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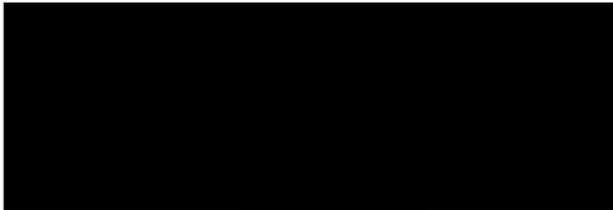
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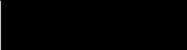
U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

APR 25 2006

EAC 03 215 51768

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an outpatient rehabilitation center. It seeks to employ the beneficiary permanently 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(a), commonly referred to as Schedule A. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on June 27, 2003. The proffered wage as stated on the Form ETA 750 is \$1,700 per week, which equals \$88,400 per year.

On the petition, the petitioner stated that it was established during August of 2001 and that it employs eight workers. The petitioner further stated that its gross annual income is \$1,400,000. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since October 2002.

In support of the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on September 3, 2003, the Vermont Service Center requested evidence pertinent to that ability.

Consistent with 8 C.F.R. § 204.5(g)(2), the service center instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested the petitioner's 2002 W-3 transmittal, its Form 941 Employer's Quarterly Federal Tax Returns, and, if it employed the beneficiary during 2002, the Form W-2 Wage and Tax Statement showing the wages it paid to her during that year.

In response, counsel submitted (1) the petitioner's 2002 W-3 transmittal, (2) the petitioner's Form 941 quarterly returns for the last three quarters of 2002,<sup>1</sup> (3) a 2002 W-2 form, (4) a letter from counsel dated November 21, 2003, (5) the petitioner's<sup>2</sup> 2002 Form 1065 U.S. Return of Partnership Income, and (6) a letter, dated November 12, 2003, from the petitioner's accountant.

The W-3 transmittal submitted shows that during 2002 the petitioner paid total compensation of \$138,974.44. The W-2 form submitted shows that the petitioner paid the beneficiary \$9,570.96 during 2002. Counsel's letter states that, as was previously asserted on the Form ETA 750B, the beneficiary began working for the petitioner during October of 2002. The petitioner's Form 941 quarterly returns show that the petitioner paid total wages of \$29,435.22, \$22,063.86, and \$49,227.02 during the last three quarters of 2002, respectively.

The 2002 tax return shows that the petitioner is a limited liability company (LLC), that it began operations on August 29, 2001, and that it reports taxes pursuant to cash convention and the calendar year. During 2002 the petitioner reported a loss of \$167,469 as its ordinary income. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's accountant's November 12, 2003 letter states that the petitioner's loss during 2002 was due to its being in a start-up phase during that year and that the petitioner now has the ability to pay the proffered wage.

The acting 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 March 24, 2004, denied the petition. The acting director acknowledged that the petitioner had paid the beneficiary a portion of the proffered wage during 2002, but noted that the petitioner's tax return did not evince the ability to pay the remainder. The acting director declined to find that the accountant's November 12, 2003 letter, absent supporting evidence, was sufficient to demonstrate that ability.<sup>3</sup>

On appeal, counsel submits (1) a letter, dated April 6, 2006, from the petitioner, (2) documents related to the petitioner's use of a contract physical therapist provided by a staffing service, (3) a copy of the beneficiary's

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<sup>1</sup> Although the acting director stated in the decision of denial that the petitioner submitted four Forms 941 this office is only able to find three in the record.

Although the taxpayer named on that return is [REDACTED] counsel also provided a Registration of Alternate Name issued by the New Jersey Department of the Treasury.

<sup>3</sup> This office concurs that the petitioner's accountant's November 12, 2003 letter is insufficient, absent supporting evidence, to demonstrate either that the petitioner's 2002 loss was due to it being a start-up company or that it currently has the ability to pay the proffered wage.

2003 Form 1040 U.S. Individual Income Tax Return including a W-2 form showing wages the petitioner paid to her during that year, and (4) a brief.

The 2003 W-2 form submitted shows that the petitioner paid the beneficiary \$55,310.37 during that calendar year.

The petitioner's April 6, 2004 letter states that the beneficiary replaced a named employee who was terminated on October 17, 2002. The letter also states that an error was made on the Form ETA 750 and that the proffered wage should be \$55,000.<sup>4</sup>

For a petition to be approvable, the petitioner must establish eligibility on the filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to render a deficient petition approvable. *In re Izummi*, 22 I&N Dec. 169, 175. The petitioner stated, in both the Form ETA 750 and the posting of the proffered position, that the proffered wage is \$1,700 per week, which equals \$88,400 per year. The petitioner's attempt to amend the proffered wage to an amount it is able to pay is ineffective. The proffered wage in the instant case remains is \$1,700 per week or \$88,400 per year.

The evidence pertinent to a staffing service's provision of a physical therapist includes a "Staffing Agreement," dated March 11, 2002, which is a contract between the petitioner and the staffing service in which the staffing service agrees to provide the services of the contract physical therapist for \$34 per hour.

Counsel submitted invoices from the staffing service showing amounts billed and cancelled checks showing amounts drawn against the petitioner's account and payable to the staffing service. Taken together, those documents show payment of \$31,974 during 2002 for work performed between April 8, 2002 and October 18, 2002. Counsel states in the brief that the photocopied checks submitted are "all checks paid by the petitioner to [the staffing service.]"<sup>5</sup>

Counsel also submitted a letter, from the staffing service and dated October 17, 2002. That letter appears to have been pertinent to reconciliation of a disagreement between the staffing service and the petitioner. Counsel asserts that this letter is "a letter of [the staffing service] accepting the termination of employment made by the petitioner to [the contract physical therapist.]" The letter does not, however, indicate that it is pertinent to the termination of that employment, though it does not make clear why it was written.

In his brief counsel argues that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel asserts that the purpose of the evidence submitted is to show that the petitioner had been paying an amount equaling the proffered wage to the named terminated employee and has, since his termination, been

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<sup>4</sup> Although that amount is less than the proffered wage of \$56,389 for physical therapists in Hudson County, New Jersey, where the petitioner is located, it is within five percent of that amount, and would be permissible pursuant to 20 C.F.R. § 656.40(a)(2)(i).

<sup>5</sup> Those checks do not indicate that they were drawn to pay for the services of a single physical therapist.

paying the beneficiary an amount equal to the proffered wage. Counsel asserts that this shows that the petitioner is able to pay an additional portion of the proffered wage.

This office accepts, on the balance, that the beneficiary replaced the contract employee on or about October 17, 2002. This office will include amounts paid to the contract employee in the calculations pertinent to the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 employed and paid the beneficiary \$9,570.96 during 2002 and \$55,310.37 during 2003.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>6</sup> shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$88,400 per year. The priority date, the date the petition was filed, is June 27, 2003.

When the instant petition was filed the petitioner's 2003 tax return was not yet available. Therefore counsel submitted, and the service center considered, evidence pertinent to the petitioner's finances during 2002. Because evidence pertinent to 2003 was submitted on appeal, however, evidence pertinent to the petitioner's finances during both 2002 and 2003 will be considered on appeal.

The petitioner paid the beneficiary \$9,570.96 during 2002 and is obliged to show the ability to pay the \$78,829.04 balance of the proffered wage during that year.

The petitioner claims to have replaced a contract employee with the beneficiary, and to have paid that contract employee \$31,974 during 2002. Subtracting that amount from the balance of the proffered wage leaves a difference of \$46,855.04 that the petitioner must show the ability to pay.

During 2002, however, the petitioner declared a loss. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its income during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it with which it could have paid the proffered wage during that year. The petitioner has not shown the ability to pay the proffered wage during 2002.

The petitioner paid the beneficiary \$55,310.37 during 2003 and is required to demonstrate its ability to pay the \$33,089.63 balance of the annual amount of the proffered wage. The appeal in this matter was submitted on April 26, 2004 and again on October 7, 2004.<sup>7</sup> On both of those dates the petitioner's 2003 tax return should have been available. The petitioner did not submit any other credible evidence pertinent to its finances during 2003<sup>8</sup> and is unable, therefore, to demonstrate the ability to pay the proffered wage out of either its net income or its net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

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<sup>6</sup> The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>7</sup> The first submission included no evidence to demonstrate that the petitioner had agreed to be represented by counsel and no evidence, therefore, that the petitioner had submitted the appeal, as required by 8 C.F.R. § 103.2(a)(3) and 8 C.F.R. § 103.3(a)(2)(i). The second appeal submitted was essentially identical, but was signed by a representative of the petitioner and accompanied by a Form G-29 Entry of appearance in which the petitioner agreed to be represented by counsel.

<sup>8</sup> The evidence required by 8 C.F.R. § 204.5(g)(2) is copies of annual reports, federal tax returns, or audited financial statements.

When the appeal in this matter was submitted the petitioner's 2004 tax return was unavailable. The petitioner is excused, therefore, from the obligation of showing its ability to pay the proffered wage during 2004 and subsequent years.

The petitioner has not demonstrated the ability to pay the proffered wage during 2002 or 2003 and has not, therefore, shown the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis.

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

**ORDER:** The appeal is dismissed.