



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 24 2007
SRC 06 236 51576

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: the Director, Texas Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a physical therapy 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. § 656.5(a), commonly referred to as Schedule A, Group 1. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The record shows that the appeal is properly filed and timely. However, it does not make a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original October 24, 2006 denial, the single issue in this case is whether or not the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States. This section 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 August 1, 2006. Aliens who will be permanently employed as physical therapists are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 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.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Permanent Employment Certification (Form ETA-9089 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The

petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is August 1, 2006. The proffered wage as stated on the Form ETA 750 is \$52,000 annually.

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 appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's bank statement for the period of September 21, 2006 through October 19, 2006, and pay stubs for the beneficiary for the period October 13, 2006 through November 24, 2006. Other relevant evidence includes a copy of the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, and copies of the petitioner's bank statements for the period June 20, 2006 through September 20, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2005 Form 1120S reflects an ordinary income or net income of \$27,213 and net current assets of \$24,726.

The petitioner's bank statements for the period June 20, 2006 through October 19, 2006 reflect ending balances ranging from a low of \$44,391.57 to a high of \$84,760.30.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$52,000 based on its bank account, based on the evidence that it is currently employing the beneficiary (pay stubs attached), and based on the replacement of outside therapists by the beneficiary.

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

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).

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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 21, 2006, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has provided copies of the beneficiary's pay stubs for the period October 13, 2006 through November 24, 2006. Therefore, the petitioner has established that it employed the beneficiary for that time period.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$52,000 and the actual wages paid of \$11,580 (assuming the petitioner continued to compensate the beneficiary at the same rate through the remainder of the year) in 2006. That difference would have been \$40,420.² The petitioner could not have paid the difference of \$40,420 from its net income of \$27,213 in 2006.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.

² It is noted that at the time of filing, August 1, 2006, the petitioner would not have had the 2006 tax return available; and, therefore, determining the petitioner's ability to pay the proffered wage of \$52,000 must be based on the petitioner's 2005 tax return.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 2005 were \$24,726. The petitioner could not have paid the proffered wage of \$52,000 in 2005 from its net current assets.

On appeal, counsel contends that the petitioner's bank statements should be considered when determining the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances 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) 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 was considered above in determining the petitioner's net current assets.

On appeal, counsel also claims that the petitioner plans to replace its outside therapists with the beneficiary, thereby, increasing its business and revenue. However, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them 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 those positions 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 workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them. In addition, it is unlikely that the beneficiary would be able to replace all of the outside therapists, and the petitioner has not specified how many outside therapists would be replaced or what amount of the \$109,182 paid to the outside therapists would be available to pay the beneficiary the proffered wage of \$52,000. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Furthermore, it is noted that the petitioner has filed additional applications and petitions for additional therapists with a 2006 priority date. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date and continuing to the present.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a

³ 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.

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 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 Sonogawa*, 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, however, the petitioner has only provided one tax return, 2005, which does not establish the petitioner’s ability to pay the proffered wage of \$52,000. It is also not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner’s reputation throughout the industry.

The petitioner’s 2005 tax return reflects an ordinary income or net income of \$27,213 and net current assets of \$24,726. The petitioner could not have paid the proffered wage of \$52,000 from either its net income or its net current assets in 2005. Again, since the petitioner had filed additional applications and petitions for additional therapists with a 2006 priority date, the petitioner must establish that it had sufficient funds to pay all the wages with a 2006 priority date, not just the beneficiary’s wage.

Beyond the decision of the director, it is noted that the notice of filing contained inaccurate information and that the petitioner filed the petition prior to the validity period of the prevailing wage determination. 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 first issue to be discussed is the inaccurate information contained in the notice of filing. The regulation at 20 C.F.R. § 656.10(d)(3) states in pertinent part:

The notice of the filing of an Application for Permanent Employment Certification must:

- i. State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity.
- ii. State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor.
- iii. Provide the address of the appropriate Certifying Officer; and

- iv. Be provided between 30 and 180 days before filing the application.

In the instant case, the petitioner provided incorrect information regarding part two of the above regulation in that it stated that “any person may provide documentary evidence bearing of the application to: [REDACTED] and not to the appropriate Certifying Officer of the Department of Labor as required.

The second issue to be discussed is the filing of the petition prior to the validity period of the prevailing wage determination. The regulation at 20 C.F.R. § 656.15(b) states in pertinent part:

General documentation requirements. A Schedule A application must include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(b)(4)(c) states in pertinent part:

Validity period. The [State Workforce Agency (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 [Prevailing Wage Determination (PWD)], employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In the current case, the PWD was made on July 24, 2006, and the Form I-140, Immigrant Petition for Alien Worker was filed on August 1, 2006, or eight days after the PWD. Therefore, the petitioner did file the petition within the validity period of the prevailing wage as required by the regulation at 20 C.F.R. § 656.40(b)(4)(c).⁴

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

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

⁴ The purpose of the validity date for the prevailing wage determination is to ensure that the prevailing wage determination is reflective of the wages being offered for comparable positions in the location where the job offer exists at the time that the Form I-140 petitioner recruits the alien worker.