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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2005  
WAC-03-107-55005

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:  
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The 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 healthcare clinic. 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. 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(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.

In this case, the petitioner 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 February 19, 2003. Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as physical therapists must possess all the qualifications necessary to take the physical therapist licensing examination in the state of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The director did not raise any issue for his decision to deny the petition other than its inability to pay the proffered wage beginning on the priority date. The AAO concurs that the beneficiary's qualifications and the posting notice meet the regulatory requirements. The issues that will be discussed in this decision is whether or not the petitioner can establish its continuing ability to pay the proffered wage beginning on the priority date and whether or not the prevailing wage rate is being offered as the proffered wage.

The regulation governing a petitioning entity's continuing ability to pay the proffered wage as of the priority date is found at 8 C.F.R. § 204.5(g)(2) which 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 petitioner is offering the beneficiary a wage of \$42,000 per year. On the petition, the petitioner claimed to have been established in 2001, to have an estimated gross annual income of \$1,000,000, and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In support of the petition, the petitioner submitted a copy of the first page of its Form 1120, U.S. Corporation Income Tax Return for 2001<sup>1</sup>.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 21, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically sought evidence from 2002 to the present.

In response, the petitioner submitted its Form 1120 Corporate tax return for the years 2002<sup>2</sup>. The 2002 tax return reflects the following information:

|                         | <u>2002</u> |
|-------------------------|-------------|
| Net income <sup>3</sup> | -\$17,519   |
| Current Assets          | \$145,023   |
| Current Liabilities     | \$315,810   |
| Net current assets      | -\$170,787  |

In addition, counsel submitted copies of the petitioner's internally generated payroll records for 2002 and 2003 that do not show that the petitioner paid any wages to the beneficiary. Finally, the petitioner submitted copies of contracts demonstrating that it would be providing its health care professionals for a fee to third-party clients.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 29, 2003, denied the petition.

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<sup>1</sup> Since 2001 precedes the priority date in 2003, the petitioner's financial standing as represented in its tax return in 2001 is not necessarily dispositive of its continuing ability to pay the proffered wage beginning on the priority date.

<sup>2</sup> Although 2002 also precedes the priority date, in mid-2003, the timeframe of the director's request for evidence and the petitioner's response, the petitioner's 2003 tax return would not be available. Thus, the AAO will rely upon the petitioner's 2002 tax return as the closest indicator of its continuing ability to pay the proffered wage beginning on the priority date.

<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

On appeal, counsel asserts that the director erred because the net income reported by the petitioner is after it paid its payroll and that the director erred by failing to consider the \$4 million dollars of projected revenues the petitioner's health service provider contracts with third-party clients would generate. The petitioner submits a letter essentially reiterating counsel's appellate assertions, a breakdown of "Projected Revenue from existing Contracts," and copies of the petitioner's health service provider contracts with third-party clients it previously submitted. The Projected Revenue from existing Contracts statement shows a breakdown of four contracts, three of which are for eight registered nurses and one of which is for ten physical therapists, all for three years at pay rates ranging from \$40 per hour to \$43 per hour. The total projected revenue from these contracts is asserted to total \$4,536,000. The author of the breakdown is unknown but does not appear to have been created by a financial advisor, accountant, or other expert. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

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). Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The petitioner posted a loss in 2002 and thus is unable to demonstrate a continuing ability to pay the proffered wage from the priority date out of its net income.

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.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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 during the year in question, 2000, however, were negative. As such, the petitioner is unable to demonstrate a continuing ability to pay the proffered wage from the priority date out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002. In 2002, the petitioner shows a loss and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner submits contracts and a summary of projected revenue that is prepared without expert attestation and analysis or detail that would provide information concerning expenses. For example, if the petitioner receives \$43.00 per hour worked for its physical therapists, who are in turn paid below the prevailing wage rate<sup>5</sup> at the proffered wage's hourly rate of \$20.19, then the petitioner would receive from its healthcare clients approximately \$23.00 per hour worked for each physical therapist. In essence, the petitioner is claiming that each physical therapist might generate approximately \$23.00 per hour worked. Yet there is no information in the record of proceeding concerning the petitioner's obligation to purchase worker's compensation, professional liability, and health insurance.<sup>6</sup> The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, however, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected healthcare personnel-generated income would be sufficient to cover the salary of its employees and all concomitant expenses of the business. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, the petitioner is submitting evidence of future earnings, not earnings it has at the time of filing the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2003 through copies of contracts with third-party clients.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2003 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and the petition must be denied for this reason.

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>5</sup> This will be further discussed below.

<sup>6</sup> No other information has been provided about the benefits the petitioner will provide to its healthcare personnel, such as housing, transportation, legal fees, education/licensure fees, etc.

Beyond the decision of the director, there is an additional reason why this petition cannot be approved. 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 petitioner is not offering a proffered wage that meets the Department of Labor's (DOL) prevailing wage rate requirements. CIS has the authority to review the petitioner's proffered wage for compliance with the DOL's prevailing wage rates. *See* 20 C.F.R. § 656.22(e). DOL maintains a website at [www.ows.doleta.gov](http://www.ows.doleta.gov) which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. The prevailing wage rates are broken down into two skill levels. General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The job title and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of physical therapist does not require any experience. OWL reports that for 2003, the year of the petition's priority date, the prevailing wage rate for a Level 1 physical therapy position in Santa Clara County, California, was \$57,117 per year. The petitioner's proffered wage for the proffered position is \$42,000 per year, which is less than the prevailing wage rate. While DOL regulations allow for the proffered wage to come within 95% of the prevailing wage, the instant petition's proffered wage does not fall within that threshold. *See* 20 C.F.R. § 656.40(a)(2)(i). Thus, the petitioner is not offering the prevailing wage rate in violation of 20 C.F.R. § 656.40 and the petition cannot be approved for this reason.

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 not met that burden.

**ORDER:** The appeal is dismissed.