

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

BE

PUBLIC COPY



File: EAC-04-263-51132 Office: VERMONT SERVICE CENTER Date: SEP 07 2006

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a physical therapy and rehabilitation clinic. The petitioner seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.” The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The regulation 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 submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on September 20, 2004, which is the priority date in the case at hand. The proffered wage as stated on Form ETA 750 for the position of a physical therapist is \$40 per hour, 40 hours per week, which equates to an annual salary of \$83,200. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 1991; gross annual income: see attached; net annual income: see attached; and current number of employees: 3.

Along with the I-140 petition in support of the petitioner's ability to pay, the petitioner submitted the company's 2002 and 2003 Federal Tax Returns, as well as several 2004 paystubs for the beneficiary. Following review of the petition, the director determined that the petitioner had not established the petitioner's ability to pay the proffered wage, and denied the petition on December 1, 2004.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Examining the information on appeal, we shall review the petitioner's ability to pay based on wages paid, net income, and net current assets, and then consider the petitioner's additional arguments raised.

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date, here, September 30, 2004, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Regarding the petitioner's ability to pay, first, Citizenship & Immigration Services (CIS) will 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.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on June 23, 2004, the beneficiary listed that she has been employed with the petitioner since December 2000.

The petitioner provided paystubs dated May 28, June 11, June 25, July 23, and August 6, 2004, reflecting annual earnings of \$22,400 on the August 6, 2004 paystub. The paystubs additionally reflect an hourly rate of \$40 per hour. However, since the last paystub reflects pay in August 2004, and the priority date is September 2004, the paystubs do not technically reflect that the beneficiary was paid the proffered wage as of the priority date on September 20, 2004. Based on the year to date earnings, the documentation shows that the beneficiary has not worked full time consistently since the beginning of the year. The petitioner submitted documentation to show that the beneficiary had some prior medical issues, which has resulted in reduced hours, but that the petitioner intends to employ her full time. While we note that the petitioner does not need to pay the beneficiary the full proffered wage until the time of permanent residence, the prior amounts paid to the beneficiary on its own would not establish the petitioner's ability to pay.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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. 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).

The record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the years 2002, and 2003.^{2,3}

As additional evidence, the petitioner submitted a contract between the petitioner and Senior Star Corp., an adult day care facility, in Ewing, New Jersey, for the petitioner to provide physical therapy services to patients in New Jersey. The contract reflected a four year duration from the date of April 8, 2004.

On appeal, counsel contends that the Service Center erred in denying the petition without first issuing a Request for Evidence ("RFE"). At the time that the petition was filed, CIS made its determination regarding the petition in accordance with the May 4, 2004 William R. Yates Memo, "Request for Evidence," which allowed for denial of cases without the need to request additional evidence in certain circumstances. The May 4 memo has been withdrawn by a later Yates Memo dated February 16, 2005.

Further, counsel contends that the Service erred in finding that the petitioner did not have the ability to pay the proffered wage. The Service Center had examined the 2002 and 2003 tax returns submitted, which did not provide either sufficient net income, or sufficient net current assets to allow payment of the proffered wage to the beneficiary. Counsel notes, however, that the tax returns for these years were not necessary based on the priority date of September 20, 2004, but rather submitted the tax returns to demonstrate that the petitioner is "an on-going established corporation which provides physical therapy services." Counsel is correct in this statement. Further, based on the date of filing, the petitioner's tax return for 2004 would not have been available.

² For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return. The returns submitted reflect net income of \$26,185 for 2002, and -\$20,103 for 2003.

³ CIS may review the petitioner's net current assets to determine ability to pay. Net current assets are the difference between the petitioner's current assets and current liabilities. *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000) defines "current assets" as consisting of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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, and evidences the petitioner's ability to pay. The petitioner would be expected to convert the net current assets to cash as the proffered wage becomes due. The 2002 and 2003 tax returns reflect net current assets of -\$7,862 and \$696 respectively.

As proof of ability to pay, the petitioner had provided contracts as “additional evidence.” On appeal, the petitioner’s director expanded on the value of the contract initially submitted. According to the petitioner’s director, the contract with [REDACTED], the adult day care facility that the petitioner contracted with would provide reimbursement in amount of \$60 to \$80 per patient. Further, the petitioner’s director provided that the petitioner treated between twenty-five to thirty patients per week. On appeal, the petitioner additionally submitted a second contract between the petitioner and [REDACTED] which reimburses the petitioner at a rate of \$70 per hour for services. The contract ran from June 2004 to June 2005, and is renewable. An additional agreement attached between the petitioner and [REDACTED] provided reimbursement at a rate between \$40 to \$45 per hour.⁴

Counsel contends that the contracts present the most relevant evidence as they demonstrate that the petitioner can use the beneficiary to provide services to patients under the contract, bill the clients and then provide payment of the proffered wage to the beneficiary. Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898, 903 (D.C. Cir. 1989), and notes that the court dismissed the “INS’s interest in the income statement” as it wrongly “assume[d] that the worker will contribute nothing to income.” Counsel notes that the court concluded that this was “wholly unrealistic [as] one would expect an employer to hire only workers whose marginal contribution to the value of the company’s production equals or exceed their wages.” Counsel contends that this is true in the present case, that the petitioner will be “directly reimbursed, at a rate at least equal to and regularly approximately twice the amount of the wage rate paid” to the beneficiary. Counsel contends that the contracts are therefore the petitioner’s best evidence of its ability to pay.

Two points are relevant. While the contracts may provide evidence of potential work, no documentation was submitted to show that the petitioning entity has been paid for work performed pursuant to the contracts, which together, may have provided compelling evidence to warrant a favorable determination. Otherwise, we are left with the assertions of the petitioner’s management regarding the number of patients treated, without proof of the income generated. Second, the record shows only that the beneficiary is currently licensed in New York. In order to perform work under the New Jersey contracts, which provided for higher payment, the petitioner would need to show that the beneficiary is authorized to practice in New Jersey. Her capacity to generate income, based on the evidence in the record, is currently limited.

Further, although not raised in the director’s denial, we find that the petitioner also failed to establish the beneficiary’s qualifications based on the submitted ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K.*

⁴ We note that the beneficiary’s resume lists that she has worked at [REDACTED] in Brooklyn, New York from April 2001 to the present, and that she has worked at [REDACTED] and Rehab Services since November 2000. From the beneficiary’s resume, it is unclear whether she works for both companies, or whether she has listed [REDACTED] based on work she does for [REDACTED] performed at the [REDACTED] location.

Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires a "Bachelor of Science degree" in Major Field of Study: "Physical Therapy;" and no experience is required. The petitioner listed special requirements for the position in Section 15 as "New York and New Jersey license eligible."

The petitioner submitted an educational evaluation that the beneficiary had the equivalent of a U.S. Bachelor of Science degree in Physical Therapy.⁵ The equivalency was based on studies completed at University of Lagos, Lagos, Nigeria, where the beneficiary completed a Bachelor of Science degree in Physiotherapy. The petitioner additionally submitted a copy of the beneficiary's physical therapist license for the state of New York. However, the petitioner provided no documentation to show that the beneficiary was New Jersey license eligible. The ETA 750 requires that the beneficiary be license eligible. Evidence to document eligibility would be in the form of a letter or statement by an authorized state physical therapy licensing official stating the beneficiary is eligible to take that state's written licensing examination for physical therapists. The petitioner has provided no documentation to show that the beneficiary is New Jersey license eligible, other than a statement by the petitioner's director that she is eligible, which is insufficient for this purpose. Therefore, the petitioner has failed to document this special requirement in accordance with the ETA 750 job offer.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the record does not demonstrate that the beneficiary meets the position's educational requirements certified on the Form ETA 750.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁵ The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.