



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
WAC 03 092 53303

Office: CALIFORNIA SERVICE CENTER

Date: APR 04 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner¹ is a medical group. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. 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. The director denied the petition accordingly.

On appeal, counsel submits a legal brief and additional evidence.

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 Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An alien seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to 20 C.F.R. § 656.22, Schedule A, (a) Group I: (1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the State in which they propose to practice physical therapy.

The regulation at 20 C.F.R. § 656.22 (c) An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:

(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. Application for certification of permanent employment as a physical therapist may be made only pursuant to this § 656.22 and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

██████████ M.D. is also known as ██████████

(B) *Skilled workers.* If the petition is for a skilled worker, 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. The minimum requirements for this classification are at least two years of training or experience.

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(l)(2) states, in pertinent part:

“*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

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 of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The petitioner must also demonstrate that, as of January 24, 2003, the petitioner possessed the ability to pay the proffered wage. The proffered wage as stated on the Form ETA 750 is \$43,728.00 per year.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested on April 15, 2003, pertinent evidence of the petitioner’s ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner’s U.S. federal tax returns for 2002 to present (i.e. April 15, 2003) as well as annual reports or audited financial statements for 2002.

In response to the request for evidence of the petitioner’s ability to pay the proffered wage beginning on the priority date, petitioner submitted the petitioner’s U.S. Internal Revenue Service (IRS) Form 1040 tax return for years 2001.

The director denied the petition on December 10, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that based upon its tax year 2002, adjusted gross income and assets, the petitioner has the ability to pay the proffered wage.

Counsel has submitted copies of the following documents to accompany the appeal statement: the Notice of Decision; Forms I-797C; a U.S. federal tax return for 2002; a AAO decision; bank statements; a case precedent; a brokerage statement; and, a deed.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. In the instant case, the sole proprietor has a family of four.

Counsel appealed the denial of the petition on January 9, 2004.

Counsel asserts on appeal that the petitioner's adjusted gross income for 2002 is evidence of its ability to pay the proffered wage. The adjusted gross income stated for tax year 2002 is \$61,954.00. Further, counsel asserts that petitioner's personal assets; cash (i.e. stated in bank statements and a brokerage account) and real estate assets are evidence of the ability to pay the proffered wage. Counsel provides AAO decided cases and cites case precedent for the proposition that in the present case, the petitioner's over-all financial condition is proof of the ability to pay the proffered wage. According to regulation,² copies of annual reports, federal tax returns,³ or audited financial statements are the means by which petitioner's ability to pay is determined. However, for sole proprietorship forms of business, the owner's personal assets may be considered to determine the ability to pay the proffered wage.

The petitioner also submitted a brokerage account statement evidencing a current account value of \$67,459.10 as of November 30, 2003. The petitioner provided evidence that with her spouse she owns three parcels of real estate. The petitioner also offers a motor vehicle titled in the name of her spouse as evidence of the ability to pay the proffered wage. It is not credible that the petitioner would sale or encumber the above real and personal property or draw upon her investments to pay the proffered wage.

As stated, counsel cites case precedent for the proposition that in the present case, the petitioner's over-all financial condition is proof of the ability to pay the proffered wage. Counsel cited *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the aforementioned premise, but the facts of that case involve entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO.

² 8 C.F.R. § 204.5(g)(2).

³ While counsel has stated in her brief that the petitioner would submit its 2003 tax return to the AAO when filed, no such return has been received.

Counsel advocates the use of the cash balance of the checking accounts to show the ability to pay the proffered wage. The record of proceeding contains a bank statement from the petitioner's business checking account covering the period September 1, 2003 through September 30, 2003, with an average daily balance of \$88,015.00. Petitioner also offers a personal bank statement that states a balance as of December 15, 2003 of \$7,096.12; joint checking statements showing ending balances as of November 20, 2003, and December 17, 2003 of \$64,659.48; and, another checking account with a balance of \$53,843.32 as of December 5, 2003. The petitioner maintains a balance of approximately \$160,000.00 in various checking accounts. The magnitude of the petitioner's affairs demonstrates that the petitioner could support the full proffered wage for a year. The petitioner's substantial cash assets as reflected in its checking accounts shift this decision in the petitioner's favor. Further, the petitioner's adjusted gross income stated for tax year 2002 is \$61,954.00. While in and of itself that amount would not be sufficient to pay the proffered wage of \$43,728.00 per year, as stated above, for sole proprietorship forms of business, the owner's personal assets may be considered to determine the ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has come forward with substantive evidence according to 8 C.F.R. § 204.5(g)(2), to show that the petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 met that burden.

ORDER: The appeal is sustained.