

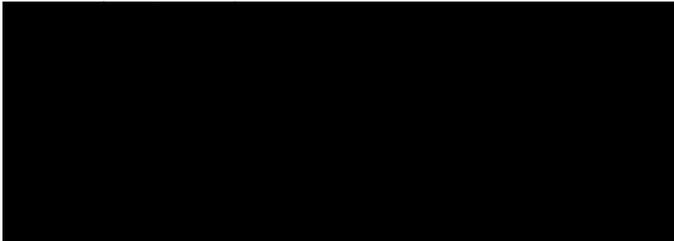
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U.S. Citizenship
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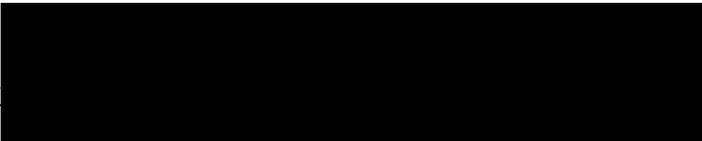


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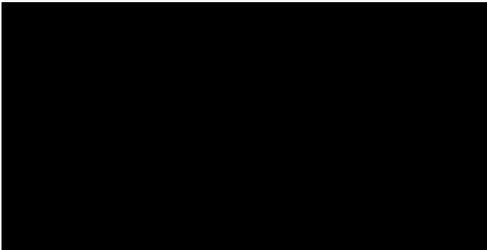
FILE: WAC 02 214 50306 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

for 
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. The petitioner is a rehabilitation center. It seeks to employ the beneficiary as a physical therapist. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel submits a brief and asserts that the petitioner is able to pay the wage.

Section 203(b)(3)(A)(i) of 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. 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.

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

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. 204.5(d). Here, the request for labor certification was accepted on June 20, 2002. The proffered salary as stated on the labor certification is \$18 per hour, which equals \$37,440 per year.

With the petition, counsel submitted a letter from the petitioner's owner stating that the petitioner employed over twelve employees and that it was able to meet its payroll needs when due. Counsel also submitted evidence of the beneficiary's education and professional licenses from the Philippines and the State of Illinois. This documentation was considered insufficient by the director, and, on November 19, 2002, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage in the form of copies of annual reports, federal tax returns, audited financial statements or original computer printouts from the Internal Revenue Service (IRS) for the years 2001 to present. The director also requested evidence of the beneficiary's experience, copies of the beneficiary's college transcripts, and a copy of the beneficiary's license for the state of intended employment.

In response, counsel submitted a copy of the beneficiary's California Physical Therapist license, a copy of the beneficiary's college transcripts, a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S

Corporation, and a copy of the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2002. The federal tax return for 2001 reflected an ordinary income of \$16,313 and net current assets of \$33,892.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 19, 2003, denied the petition.

On appeal, counsel provides a copy of a payroll check for the beneficiary and a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, filed with the IRS after the petitioner's response to the director's November 19, 2002 request for additional documentation. The federal tax return for 2002 reflects an ordinary income of \$45,903 and net current assets of \$33,038.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the beneficiary did not begin working for the petitioner until March of 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the present case and for the time of filing the petition, the petitioner's 2002 federal tax return shows an ordinary income of \$45,903. This amount is more than enough to pay the proffered wage. Therefore, the petitioner has overcome the basis of the director's decision.

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 met that burden.

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