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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: WAC 04 255 53551 Office: CALIFORNIA SERVICE CENTER Date: FEB 27 2006

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home health agency. 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 September 21, 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) or that it had the continuing ability to pay the proffered wage from the priority date of September 21, 2004. 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 June 23, 2005 denial, the issues in this case are 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 and whether or not the petitioner has the continuing financial ability to pay the proffered wage from the priority date of September 21, 2004.

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 maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal[1]. The relevant evidence in the record includes a letter to the beneficiary dated September 3, 2004 from the International Commission on Healthcare Professions (ICHP), a certificate dated September 3, 2004 from ICHP, a letter dated April 27, 2004 from the Federation of State Boards of Physical Therapy (FSBPT), and a letter dated September 3, 2003 from the Physical Therapy Board of California (PTBC) as evidence that the beneficiary meets the above regulatory requirements.

The PTBC September 3, 2003 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.
>
> Your evaluation report from the credential evaluating service has been received and is currently being reviewed. . . .
>
> The Physical Therapy Board of California will maintain your application on file for one year from the date of this letter to allow you an opportunity to complete your application. If you are unable to complete your application from the date of this letter, you will be required to reapply by submitting a new application with appropriate fees and complying with all laws and regulations in effect at the time the new application is filed.

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.

The ICHP letter dated September 3, 2004 states in pertinent part:

> The International Commission on Healthcare Professions (ICHP, a division of CGFNS) has completed your ICHP VisaScreen: Visa Credentials Assessment. We are pleased to report that, upon analyzing your application under the standards set forth in section 212(a)(5)(C) of the Immigration and Nationality Act (also known as "section 343"), ICHP has approved you for a VisaScreen Certificate.
>
> This review was conducted in accordance with Bureau of Citizenship and Immigrant Services (BCIS) Final Regulations of July 23, 2003, implementing the "section 343" certificate requirement. Enclosed is your VisaScreen Certificate and information pertaining to the Final Regulations.

Section 343 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), created a new ground of inadmissibility for any immigrant or nonimmigrant alien who seeks to enter the United States to perform labor as a healthcare worker. Section 343 requires certification that verifies the healthcare worker's education, training, licensing, experience, and English competency.

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[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).

Once the screening is successful, the certifying organization issues what is called a Visa Screen certificate. The certificate is evidence that the alien has met the requirements of section 343 of IIRIRA and nothing more. One should not confuse the certificate with other requirements, such as state license requirements and other requirements. In other words, the Visa Screen certificate merely indicates that the alien's education, training, license, and experience suggest that he or she should not have any problem in getting licensed in the United States. However, the alien must still meet all other regulatory and statutory requirements for the Employment-Based classification sought. In this case, the petitioner must provide a signed statement or letter from an authorized State physical therapy licensing official in the State of intended employment, stating that the alien is qualified to take the State's written licensing examination for physical therapists. *See* the regulation at 20 C.F.R. § 656.22(c).

The FSBPT letter dated April 27, 2004, titled Authorization to Test (ATT), states that the beneficiary is eligible to take the Physical Therapist examination during the period April 28, 2004 through June 27, 2004 as provided by Prometric, the organization responsible for conducting the testing for the state of California. The letter specifically states:

> You must schedule your appointment and take your examination during the eligibility period listed above. If you do not test or withdraw your registration during this period, you will forfeit all fees.

In the instant case, there is no evidence in the record that the beneficiary took the physical therapy examination during the eligibility period of April 28, 2004 through June 27, 2004, and a search of public records does not reflect either a pending or issued license for the beneficiary. The filing date of the visa petition is September 21, 2004, and the evidence submitted does not establish that the beneficiary was still qualified to take the State of California's written licensing examination for physical therapists at that 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 of the regulation and the content of the letters provided from PTBC and FSBPT, and the remaining evidence in the record of proceeding, the AAO concludes that the petitioner has not established that the beneficiary meets the 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 June 23, 2005 is affirmed.

The second issue in this proceeding is whether or not the petitioner has the continuing financial ability to pay the proffered wage from the priority date of September 21, 2004.

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. 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 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 September 21, 2004. The proffered wage as stated on the Form ETA 750 is $22.40 per hour or $46,592 per year. On the petition, the petitioner claimed to have been established in 1996, to have an estimated gross annual income of over $750,000, and to have a net annual income of $55,000. The petitioner failed to list its current number of employees. On the Form ETA 750B, signed by the beneficiary on April 26, 2004, the beneficiary did not claim to have worked for the petitioner.

Relevant evidence in the record includes counsel's brief, copies of the petitioner's 2003 and 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the petitioner's Forms DE-6, Quarterly Wage and Withholding Report, for the quarters ended September 30, 2004, December 31, 2004, and March 31, 2005, copies of the petitioner's unaudited income statement and balance sheet for the six months ended June 30, 2005, and copies of the 2004 Forms 1099, Miscellaneous Income, for physical therapists and nurses employed by the petitioner as outside services. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner's 2003 Form 1120S reflects an ordinary income or net income from Schedule K of $57,718 and net current assets of -$370,368.[2]

The petitioner's 2004 Form 1120S reflects an ordinary income or net income from Schedule K of $93,023 and net current assets of -$94,858.

The petitioner's unaudited income statement and balance sheet for the six months ended June 30, 2005 reflect a net income of $141,252.13 and net current assets of $95,567.90.[3]

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[2] It is noted that the petitioner's 2003 Form 1120S is for the year prior to the priority date of September 21, 2004, and, therefore, has little evidentiary value with regard to the petitioner's ability to pay the proffered wage of $46,592 from the priority date and continuing until the beneficiary obtains lawful permanent residence. Therefore, the petitioner's 2003 Form 1120S will not be considered except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

[3] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the unaudited balance sheet and income statement for the six months ended June 30, 2005 will not be considered when determining the petitioner's ability to pay the proffered wage of $46,592.

The petitioner's Forms DE-6 for the quarters ended September 30, 2004, December 31, 2004, and March 31, 2005 does not show that the beneficiary was employed by the petitioner during those quarters.

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.[4] The quarterly reports submitted for the quarters ended September 30, 2004, December 31, 2004, and March 31, 2005 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

[4] It is noted that the 2004 Forms 1099-MISC, Miscellaneous Income, submitted on appeal do not show any wages paid to the beneficiary in 2004.

> 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.

In 2004 the petitioner was organized as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

In the instant case, the petitioner's net income from Schedule K in 2004 was $93,023. The petitioner could have paid the proffered wage of $46,592 from its net income in 2004 had it not petitioned for additional employees in 2004 and subsequently. A review of CIS electronic records reveal that at the time of the adjudication of the visa petition, four additional petitions had been approved within the six months prior and three more petitions were pending.[5] The petitioner is obligated to show that it had sufficient funds to pay the wages of all the employees petitioned for, not just the beneficiary. The combined wages of the four approved petitions exceed the petitioner's net income in 2004. Therefore, the petitioner has not established its ability to pay the proffered wage and the additional wages from its net income in 2004.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 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.

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[5] CIS electronic records reveal that the petitioner has filed a total of twenty seven immigrant petitions since 2002.

Net current assets are the difference between the petitioner's current assets and current liabilities.[6] 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2004 were -$94,858. The petitioner could not have paid the proffered wage of $46,592 or any of the wages for the additional employees petitioned for from its net current assets in 2004.

On appeal, counsel asserts that the wages paid to outside services for physical therapists in the amount of $130,000 and about $197,832 for nurses could be greatly reduced with the hiring of the beneficiary and the additional employees for whom the petitioner petitioned. In addition, counsel claims that there is also the potential of increased productivity with the petitioner's guaranteed full-time employees.

Counsel is mistaken. The record does not provide evidence that the petitioner has replaced or will replace any of the outside workers with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the physical therapists paid for outside services involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker or workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her (i.e., a physical therapist could not replace a nurse).

In addition, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the

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[6] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was established in 1996. The petitioner has provided tax returns for the year 2004 which does not establish the petitioner's ability to pay the proffered wage of $46,592 and the wages of the additional employees petitioned for. Furthermore, one tax return is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

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.