

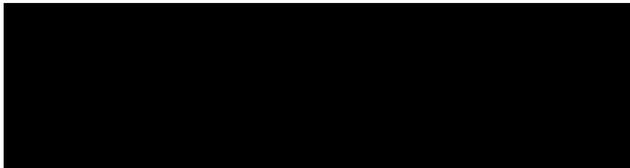


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



JAN 29 2003

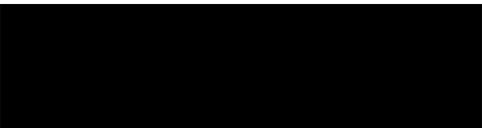
File: EAC 01 172 55457 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care provider. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group 1.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), 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 or seasonal nature, for which qualified workers are not available in the United States.

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.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) on April 16, 2001 for classification under Section 203(b)(3)(A)(i) of the Act as a physical therapist. Aliens who will be employed as physical therapists are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. 656.10 with respect to which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

20 C.F.R. 656.10 provides in pertinent part that an employer shall apply for a labor certification for a Schedule A occupation by the

filing of the Application for Alien Employment Certification (Form ETA 750) in duplicate with the appropriate Immigration and Naturalization Service office.

Form ETA 750 certifications shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. 656.20(g)(3).

Eligibility in this matter hinges on the petitioner's ability to pay the proffered wage, \$48,000 per year, on the date of the filing of the instant I-140, and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. 204.5(g)(2).

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (herein RFE) of September 9, 2001, the director required the petitioner's 2000 federal income tax returns and Forms W-2 to show wage payments to the beneficiary in 2000.

In response to the RFE, counsel submitted the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. Counsel averred that the petitioner had not employed the beneficiary.

The director found ordinary income on the federal tax return for 2000, submitted by a copy without signatures, to be \$28,352, and net current asserts from Schedule L thereof, to be \$26,803, both less than the proffered wage. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits a brief interpreting the petitioner's letter to the director dated February 25, 2002 and states,

... First, ... if the petitioner could pay the services of therapists temporarily engaged at higher rates, then it could easily pay [the beneficiary] who would ... get comparatively lower, although the legally allowed and approved, salaries...

Counsel advises that the beneficiary will replace unspecified workers. The record, however, does not name these workers, state their wages, or provide evidence that the petitioner replaced

them. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary upon the filing of the I-140 on April 16, 2001 and continuing to the present.

The petitioner and counsel also state that temporary workers will cost more than permanent workers because of an employment agency fee, but the record has no factual basis for this proposition.

Counsel continues,

Secondly, if [the beneficiary], along with other therapists that petitioner desire [sic] to hire for its expansion plans, would be given the opportunity to work for petitioner under this I- [1]40 petition which is now up for your approval, the business of petitioner would be bolstered and its income significantly augmented and enhanced. This would subsequently reinforce the financial stature of the company and strengthen its capacity to pay its employees.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

Counsel further contends that the petitioner plans to hire other therapists and that they will, subsequently, reinforce the financial stature of the company. To the contrary, Form I-140 states that the petitioner is filing no other petitions with this one and that this one is not a new position. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date, in this instance, the filing date of the Form I-140. In addition, the petitioner must demonstrate the financial ability continuing

until the beneficiary obtains lawful permanent residence. See Matter of Great Wall, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. 204.5(g)(2). 8 C.F.R. 103.2(b)(1) and (12).

After a review of the federal tax return and representations of the petitioner and counsel, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.