U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 12 2008

SRC 06 268 51746

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.

Kevan S. Poulos for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director denied a subsequent motion to reopen and for reconsideration. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home health care provider. 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. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. The director also determined that that the petitioner failed to file its application supported by a designation of the prevailing wage as determined by a state workforce agency (SWA) and denied the petition accordingly on March 21, 2007.

The petitioner submitted a motion to reopen and reconsideration with additional evidence and asserted that it had established that it had timely sought a prevailing wage determination (PWD) from the appropriate SWA and that it had the continuing financial ability to pay the proffered wage.

On May 8, 2007, the director denied the motion to reopen and reconsideration finding that the grounds for the denial of the petition had not been overcome.

On appeal, the petitioner, through counsel,[1] submits additional evidence and maintains that the petitioner had established its financial ability to pay the proffered wage and that the director erred in failing to accept its determination of the PWD submitted on motion.

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).

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (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 priority date of any petition filed for classification under section 203(b) of the Act "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)]." 8 C.F.R. § 204.5(d). Here, the priority date is September 13, 2006..

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 DOL

[1] Counsel is reminded to specify his credentials on the G-28, Notice of Entry of Appearance.

regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is September 13, 2006.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.15(b)(1), a Schedule A application shall include an "Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41."

The regulations at 20 C.F.R. § 656.40 state in relevant part:

> (a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....
>
> (b) Determinations. The SWA determines the prevailing wage as follows:
>
> (1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes. . . .
>
> (c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 that it has the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). Here, as noted above, the priority date is September 13, 2006. The proffered wage as stated on the Form ETA 9089 is $30.00 per hour, which amounts to $62,400 per year. On the Form ETA 9089, signed by the beneficiary on August 21, 2006, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), this petitioner claims to have been established in October 2000 and currently employ six workers.

In a request for evidence issued November 27, 2006, the director notified the petitioner that it had failed to complete Section F of ETA Form 9089 regarding the prevailing wage information as provided by the SWA and that it had failed to complete Section K relating to the beneficiary's work experience. The director instructed that the petitioner complete these sections and return the photocopied form to the director. She further requested evidence that the petitioner has had the continuing ability to pay the proffered wage as of the priority date of September 11, 2006. The director also specifically requested a copy of the petitioner's latest federal income tax return, audited financial statement or annual report for 2005 and advised the petitioner that it may submit the beneficiary's Wage and Tax Statement (W-2) for 2005 and any additional evidence such as bank account records from 2005 to the present.

In response, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005. It reflects that the petitioner files its taxes using a standard calendar year. The return contains the following information:

	2005
Net Income[2]	$18,909
Current Assets	$18,789
Current Liabilities	$11,770
Net Current Assets	$ 7,019

Besides net income and 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.[3] It represents a measure of liquidity during a given

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[2] 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e* (2005) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income is found on line 17(e) of page one of its tax return for 2005.

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

period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. 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.

The petitioner additionally submitted a copy of the beneficiary's W-2 for 2006 reflecting that the petitioner paid $16,575 in wages to him.

The petitioner also completed the pertinent sections of the ETA Form 9089 as requested by the director and provided the Indiana SWA determination of the prevailing wage. It determined the prevailing wage rate at $39,291 and was dated February 15, 2007.

The director denied the petition on March 21, 2007, determining that the petitioner had not established its continuing financial ability to pay the proffered wage of $62,400 per year. The director also denied the petition based on the date of the Indiana PWD as reflected by the copy submitted by the petitioner. To conform to the regulatory requirement set forth at 20 C.F.R. § 656.40(c), a petitioner must file the application or begin recruitment within the validity period set forth on the state prevailing wage determination. In this case, the validity period is specified for not less than 90 days or more than 5 months from the date of issue (determination). Since the date of determination was February 15, 2007, this would necessitate filing the application after the SWA determination of the prevailing wage. Because the filing date of this application was September 13, 2006 and preceded the SWA determination, the director found that the petition could not be approved.

With the petitioner's motion to reopen and for reconsideration, a copy of a different state determination of the prevailing wage was submitted, which was dated May 5, 2006 and which stated that its prevailing wage ($39,811) validity period was for not less than 90 days or more than 8 months form the date of issue. The petitioner, through counsel asserts that this prevailing wage determination demonstrates that the petitioner's application could be approved because it now fell within the appropriate timelines.

In support of the petitioner's ability to pay the proffered wage of $62,400 per year, the petitioner also provided on motion copies of its payroll records showing the beneficiary's earnings from July 2006 to March 2007. The 2006 earnings as of December 31, 2006 correspond to the earnings shown on his 2006 W-2. The beneficiary's year-to-date earnings as of March 31, 2007 were $8,570. Counsel also provided copies of an unaudited financial statement for 2006 including the petitioner's balance sheet and a profit and loss statement, as well as copies of the petitioner's bank statements for two accounts as of March 2007.

The director denied the motions to reopen and for reconsideration, determining that the petitioner had not overcome the reasons for the denial of the petition at the time it was first considered by submitting a new wage determination which indicates that the petitioner had now complied with eligibility requirements.

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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.

The director further determined that the petitioner had not demonstrated that it had paid the proffered wage to the beneficiary or that it had submitted pertinent evidence demonstrating that it had the continuing financial ability to pay the proffered wage.

On appeal, counsel submits documentation previously provided to the record and maintains that the director erred in failing to consider the SWA PWD submitted on motion. Counsel argues the petitioner was merely seeking to correct its mistake by submitting the actual wage determination that it had sought prior to filing the petition. Counsel claims that difference between the prevailing wage amounts was insignificant as the proffered wage was far above both of the amounts determined to be the prevailing wage.

Counsel further asserts that the petitioner has the ability, or the substantial ability to pay the proffered wage of $30.00 per hour as shown by its financial statements, which counsel claims are audited as they are signed and attested by the accountant. Counsel also states that the submitted bank statements indicate sufficient funds to cover payment of the difference between the proffered wage and the actual wages paid to the beneficiary.

Counsel's assertions are not persuasive. Substantial ability to pay the proffered wage is not consistent with the plain language of 8 C.F.R. § 204.5(g)(2), which clearly requires that the petitioner affirmatively demonstrate its ability to pay the proffered wage. Regarding the financial statements provided on appeal, it is also that the regulation at 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. A signature by an accountant on the financial statement does not indicate that an audit has been conducted. No attestation of the accountant's level of review was provided. If an audit is performed, an audit opinion is rendered by the independent CPA at the end of an audit investigation, whereby the auditor reports on the nature of his or her work and the degree of responsibility assumed. The opinion states that the auditor has examined the client's financial statements for the year then ended in accordance with *generally accepted auditing standards (GAAS).* The auditor's opinion specifies whether the financial statements fairly represent the client's financial position, operations and changes in financial position and is rendered in conformity with *generally accepted accounting principles (GAAP). See Barron's Accounting Handbook,* 319 (2000). In this case, the financial statements provided by the petitioner for 2006 cannot be considered as probative of the petitioner's financial position in 2006.

The petitioner's two March 2007 bank statements submitted to the record do not constitute probative evidence of the petitioner's continuing ability to pay a certified wage as represented on the labor certification. 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," bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Unless submitted where a short period of time is at issue and otherwise supports other regulatorily required evidence that demonstrates the petitioner's continuing financial ability to pay a given salary, they generally do not demonstrate a sustainable ability to pay a specified salary or constitute an acceptable substitution for such evidence. It is also noted that cash assets are typically reflected on the corresponding tax return. In this matter, although the relevant 2007 period is short, the record does not make clear what level of funds existed in these accounts for the first two months of 2007.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage because his employment was less than full-time or because his wages were less than the proffered wage is not relevant to this calculation. Actual amounts will be considered if they are supported by the documentation contained in the record. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. The record in this case indicates that the beneficiary was employed and paid $16,575 in 2006. This represents a $45,825 shortfall between the proffered wage of $62,400 per year and the actual wages paid. The beneficiary's average monthly wages of approximately $2,550 per month during his six and one-half months of employment in 2006 also fell short of a full-time monthly employment of approximately $5,200 at the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner's corporate tax return for 2005 indicates that the petitioner could not cover the proffered wage out of either its net income of $18,909 or the net current assets of $7,019. In 2006, the year covering the priority date, the petitioner did not include a federal income tax return or audited financial statement as part of its submissions so a comparison of whether its net income or net current assets could cover the $45,825 difference between wages paid and the proffered wage is not calculable.[4] It may not be concluded that the petitioner established its continuing ability to pay the proffered wage beginning at the priority date.

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[4] Even using figures extracted from the unaudited balance sheet submitted by the petitioner, neither the net income of $17,816.47, nor a net current asset calculation of $13,466.07 (drawn from total current assets less total current liabilities) was sufficient to cover the shortfall.

As to the issue of whether the director erred in declining to consider the petitioner's submission of a new wage determination on a motion to reopen and reconsider, it is noted that the regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

In this case, it is noted that the petitioner failed to initially submit with the visa petition a completed ETA Form 9089 indicating the prevailing wage rate as provided by a state workforce agency's determination of this amount. In response to the request for additional evidence sought by the director, the petitioner provided a PWD as well as a completed Part F of the ETA Form 9089 that conformed to the information as stated on the February 15, 2007, PWD which was then submitted. However, this PWD did not support the petition's eligibility for approval. The director properly denied the petition based in part on the fact that the petitioner's February 15, 2007, SWA determination and completed ETA Form 9089 submitted with a filing date of September 13, 2006 failed to establish that, pursuant to 20 C.F.R. § 656.40(c), the petitioner filed its application or began the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

Given these opportunities to examine the accuracy of its submissions, the AAO cannot find that the director necessarily erred in declining to reconsider a decision that was correct based on the evidence in the record at the time or reopen a proceeding based on the petitioner's allegation of its own error when the director's request for evidence had specifically requested a SWA determination that would support a completed Form ETA 9089 on this issue.

Beyond the decision of the director, it is noted that while the notice of posting the job opportunity was properly documented by a memorandum indicated to be distributed as the petitioner's in-house medium pursuant to the requirements of 20 C.F.R. § 656.10(d)(1)(ii), it is noted that the notice of posting of the job opportunity intended to be posted in a 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 failed to contain an accurate and complete address of the Department of Labor location where individuals may provide documentary evidence bearing on the application for certification under 20 C.F.R. § 656.10(d)(3). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.