and reconsider on September 11, 2012, the single issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Concerning the petitioner's ability to pay the proffered wage, 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

The ETA Form 9089 in the record reflects a priority date of April 26, 2010, and a proffered wage of \$46,571. Therefore, for the petitioner to meet the requirements of 8 C.F.R. § 204.5(g)(2), it must establish a continuing ability to pay the proffered wage of \$46,571, beginning April 26, 2010, and continuing until the beneficiary is able to adjust status to permanent residence. To meet this evidentiary burden, the petitioner, on appeal, has submitted its 2010 and 2011 federal tax returns, as well as the beneficiary's IRS Form W-2 Wage and Tax Statements for 2010 and 2011, which establish that he was in the petitioner's employ during each of these years and paid the proffered wage. We note that, as of this date, 2011 is the most recent year for which the petitioner is able to submit its federal tax return.

Having reviewed the financial records submitted on appeal, as well as the evidence previously provided, we find that the petitioner has established a continuing ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). Accordingly, the appeal will be sustained and the petition will be approved.

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, the petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.