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U.S. Citizenship  
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FILE:

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Date: APR 11 2007

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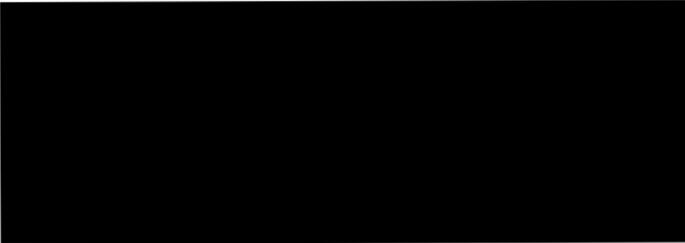
Petitioner:

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

The petitioner, a physical therapist clinic, 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.<sup>1</sup> The petitioner submitted an Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that petitioner had failed to establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I. The director also found that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has established that it has the ability to pay the proffered wage and that the beneficiary qualifies as a physical therapist.

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 for 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) 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

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<sup>1</sup>The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation became effective March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition was filed prior to March 28, 2005 and is governed by the prior regulations. The Title 20 citations in this decision are to the Department of Labor regulations as in effect prior to the PERM amendments.

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 regulation at 8 C.F.R. § 204.5(d) provides that “[T]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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)].” The petitioner must also demonstrate its continuing ability to pay the proffered wage beginning on the priority date, as well as establish that the beneficiary has acquired the requisite credentials. In this case, the priority date is December 13, 2004.

The regulations in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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 at 20 C.F.R. § 656.22(c) also provides in pertinent part:

(1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§656.10(a)(1) of this part) shall file as part of its labor certification application a letter or statement signed by an authorized State physical therapy licensing official in the State of intended employment, stating that the alien is qualified to take that State's written licensing examination for physical therapists.

As evidence of its ability to pay the proffered wage of \$42,200 per year, the petitioner provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2003. The corporate income tax return reflects that the petitioner files its taxes using a standard calendar year and reported \$11,162 in taxable income before the net operation loss (NOL) deduction. Schedule L of the return indicates that its current assets were \$5,241 and its current liabilities were \$267, resulting in net current assets of \$4,974.<sup>2</sup>

As evidence of the beneficiary's qualifying licensure, the petitioner provided a copy of the beneficiary's license from the state of Michigan and a copy of a response received from the state of New York Division of

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<sup>2</sup> Besides net taxable income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s)16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Professional Licensing Services telling the beneficiary that his application was incomplete and requesting a copy of his immigration visa or immigration employment authorization card.

The director requested additional evidence on March 30, 2005. He advised the petitioner that it must show that the beneficiary has a letter from the from state of intended employment, stating that the alien is qualified to take that state's written licensing examination for physical therapists or that the beneficiary has a license to practice physical therapy in New York, his indicated state of intended employment. The director also informed the petitioner of the requirements set forth in 8 C.F.R. § 204.5(g)(2) relating to the required evidence in order to demonstrate its ability to pay the proffered wage and requested the petitioner to provide evidence of its ability to pay the proffered salary of \$42,200 as of the date of filing and continuing until the present.

The director also advised the petitioner that as it had indicated that the beneficiary would not fill a newly created position, he requested information as to the identity and wages paid to the former employee and requested that the petitioner provide evidence of the salary paid and document the position that was vacated. The director also requested the petitioner to provide copies of the employer's federal quarterly tax return for the period covered.

In response, the petitioner, through counsel, provided a copy of the petitioner's 2004 federal corporate income tax return. It shows that the petitioner declared taxable income of \$18,547 before the NOL deduction. Schedule L reflects that the petitioner had \$19,521 in current assets and no current liabilities, yielding \$19,521 in net current assets. Counsel did not provide a copy of any of the petitioner's quarterly federal tax returns, but indicated in his transmittal letter that the beneficiary would fill the position of a former employee identified as [REDACTED] enclosed Wage and Tax Statement (W-2) for 2003 was also provided, as well as copies of three 2004 pay stubs from the last two weeks of June 2004 and the month of July, 2004. The W-2 reflects that the petitioner paid a salary of \$43,200 to [REDACTED] 2003. The pay stubs indicate that the petitioner had paid \$25,200 to him as of the end of July 2004. The transmittal letter also stated that counsel was enclosing a copy of the beneficiary's license to practice physical therapy in New York, but it is not contained in the materials submitted with the response.

**On August 10, 2005, the director denied the petition.** The director determined that the petitioner had failed to establish the beneficiary's qualifying licensure in the state of New York because it had failed to provide either a letter from the designated licensing authority that the beneficiary was qualified to take the licensing examination or a copy of a beneficiary's license to practice therapy in the state of New York.

The director also determined that the record failed to demonstrate that the petitioner had the financial ability to pay the proffered wage of \$42,200 per year as of the date of filing, December 13, 2004. The director noted that the 2004 income tax return reflected that the current assets did not exceed the current liabilities in an amount sufficient to cover the proffered wage and also failed to show that the taxable income of \$18,547 was sufficient. The director also noted that there was no documentary evidence provided to support the claim that the employee that the beneficiary is intended to replace had vacated the position.

On appeal, counsel provides a copy of the beneficiary's license to practice physical therapy in New York. It indicates that it was awarded on February 25, 2005.

Counsel also provides seven letters from the petitioner's president [REDACTED] They are all dated August 15, 2005 and are each styled as a "termination letter." Each letter simply states that the named employee "is no longer employed with our firm" and gives the last day of employment. One of the

employees is [REDACTED] states that his last day of employment was 12/31/2004.

It is noted that the director specifically requested the petitioner to document that the position of the former employee was vacated in his request for evidence, issued on March 30, 2005. The AAO will not consider such evidence offered for the first time on appeal where a petitioner has been put on notice of the deficiency. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Moreover, by submitting six other "termination letters," which do not identify the positions held, it is unclear if Mr. Elsayed was ever the employee intended to be replaced.

It is noted that if a 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, as noted above, CIS will examine the net income figure or the net current assets reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses such as amounts paid to other employees. 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).

In this case, as explained by the director, neither the petitioner's taxable income of \$18,547 before the NOL deduction, nor its net current assets of \$19,521 as indicated on its 2004 corporate tax return, were sufficient to pay the beneficiary's proposed wage offer of \$42,200. The petitioner has not established its continuing ability to pay the proffered wage.

Similarly, the director also requested that the petitioner provide a copy of the beneficiary's New York License. It was not provided until the appeal. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document(s) in response to the director's request for evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of this evidence provided for the first time on appeal. It is additionally noted that such a license, acquired on February 25, 2005, does not establish the beneficiary's requisite credentials as of the December 13, 2004, priority date. As such, the petitioner has not established either the petitioner's ability to pay the proffered wage or that the beneficiary had obtained the necessary licensure credentials as of the priority date.

A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on a review of the evidence contained in the underlying record, the petition may not be approved.

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.