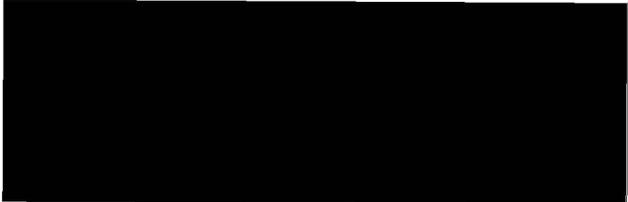




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FILE: LIN 02 253 50135 Office: NEBRASKA SERVICE CENTER Date: MAY 09 2006

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: SELF-REPRESENTED

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 Director, Nebraska 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 a rehabilitation services and staffing company. It seeks to employ the beneficiary permanently in the United States as a physical therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The 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, the petitioner submits a statement.

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 August 5, 2002. The proffered wage as stated on the Form ETA 750 is \$34,000 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 60 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since April 1999. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

Therefore, on December 4, 2002, the Director, Nebraska Service Center, requested additional evidence of that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Return and copies of its state unemployment compensation forms.

In response, the petitioner submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner reports taxes based on the calendar year and that it declared taxable income before net operating loss deduction and special deductions of \$369,106 during 2001. The

corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$437,390 and current liabilities of \$305,490, which yields net current assets of \$131.830. The petitioner also submitted a copy of its November 2002 checking account statement.

The petitioner did not submit the requested Form 941 Employer's Quarterly Federal Tax Return and state unemployment compensation forms.

In a decision dated June 12, 2003, the Director, Nebraska Service Center, noted that the petitioner has had at least 20 other alien worker petitions with 2002 priority dates approved. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability, beginning on the priority date, to pay the proffered wage of the instant beneficiary as well as those other beneficiaries, and denied the petition.

On appeal, the petitioner stated,

Though it is true that at least 20 other beneficiaries with 2002 priority dates were previously approved, majority of which are employed by another company, as authorized by their I-765 documents. [sic] With that said, figures on submitted financial ability, does [sic] not necessarily apply only to petitioned beneficiaries. Gross income figure is not only the determining factor [sic] for all of our application. [sic] Please note that the application is employment based and thus, increased in gross and net income as well. [sic]

No other information, argument, or documentation was submitted.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return. The only reliable evidence in the record pertinent to the petitioner's ability to pay the proffered wage, therefore, is the petitioner's 2001 tax return.

The priority date, however, is August 5, 2002. Information pertinent to the petitioner's financial condition during 2001, therefore, is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, since the Request for Evidence in this matter was issued on December 4, 2002, the petitioner's 2002 tax return was not then available. The petitioner could likely have provided it on appeal, but it was not requested. In these circumstances, to penalize the petitioner for failing to provide it would be unjust.

The director stated that at least 20 alien worker petitions with 2002 priority dates had recently been approved for the instant petitioner. On appeal, the petitioner appears to argue that not all of those beneficiaries are currently working for it, and that those who are working for it have increased the petitioner's revenue. The

petitioner, however, provided no evidence of the number of people it now employs, its current annual income, or the number of alien workers it now employs pursuant to alien worker petitions. The petitioner has not provided its Form 941 Employer's Quarterly Federal Tax Return and state unemployment compensation forms, although they would have been relevant to the issue at hand, and although the service center, on December 4, 2002, requested them. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Under these circumstances the petition was correctly denied for failure of the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

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.