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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
SRC 04 153 50372

Office: TEXAS SERVICE CENTER

Date: **SEP 11 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

CC: SUSAN LONG
671 S. MESA HILLS, STE. 1
EL PASO, TX 79912

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further investigation and entry of a new decision.

The petitioner, a home care firm, seeks to employ the beneficiary permanently in the United States as physical therapist. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted an Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and maintains that it has the financial ability to pay the proffered 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.

In this case, the petitioner has filed an I-140 seeking classification under section 203(b)(3)(A)(i) of the Act as a physical therapist. Aliens who will be employed as physical therapists are listed on Schedule A. 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be “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 regulation at 8 C.F.R. § 204.5(g)(2) provides:

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. 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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which, for a petition that is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the DOL's Labor Market Information Pilot Program is the date that the I-140 is properly filed with CIS. *See* 8 CFR § 204.5(d). Here, the I-140 was filed on August 2, 2004. The proffered wage as stated on the Form ETA 750 is \$1,442.31 per week, which amounts to \$75,000.12 per year. On the Form ETA 750B, signed by the beneficiary on July 21, 2004, the beneficiary claims to have worked for the petitioning employer since April 2004.

Part 5 of the I-140 indicates that the petitioner was established in March 2004, and employs eight workers.

The petitioner initially provided no evidence of its financial ability to pay the beneficiary's proposed wage offer.

On December 4, 2004, the director issued a notice of intent to deny. Quoting the regulation at 8 C.F.R. § 204.5(g)(2), she instructed the petitioner to provide additional documentation demonstrating that it has had the continuing financial ability to pay the proffered wage as of the priority date.

In response, the petitioner submitted copies of four consolidated financial statements for various periods in 2004. The most recent statement is for the period ending October 31, 2004. There is no indication that these documents are audited. Five separate entities are represented on the October 31, 2004, statement, including the petitioner. The statement reflects that the petitioner reported net income of -\$129,444.22. The petitioner's response also included a letter, dated December 22, 2004, and signed by [REDACTED]. [REDACTED] states that the "[beneficiary] has been employed with our company since April 2004 to the present in the capacity of a Physical Therapist."

The director denied the petition on January 14, 2005. She determined that the consolidated financial statement offered in support of the petitioner's ability to pay the certified wage did not clearly conform to the regulatory requirement that such statements be audited and noted the losses reported by the petitioner for the period(s) ending on September 30, 2004 and October 31, 2004.

On appeal, the petitioner submits copies of 2002 and 2003 audited balance sheets and related consolidated statements of income in a document entitled "Wellcare Enterprises, Inc. and Subsidiaries Consolidated Financial Report." As the petitioning corporate company, "Wellcare, Inc. of Roswell" was not established until March 2004, it is not included among the listings. The petitioner also submits copies of unaudited financial statements of the petitioner and the parent corporation containing financial information relevant to the year ending December 31, 2004. In a letter, dated February 7, 2005, submitted on appeal, Susan Long, the chief financial officer of Wellcare Enterprises, Inc., summarizes the submitted documents and advises that the petitioner is a start-up home health agency that is managed and owned by the parent company and was not projected to be profitable until the fourth quarter of 2004. She claims that the other subsidiaries were and are intended to provide financial support as needed.

In this case, as the record stands, this contention is not persuasive. It is noted that the assets of the petitioner's corporate owner or affiliated corporations will not be considered in reviewing the petitioner's financial ability to pay the proposed salary. The petitioner is the named corporate employer on the preference petition. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court noted that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."¹ Absent a demonstrated contractual obligation to pay the wages of the petitioner's employees existent as of the time when the petitioner's obligation to establish its ability to pay the proffered wage begins, the financial information of the parent shareholder or of other corporate enterprises will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets² during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

As the petitioner included a letter suggesting that it had employed and paid wages to the beneficiary, the case will be remanded for further investigation and consideration whether such compensation was sufficient to establish the petitioner's ability to pay the certified wage.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established

¹See *Avena v. INS*, 989 F. Supp. 1, 7 (D.D.C. 1997), where the court noted that the claimed parent church's assets were irrelevant since it was not the entity paying the local wages and the plaintiff's in particular.

² Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period. Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, CIS will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid.

its ability to pay the certified salary during the period covered by the 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)). 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.

If an examination of the petitioner's net taxable income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, as noted above, CIS will review a petitioner's net current assets.

Regarding the documentation consisting of unaudited financial statements, it is noted that such financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As such documents are not audited as required by the 8 C.F.R. § 204.5(g)(2), they are not sufficiently probative of the petitioner's ability to pay the proffered wage during the period represented. As noted by the director, the regulation requires that evidence of a petitioner's continuing financial ability to pay a certified wage must include federal tax returns, audited financial statements, or annual reports. Additional documentation may be offered in appropriate cases, but may not be provided in lieu of the prescribed evidence.

As noted above, this case will be remanded to allow the petitioner to provide evidence of actual payment of wages to the beneficiary and any other evidence consistent with the guidelines set forth in 8 C.F.R. § 204.5(g)(2) in order to demonstrate the petitioner's ability to pay the proffered salary at the time that the priority date is established and continuing until the present.

Beyond the decision of the director it is noted that record lacks any evidence that the petitioner provided a notice of filing the Application for Alien Certification to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3),³ for ten days prior to filing the I-140. On remand, the petitioner should provide such evidence for consideration.

³ The procedure to post the availability of the job opportunity to interested U.S. workers is set forth at 20 C.F.R. § 656.20(g)(1). It provides:

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:

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2) and 20 C.F.R. § 656.20(g)(1) relevant to the petitioner's continuing financial ability to pay the proffered wage and evidence of providing a notice of filing. 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.

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

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- (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).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).