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FILE: LIN 06 034 52543 Office: NEBRASKA SERVICE CENTER Date: **JAN 29 2008**

IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner, [REDACTED], is a recruiting agency and therapy 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner had established its financial ability to pay the proffered wage and that the petition should be approved.¹

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 November 10, 2005.

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 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 November 10, 2005.

The regulation at 20 C.F.R. § 656.15(c) provides:

Group I documentation. An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

¹ 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.

(1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only under this § 656.15 and not under § 656.17

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 November 10, 2005. 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 October 22, 2005, 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 2005, claim a projected gross annual income of \$1,103,856, a projected net annual income of \$368,121, and currently employ three workers.

In a request for evidence issued February 7, 2006, the director requested evidence that the petitioner has had the continuing ability to pay the proffered wage as of the priority date of November 10, 2005. The director also specifically requested a copy of the petitioner's latest federal income tax return and advised the petitioner that it may submit additional evidence such as audited financial statements, bank account records, and/or personnel records.

In response, the petitioner explains in a letter, dated April 17, 2006, that it functions in two ways; 1) as an employment placement service for foreign-trained therapist personnel seeking regular employment with its healthcare client organizations and 2) as a provider of contract therapy services for other healthcare client organizations who prefer to obtain contract therapist services rather than in-house programs. The petitioner also provided copies of three documents identified as "International Recruiting Network's Confirmation for Therapist Recruitment" that concerns the petitioner's recruitment of occupational therapists for other rehabilitation firms, dated in February and March 2006. These documents appear to be an example of the

petitioner's operation as a third party recruitment agent for other healthcare providers. A copy of one other document, dated November 9, 2005, is identified as [REDACTED] "Confirmation for Occupational Therapy Services" and appears to be a contract between [REDACTED] and another rehabilitation provider for the provision of services of a named occupational therapist. A sentence at the bottom of the document refers to another supplemental service agreement and refers to the corporate petitioner doing business as [REDACTED]. The petitioner additionally provided a copy of a contract for services, dated March 28, 2005, executed by [REDACTED] and [REDACTED] as well as a business associate agreement between the same parties, signed on the same date concerning the general provision of therapy services.

It must be noted here only the actual U.S. employer that intends to employ the beneficiary may file a petition to classify the beneficiary under section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). This means that the prospective U.S. employer who intends to offer permanent full-time work to the beneficiary is the actual employer that is empowered to file an immigrant petition for an alien worker. An agency functioning only as a recruitment arm for the actual employer offering permanent full-time employment would not qualify. *See Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982)

The petitioner also provided a copy of its brochure advertising its services as an international recruitment agency, a copy of an internally generated financial statement, and a copy of its March 2006 bank statement. Copies of two letters from [REDACTED], the corporate petitioner's president, refers to her position as the primary shareholder and president of [REDACTED], a prior identically named company which had operated in three northwestern states and which was sold in 1998. She also states that this corporate petitioner was established in the last quarter of 2005. [REDACTED] refers to [REDACTED] as the petitioner's contract therapy division. She emphasizes the petitioner's ability to pay the proffered wage is based on the expected revenues to be received from the petitioner's various work orders.

The director denied the petition on September 7, 2006, determining that the petitioner had not established its continuing financial ability to pay the proffered wage of \$62,400 per year. The director declined to rely on the petitioner's March 2006 bank statement which he noted showed an unexplained deposit during the month of \$65,788.82 and noted the documentation referring to the petitioner's projected income did not establish its ability to pay the proffered wage as of the priority date.

On appeal, counsel submits a copy of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2005 explaining that the petitioner had erroneously followed the advice of its accountant in failing to provide it in response to the director's request. The tax return reflects that the petitioner reported gross receipts or sales of \$37,813, salaries and wages of \$25,770, and net income of -\$5,080.² The petitioner listed no assets or liabilities on Part III, Balance Sheets per Books.

Counsel also provides various other documents including a copy of the petitioner's 2005 Oregon Corporation Excise Tax Return, copies of forecasted compiled financial statements for the period ending December 31, 2006, including an historical balance sheet for the period ending September 30, 2006, a duplicate copy of the petitioner's March 2006 bank statement, one page from the transaction history of the September bank statement, and copies of various invoices and work records dated during the first quarter of 2006. The

²For the purpose of this review, line 24, taxable income before net operating loss deduction & special deductions will be treated as net income.

petitioner also provided copies of documents related to its bank line of credit, and a copy of its business plan, as well as copies of various recruitment and contracts with foreign workers and other U.S. rehabilitation firms.

On appeal, counsel asserts that the petitioner did not submit a copy of its federal income tax return in response to the director's request for evidence because it was following the advice of its accountant. Counsel contends that the documentation provided establishes the petitioner's continuing ability to pay the proffered wage, citing a CIS Memorandum issued by William R. Yates, Associate Director of Operations as authority for CIS to accept profit/loss statements, bank statements, and personnel records. According to counsel, when the petitioner filed the I-140, it had only been an active business for one month and did not have a 2004 or 2005 federal income tax return to submit with the initial filing.

Regarding the compiled financial statements provided on appeal, it is noted that according to the plain language of 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 compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). It is restricted to information based upon the representations of management. *See Barron's Accounting Handbook*, 37071 (3rd ed. 2000). As is the case here, a disclaimer is usually found at the beginning of a compilation where the accountant explains that no form of assurance or opinion can be expressed based on the figures presented. As such, the compiled financial statement submitted for either 2006 or as a forecast of 2007 cannot be considered as probative of the petitioner's continuing financial ability to pay a proffered salary as of the priority date.

The petitioner's March 2006 bank statement submitted to the record and on appeal does not constitute probative evidence of the petitioner's continuing ability to pay a certified wage as represented on the labor certification. Bank statements, including the related copies of the petitioner's bank transaction history and reconciliation relevant to its balance as of September 30, 2006, 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 provides an inaccurate financial portrait of the petitioner. 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 as set forth on an audited financial statement or, where applicable, a federal tax return. Unless submitted where a short period of time is at issue and otherwise supports other required evidence that demonstrates the petitioner's continuing financial ability to pay a given salary, they do not demonstrate a sustainable ability to pay a specified salary or constitute an acceptable substitution for such evidence. Similarly, the copies of miscellaneous invoices that petitioner may have generated in 2006 as submitted on appeal may demonstrate that it was conducting business and producing revenue during this period, but they are not specifically convincing that the petitioner established its ability to pay the certified wage of \$62,400 during this period.

The petitioner provided copies of documents respectively dated September 29, 2006 and October 6, 2006, indicating that it has secured two line(s) of credit for \$75,000 and \$50,000. Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit were available at the time of filing the petition on November 10, 2005. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, at 49.

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided on an audited financial statement and/or tax return and will be fully considered in the evaluation of the corporation's net current assets. Although lines of credit may demonstrate creditworthiness at a given debt, they also represent a potential obligation that must be repaid and for the purpose of showing compliance with the requirements set forth in the regulation at 8 C.F.R. § 204.5(g)(2), they will not be treated as cash or as a cash asset. It is also noted that the petitioner provided a copy of its business plan describing its operation and containing copies of the (unaudited) compiled financial statements discussed above.

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, there is no evidence that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the instant beneficiary in an amount at least equal to the proffered wage from the priority date onwards, 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 not sufficient. Also, showing that the petitioner paid wages in excess of the proffered wage is not sufficient. 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's net income as shown on its federal income tax return or an audited financial statement is not the only statistic that can be used to demonstrate a petitioner's ability to pay the proffered wage. If the net income the petitioner reports does not establish that sufficient funds were available to cover the proffered wage during a given period, 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.³ A corporation's year-end current assets are shown on Part III, Balance Sheets per Books on a Form 1120-A Short Form Income Tax Return, lines 1 through 6. Its year-end current liabilities are shown on lines 13 and 14. 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. In this case, the petitioner's federal income tax return for 2005 indicated that the proffered wage could not be covered by the

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.

reported -\$5,080 in declared net income. As noted above, the petitioner did not declare any current assets or current liabilities. The petitioner failed to establish its ability to pay the certified wage of \$62,400 in 2005.

Counsel asserts on appeal that the petitioner should be considered for approval based on the employee's ability to generate revenue. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage which it now has. Within this context, on appeal, the petitioner submits six additional copies of its internal confirmation of physical therapist services requests including one naming the beneficiary requesting his services for a 13 week assignment dated August 24, 2006, copies of three requests for unnamed therapists, a copy of a supplemental staffing agreement, and copies of three of the petitioner's confirmations for fee based therapist recruitment. These documents carry various dates in 2006. While the beneficiary's projected assignment may represent possible future revenue, it does not establish the petitioner's continuing financial ability to pay the proffered wage beginning as of the priority date within the requirements of the regulation at 8 C.F.R. § 204.5(g)(2).

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

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

It is noted that in some cases that petitioners who have experienced unique and unusual business circumstances may be deemed to qualify for approval under the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), based on a petitioner's history of performance that supports its reasonable expectations of increasing profit. That case however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner, that had been in business for 11 years, changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner filed its petition establishing the priority date before it was business. It cannot be concluded that this circumstance represents a framework of established success similar to *Sonogawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her

clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner, a start up business at the time of filing the petition, has presented one tax return that fails to establish its ability to pay the proffered wage in 2005 which encompasses the priority date. Moreover the evidence submitted relevant to 2006 failed to include any of the required forms of evidence set forth in the regulation at 8 C.F.R. § 204.5(g)(2) and was not probative of its ability to pay the proffered wage during that period.

It cannot be concluded to form a framework of success such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

Counsel also asserts on appeal that the director should have reached a favorable conclusion in this case as a matter of discretion, based on the shortage of healthcare workers as recognized by the Schedule A blanket labor certification process available to physical therapists.⁴ The AAO has reviewed the record in this case, and concurs with the director's denial for the reasons expressed herein. Although Schedule A regulations are designed to address concerns regarding the shortage of healthcare workers such as registered nurses and physical therapists, this concern does not permit CIS to overlook the specific regulatory provisions relating to petitioner's burden that it has had the ability to pay the proffered wage beginning at the priority date. Because the filing of I-140 petition also establishes a priority date, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each period 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, supra. See also 8 C.F.R. § 204.5(g)(2)*. If the preference petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

For the above stated reasons, the AAO concurs with the director's decision that the petition may not be approved. 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 petitioner has submitted a letter from [REDACTED] expressing interest in the case.