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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 23 2007

SRC-04-121-51861

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

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 appeal will be dismissed.

The petitioner is a rehabilitation facility. 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, Schedule A, Group I and filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a physical therapist on March 24, 2004. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary meets the requirements of 20 C.F.R. § 656.22(c)(1). The director denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific 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.

As set forth in the director's March 25, 2005 denial, the single issue in this case is whether or not the petitioner has established that the beneficiary is qualified to sit for the qualifying exam or that she already has the necessary state license.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 20 C.F.R. § 656.10(a)(1) defines Schedule A, Group I as the following:

> 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)(1) states the following:

> An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist 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.

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 appeal[1]. The relevant

[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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

evidence in the record includes a letter to the beneficiary dated February 3, 2005 from the Physical Therapy Board of California (PTBC) as evidence that the beneficiary meets the above regulatory requirements.

The PTBC February 3, 2005 letter states in pertinent part:

> The Physical Therapy Board of California received your application for physical therapist licensure. You may only work as an aide as defined in the Requirements for Use of Aides in Section 1399 of the Physical Therapy Practice Act.
>
> In order to complete your application, please submit the following:
>
> > Evaluation of your credentials from an approved evaluation service for Committee review.

This is only a receipt notice informing the beneficiary of receipt of her application to obtain a license to practice physical therapy. It does not state whether or not the beneficiary is qualified to sit for the examinations. Therefore, the director concluded that the beneficiary did not meet the requirements of 20 C.F.R. § 656.22(c)(1) and denied the petition. On appeal, counsel submits another letter from PTBC to the beneficiary on March 21, 2005. The second letter states the following:

> This is to advise you that your credentials were reviewed and approved. We are pleased to inform you that you have been recommended to appear for the National Physical Therapy Examination (NPTE) and the California Laws Examination (CLE). This is your original notice to appear for the examinations; however, this is not your Authorization to Test (ATT) letter.

The second letter expressly confirms that the beneficiary is qualified to take the licensing examination for physical therapists in California, the state in which the beneficiary intends to practice physical therapy. However, the priority date in the instant case is March 24, 2004 and the second letter dated March 21, 2005 does not verify the beneficiary's qualifications prior to the priority date. 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). After a complete review the regulation and the content of the letter from PTBC on March 21, 2005, the AAO concludes that the petitioner has not established that the beneficiary meets the requirements of requirements of 20 C.F.R. § 656.22(c)(1) prior to the priority date. Accordingly, the ground of the denial in the director's March 25. 2005 is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss another issue in this case whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. 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*, 299 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).

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. 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R.. § 204.5(d).

Here, the priority date is March 24, 2004. The proffered wage as stated on the Form ETA 750 is $21.00 per hour ($43,680 per year). On the petition, the petitioner claimed to have been established in 2000, to have an estimated gross annual income of over $200,000, and to current have six employees. On the Form ETA 750B, signed by the beneficiary on December 29, 2003, the beneficiary did not claim to have worked for the petitioner.

Relevant evidence in the record includes a letter dated December 22, 2004 from the petitioner's CEO regarding the financial status of the petitioner, bank statements for the petitioner's business checking account covering January to December 2004, the petitioner's corporate federal tax return for a period from May 17, 2003 to December 31, 2003 and the petitioner's quarterly reports for the four quarters of 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the beneficiary did not claim to have worked for the petitioner, and the petitioner did not submit W-2 forms or any other compensation documents for the beneficiary. The quarterly reports for 2004 submitted do not show the petitioner hired and paid the beneficiary in that year. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2004 onwards.

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, without consideration of depreciation or other expenses. 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's tax return for a period from May 17, 2003 to December 31, 2003.[2] The petitioner did not submit its tax return for the period from January 1, 2003 to May 16, 2003. The tax return covering from May 17, 2003 to December 31, 2003 demonstrates that the petitioner had a net income[3] of $4,134 in 2003 which is $39,546 less than the proffered wage. Therefore, for the year 2003, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in

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[2] The petitioner's 2003 corporate tax return is most likely the most current return available at the time the petitioner filed the petition although 2004 would be more relevant because that is the year of the priority date. The AAO will analyze the most current available regulatory-prescribed piece of evidence in the record of proceedings.

[3] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during 2003 were $(282). Therefore, for the year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

However, the priority date in the instant case is March 24, 2004, therefore, the tax return for 2003 is actually not necessarily dispositive. The record before the director closed on March 7, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for 2004 was not due yet. Therefore, the record does not contain any dispositive tax returns for the petitioner. The AAO cannot determine whether or not the petitioner had the ability to pay the proffered wage in the year of priority date and onwards.

In response to the director's RFE, counsel submitted a letter from the petitioner's CEO to establish its ability to pay the proffered wage. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "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 establish the prospective employer's ability to pay the proffered wage." (Emphasis added.) However, the rule is not applicable here and the CEO's letter is not acceptable because the petitioner has less than 100 employees.

Furthermore, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from CEO even if the petitioner had had more than 100 employees. CIS records indicate that the petitioner has filed 15 Form I-140 petitions with CIS since 2003: one in 2003, twelve in 2004 and two in 2005. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Given that the number of immigrant petitions, we cannot rely on a letter from CEO referencing the ability to pay a single unnamed beneficiary.

The petitioner also submitted its bank statement for business checking account for the year of 2004. However, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2)

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist 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.

is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Therefore, the record of proceeding does not contain any regulatory-prescribed evidence to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income; or net current assets.

Additionally, the AAO notes that the petitioner has not filed a posting notice that complies with the applicable regulatory requirements. The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

> 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:
>
> (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).

The AAO notices that the petitioner submitted a posting notice with the petition. However, the notice is certified "Notice of Filing Permanent Application for Labor Condition" and thus fails to provide the requisite notice that it was posted because of a filing for Permanent Alien Labor Certification as required by 20 C.F.R. § 656.20(g)(3)(ii). The notice was not signed, nor did it indicate the place posted. Therefore, it is not clear whether or not the notice was posted at the facility or location of the employment. The posting notice is also defective because it does not direct applicants to report to the employer in violation of 20 C.F.R. § 656.20(g)(3)(i). Therefore, the petitioner failed to submit evidence that the posting notice was posted in accordance with 20 C.F.R. § 656.20(g)(1).

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. The petition remains denied.