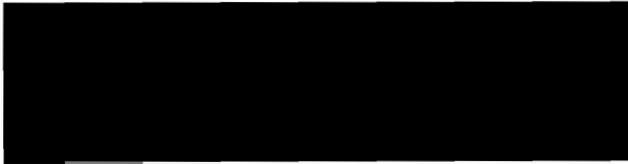


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JUN 29 2007

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC-05-227-50277

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:

SELF-REPRESENTED

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, California Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a home health care company, and seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3).

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b). *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) 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.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “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).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Permanent Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, a petitioner must file with the petition, a letter of statement signed by an authorized state physical therapy licensing official in the state of intended employment, which provides that the beneficiary is qualified to take the state’s written licensing examination for physical therapists.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. 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 the case at hand, the petitioner submitted the Application for Permanent Employment Certification, Form ETA-9089,¹ with the I-140 Immigrant Petition with the I-140 Immigrant Petition on August 11, 2005, which is the priority date. The proffered wage as stated on Form ETA 9089 for the position of a nurse is \$24 per hour, 40 hours per week, which equates to an annual salary of \$49,920. On the I-140 petition filed, the petitioner listed the following information: established: 1996; gross annual income: \$750,000; net annual income: \$55,000; and current number of employees: 10.

On October 3, 2005, the director issued a Request for Evidence (“RFE”) for the petitioner to submit: evidence that the beneficiary was certified as a physical therapist by the Foreign Credentialing Commission on Physical Therapy (“FCCPT”); a copy of the beneficiary’s valid California Board of Physical Therapy License; evidence that the beneficiary possesses the experience listed on Form ETA 9089;² a copy of the beneficiary’s employment offer specifying the wage and job duties;³ and evidence of the petitioner’s ability to pay the proffered wage, in the form of the petitioner’s 2004 federal tax return.⁴ The petitioner responded.

On January 26, 2006, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with 20 CFR § 656.10(d)(1). Specifically, the notice must be posted within 30 to 180 days of filing. The petitioner posted the notice in January 2002, more than 180 days prior to filing. Further, the posting notice listed a wage rate of \$22.13 per hour, below the prevailing wage of \$23.16. The position was, therefore, not properly posted for the required ten consecutive business days for the position and requisite wage prior to filing. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (“PERM”), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² The Form ETA 9089 required that the individual have a Bachelor’s degree in Physical Therapy, but did not require any prior work experience. The petitioner provided a copy of the beneficiary’s degree and transcripts demonstrating studies in the requisite field. Additionally, the petitioner provided two letters documenting the beneficiary’s work experience, although not required on the ETA 9089. The petitioner also provided a letter from the Physical Therapy Board of California that the beneficiary did not provide a social security number or alternate tax identification number and that her application could not be processed without this information. We would not consider this sufficient to meet the requirement of 20 C.F.R. § 656.15 for the petitioner to provide a letter or statement signed by an authorized state physical therapy licensing official in the state of intended employment, which provides that the beneficiary is qualified to take the state’s written licensing examination for physical therapists.

³ We note that the employment agreement submitted lists the position’s wage as \$22.13, which is below both the prevailing wage of \$23.16 per hour, and the proffered wage of \$24.00 per hour on the petition.

⁴ The RFE additionally requested information related to the beneficiary’s I-485 Adjustment of Status application.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

The record shows that the appeal is properly filed, timely and makes an 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.

On appeal, the petitioner provides that the posting notice that listed January 2002 contained a “typographical error” and that the notice should have read “January 2005.” Further, the petitioner provides that there is a high demand for physical therapists, and that the position as a result is “open indefinitely.”

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (ii) If there is no such bargaining representative, by posted notice to the employer’s employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer’s U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer’s organization.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

⁵ 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- (i) State that 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.

...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) **there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and**
- (II) **the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.**

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the August 11, 2005 filing, and have met the other requirements of 20 CFR § 656.10(d).

The posting notice submitted was deficient in that it listed it was posted in January 2002, listed a wage of \$22.13 per hour, below both the prevailing and the proffered wage, and did not provide the appropriate address for the regional certifying officer.

Additionally, although not raised in the director's decision, the posting notice was further deficient in that the petitioner listed the address of the State Workforce Agency for California, which was the accepted practice under the prior system of filing "Reduction in Recruitment" labor certifications, but changed under PERM. The petitioner is required to list the proper address of the certifying officer under the PERM system. *See* 20 C.F.R. § 656.10(d). 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*, 229 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 asserts that the January 2002 date was in error, and should have been January 2005. Even if the posting were completed in January 2005, the posting would still be outside the 180-day range. To meet the 180-day requirement, the posting would need to have begun after February 12, 2005, and be completed by July 12, 2005. The posting would also need to list the proper wage offered for the position, be posted for the required 10 consecutive business days, and identify the regional certifying officer's address. The posting failed on all of the foregoing points, and accordingly, the posting, whether accurately dated or not, failed to meet the requirements of 20 C.F.R. § 656.10(d).

CIS noted in the decision that the petitioner listed \$22.13 on the posting notice. The petitioner provides in response that it listed \$24 per hour as the wage offered on the ETA 9089, and that the petitioner will pay the beneficiary \$24 per hour, above the prevailing wage.

While the Form ETA 9089 lists the wage offered as \$24.00 per hour, the posting notice similarly must list the offered wage for the position. It is insufficient to list the offered wage on the Form 9089, but not on the posting notice. *See* 20 C.F.R. § 656.10(d)(6).

Further, a petitioner is also required to obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 CFR § 656.15(b)(i). The petitioner lists on Form ETA 9089 a "determination date" of June 30, 2005 for obtaining the prevailing wage. However, the petitioner failed to file the petition with the required SWA wage determination. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, although not raised in the director's decision, we find that the petitioner has failed to establish its ability to pay the proffered wage. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date, here, August 24, 2004, 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).

Regarding the petitioner's ability to pay, first, CIS will 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. On Form ETA 750B, signed by the beneficiary on August 4, 2005, the beneficiary did not list that she was employed with the petitioner. The petitioner did not submit any documentation regarding any prior wage payment. Therefore, the petitioner is unable to establish its ability to pay through prior wage payment to the beneficiary.

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. 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).

The record demonstrates that the petitioner is 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 page one, Form 1120S, line 21. The Form 1120S instructions, 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.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists only income from its business and will take the income from line 21:

Tax year⁶: 2004 **Net income or (loss):** \$93,023

⁶ We note that the priority date is August 2005, so that the petitioner would need to demonstrate its ability to pay from this date onward, however, we will consider the petitioner's 2004 tax return in light of the petitioner's other filings for multiple beneficiaries.

Additionally, we note that the petitioner provided a "Tax Return Listing," rather than its Form 1120S copy and attached schedules. The listing provides the tax form line number, and figure listed. As the petitioner did not include its full Schedule L, we cannot calculate the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000) defines "current assets" as consisting 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. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a

While the petitioner's net income would allow for payment of the instant beneficiary, we note that CIS records reflect that the petitioner has filed for 23 individuals between the dates of December 30, 2002, and March 26, 2007, and for 6 individuals alone in 2005.⁷ The petitioner would need to demonstrate that it can pay the proffered wage for all the sponsored beneficiaries, and based on the foregoing net income, we find that the petitioner has failed to demonstrate its ability to pay the proffered wage for all the sponsored individuals.

The petitioner additionally submitted an Income Statement for the nine months ending September 30, 2005. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement submitted with the petition is not persuasive evidence. The petitioner did not provide an accountant's statement, or other evidence to demonstrate that the statement was prepared pursuant to an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Accordingly, based on the foregoing, we find that the petitioner is unable to establish its ability to pay for the multiple beneficiaries sponsored.

The petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d), and failed to file with a copy of a prevailing wage determination. Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application. Further, the petitioner has failed to establish that it can pay the proffered wage to all the sponsored beneficiaries. 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.

corporation's 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, and evidences the petitioner's ability to pay. The petitioner would be expected to convert the net current assets to cash as the proffered wage becomes due.

⁷ The petitioner listed that it employs ten individuals. The number of sponsored beneficiaries seems high in light of the petitioner's overall workforce. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).