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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: [illegible]

IN RE: Petitioner: [redacted]

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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a chiropractic clinic. It seeks to employ the beneficiary permanently in the United States as a chiropractic assistant. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the petitioner has over 100 employees and has the financial ability to pay the beneficiary's 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.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 either 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)].

Eligibility in this case is based, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. 204.5(d). In this case, that date is February 16, 1999. The beneficiary's salary as stated on the labor certification is $9.50 per hour, which amounts to $19,760 per year, based on a 40-hour week. The Immigrant Petition for Alien Worker (Form I-140), filed February 28, 2003, indicates that the petitioning business was originally established in 1986 and currently has 140 employees.

As evidence of its ability to pay the proffered wage, the petitioner, through counsel, initially submitted a copy of a quarterly wage report for the quarter ending 12/31/2001 and a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. It indicates that the petitioner uses a standard calendar year to

file its taxes. The 2001 tax return shows that the petitioner had $6,935,502 in gross receipts or sales, reported gross income of $7,031,502, paid $1,456,612 in salaries and wages, and declared -$1,509,117 in ordinary income. As shown on Schedule L of the tax return, its current liabilities far exceeded its current assets.

On April 24, 2003, the director denied the petition, citing the lack of net income as shown on the petitioner's 2001 tax return. The director also noted that the petitioner had filed five other I-140s in the past. Two had been denied, two had been approved and one (WAC 03 075 56175) was still pending at the time of the director's decision. As of this date, CIS's electronic records confirm that WAC 03 075 56175 was approved.

On appeal, counsel asserts that the petitioner has more than 100 employees and that a letter from its chief financial officer should be accepted to establish its ability to pay the proffered wage. Counsel submits a letter, dated May 8, 2003, from shown on the 2001 corporate tax return as the sole shareholder of the petitioning employer. He signs the letter as the chief financial officer. Dr. confirms that he makes the final decisions relating to financial matters. He also certifies that the prospective U.S. employer is a headache and pain control center, originally established in 1986, has 140 employees, grossed over 8 million dollars in 2001,[1] and has sufficient income and ability to pay the beneficiary's proffered salary. Accompanying letter are copies of the petitioner's quarterly wage reports for the quarters ending December 31, 2002 and March 31, 2003, showing that the petitioner had more than 100 employees on its payroll.

At least as to this aspect of the petition's eligibility for approval, counsel is persuasive. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proposed wage offer.

In this case, although the petitioner's federal tax return showed a net loss for 2001, the balance of the evidence indicates that it has been in business for at least 10 years, operates in several locations, grossed over 7 million dollars in 2001 and paid almost 1 1/2 million dollars in salaries and wages. Here, the totality of the circumstances reflecting the overall operations of the petitioning employer in conjunction with the favorable regulatory language relating to large employers at 8 C.F.R. § 204.5 (g)(2), weighs in the petitioner's favor.

Although the evidence presented on appeal may establish the petitioner's ability to pay the proffered annual wage of $19,760, the petition raises a question as to whether the petitioner has established that the beneficiary has the requisite two years of prior employment experience in the job offered of chiropractic assistant as required by the terms of the labor certification. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation.

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[1] The tax return shows that the petitioner actually grossed slightly over 7 million dollars, rather than 8 million dollars.

The ETA 750B, signed by the beneficiary, indicates that she worked full time as a chiropractic assistant in Israel from April 1994 until October 1996,[2] but the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that verification of a beneficiary's employment experience must be in the form of letters from trainers or employers describing the training received or the beneficiary's pertinent work experience.

With the petition, the petitioner originally supplied a copy of a letter, dated November 1, 1996, from "Dr. ." The letter states that the beneficiary worked "at our clinic from April 1994 to October 1996 as a Chiropractor Assistant in which her duties also included physiotherapy treatments to patients and certain office management tasks." The letter is not signed. It is not acceptable evidence of the beneficiary's past employment experience. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The director did not address this aspect of the petition in his decision.

Moreover, counsel submitted another copy of, what appears to be the same letter, on appeal. It is purportedly from It is also dated November 1, 1996 and is not signed. The wording has been altered, however, to state that the beneficiary worked "at our clinic from April 1994 to October 1996 on a full time basis as Chiropractor Assistant in which some of her duties also included physiotherapy treatments to patients and certain office management tasks." No explanation for these discrepancies has been offered.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional evidence from the petitioner relevant to the beneficiary's qualifications for the position offered. 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.

[2] The ETA 750B also indicates that the beneficiary attended school at the Academy World Center from December 1993 until June 1996.