



U.S. Citizenship
and Immigration
Services

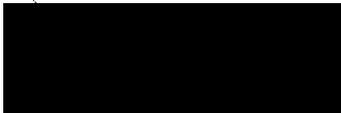
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FILE: WAC 02 21051559 Office: CALIFORNIA SERVICE CENTER Date: **NOV 10 2005**

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:

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.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The previous decision of the director based on the petitioner's ability to pay the proffered wage will be withdrawn. The petition is remanded to the director for further consideration of the petitioner's posting notice.

The petitioner is a senior care for skilled nursing facility and a home health agency. The petitioner states it has a gross annual income of \$5,734,607 on its visa petition. It seeks to sponsor the beneficiary in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a statement. Although counsel states on the I-290B form that he will send a brief or evidence to the AAO within 30 days, the AAO has received no further materials. Therefore, the instant petition will be examined based on the record as presently constituted.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a physical therapist. Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as physical therapists must possess all the qualifications necessary to take the physical therapist licensing examination in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification 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).

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is June 17, 2002. The beneficiary's salary as stated on the labor certification is \$34.24 per hour, (and time and a half for overtime), which equates to \$71,219.20 per annum, based exclusively on the basic rate of pay.

In support of the petition, the petitioner submitted a letter from [REDACTED] dated April 15, 2002. [REDACTED] stated that the petitioner had been in operation since 1955, and currently had a total of 230 employees. [REDACTED] added that the petitioner's gross annual income in 2001 amounted to \$5,734,607.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage as of the priority date, on October 11, 2001, the director specifically requested that the petitioner submit evidence such as copies of annual reports, federal tax returns or audited financial statements. The director stated that if the petitioner had one hundred or more workers, the petitioner could instead provide a statement from a financial officer that established the petitioner's ability to pay the proffered wage. The director stated that evidence submitted should be from 2000 to the present, and that all schedules and tables should accompany the submitted tax returns. Finally the director asked the petitioner to submit the beneficiary's W-2 Forms from the year 2001 to the present.

In response, the petitioner submitted a Form 990 Form of Organization Exempt from Income Tax for the tax year 2001. The petitioner also submitted copies of the beneficiary's W-2 Forms for 2001. This form indicated net assets or fund balances at the end of the year of -\$2,363,541. On Part III, Statement of Program Service Accomplishments, the petitioner's primary program services were identified as two long term care and two retirement facilities offering skilled nursing care, rehabilitation services, activities and personal care assistance. The petitioner resubmitted the letter from [REDACTED] Director of Finance, as to the petitioner's business operations, and employees. The petitioner also submitted three W-2 Forms for the beneficiary for the year 2001. These forms indicated the beneficiary earned \$1,024 while working for [REDACTED]; \$43,647.31 while working for [REDACTED]; and \$13,703 while working for [REDACTED].

The director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and, on January 23, 2004, the director again requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its federal income tax returns for the years 2002 and 2003. The director also asked the petitioner to explain whether the three companies from which the beneficiary had received W-2 Forms were the same company. If the three businesses were the same company, the director asked the petitioner to explain why the Employee identification numbers were different.

In response, counsel submitted a letter from the beneficiary that stated the three companies listed on his W-2 forms were not the same company, and that the beneficiary did not work for the petitioner. The beneficiary stated that he did not have any W-2 forms from the petitioner. The petitioner also submitted a Form 990 for 2002 that indicated net assets of \$713,324.

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 May 12, 2004, denied the petition. The director stated that the petitioner did not submit its federal tax return for the year 2003 as requested by CIS. The director then stated that as a result, the petitioner had failed to show sufficient financial viability to warrant or support a permanent fulltime position.

On appeal, counsel states that the petitioner has over 100 employees and has submitted a letter signed by the director of finance verifying that the company has the ability to pay the proffered wage. Counsel cites to 8 C.F.R. § 204.5(g)(2), that states the director may accept a statement from a financial officer of the organization to establish the petitioner's ability to pay the proffered wage. Counsel states that the petitioner is exempt from income tax, subsequently it files Form 990 and has revenues in excess of \$7 million. Finally counsel states that the petition should not be denied because the petitioner does not have its 2003 tax returns available. Counsel submits a letter from [REDACTED] dated June 10, 2004. This letter states that the petitioner has been granted an extension on the filing of their 2003 tax return which will be filed in November 2004. [REDACTED] states that due to a turnover in staff and a relocation of office functions, he was unable to locate the IRS notification letter that informed the petitioner of the extension.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure 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. Texas 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With regard to the petitioner's 2001 Form 990, Part IV Balance Sheets, on page three, examines the petitioner's total assets and liabilities. The total net assets or fund balances based on the petitioner's assets and liabilities is noted on line 73 as -\$2,363,541. Although the federal income tax return states that the petitioner

provides services for four facilities, there is no further breakdown on the individual revenues or liabilities of the individual facilities. With regard to tax year 2002, on Part IV Balance Sheets, on page three, the total net assets or fund balances based on the petitioner's assets and liabilities are noted on line 73 as \$713,324. Based on the petitioner's financial resources as documented by its federal tax Forms 990, and the fact that CIS computer records reflect no further I-140 petitions being submitted by Sunset Haven, Inc., it appears that the petitioner did not have sufficient net assets to pay the proffered wage in 2001. However, the petitioner's Form 990 for 2002 establishes that the petitioner has sufficient total net assets or fund balances in that year to pay the proffered wage of \$71,219.20. Nevertheless, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not shown the ability to pay the proffered wage during the salient portion of 2001 and to the present day based on its total net assets or fund balances.

Nevertheless, counsel submitted with the initial petition and in response to the director's first request for further evidence, a letter from the petitioner's financial director that states it has 230 employees and it is capable of paying the proffered wage. On appeal, the petitioner submitted a second letter dated June 10, 2004, from [REDACTED], Chief Financial Officer, that states the petitioner has over 100 employees. In general, 8 C.F.R. 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." In the instant petition, the I-140 petition identified the number of the petitioner's employees as 230. Mr. Nick Sherg, the original financial officer for the petitioner, and [REDACTED] a second financial officer for the petitioner, have been consistent in their further assertions that the petitioner has over 100 employees. The petitioner appears to have fulfilled the regulatory criteria outlined in 8 C.F.R. 204.5(g)(2). Therefore the petitioner has established that it has the ability to pay the proffered wage in both 2001 and 2002. The petitioner has established that it had the continuing ability to pay the proffered wage as of the priority date and onward. Therefore the director's decision with regard to the petitioner's ability to pay the proffered wage is withdrawn.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*. 345 F.3d 683; *see also Dor v. INS*, 891 F.2d at 1002 n. 9. Since the director overlooked this issue, the AAO has examined it on appeal and determined that the posting notice is deficient.

Under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains a notice in response to the director's request for evidence which states the notice was posted in two different locations on the job premises; however, the record is not clear as to whether the petitioner referred to its offices at [REDACTED] or at the proposed employment location, [REDACTED]. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.¹ The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s) and the dates the notice was posted. Although the petitioner has overcome the director's denial of the petition based on the petitioner's inability to pay the proffered wage, neither the petitioner nor the director has addressed the issue of whether the petitioner properly posted the posting notice. In view of the foregoing, the petition will be remanded to the director for further consideration of whether the petitioner satisfactorily met the regulatory criteria for posting notices outlined in 20 C.F.R. § 656.20. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ See the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); see also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).