U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: WAC 02 023 56734 Office: CALIFORNIA SERVICE CENTER Date: APR 15 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E Crawford for
Robert P. Wiemann, Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a physical therapy service. 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 the beneficiary is qualified to take the state licensing examination for physical therapists, or that she holds a full and unrestricted (permanent) license to practice physical therapy in the state of intended employment. The director further determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, 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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158

(Act. Reg. Comm. 1977). Here, the petition's priority date is October 5, 2001. The beneficiary's salary as stated on the labor certification is $28.05 per hour or $58,344.00 per annum.

Counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the tax returns submitted with the application were irrelevant evidence of the petitioner's ability to pay the wage offered from the priority date of the petition, October 5, 2001.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1040 U.S. Individual Income Tax Return which shows an adjusted gross income of $97,280. The petitioner could pay a salary of $58,344.00 a year out of this figure. Consequently the petitioner has overcome this portion of the director's decision.

The other issue in this proceeding is whether the beneficiary is qualified to take the state licensing examination for physical therapists, or provide a copy of the beneficiary's state license.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (physical therapist). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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 Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate Immigration and Naturalization Service office. 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).

In this case, Form I-140 was filed on October 5, 2001. On February 20, 2002, the director requested that the petitioner submit evidence that the beneficiary had passed the state licensing examination for physical therapists, or that she held a full and unrestricted license to practice physical therapy in the state of intended employment.

In response, counsel submitted a copy of a letter from the Physical Therapy Board of California (PTBC) which stated that the PTBC cannot authorize the beneficiary to sit for the exams until her credentials have been evaluated by an approved credential evaluating agency.

On appeal, counsel submits a letter from the Physical Therapy Board of California which states that the beneficiary's "credentials have been reviewed and approved and that she has been recommended to appear for the National Physical Therapy Examination (NPTE) and the California Laws Examination (CLE)."

Employment-based petitions are based on priority dates. The priority date is established when the petition is properly filed with the Service. 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which submitted. 8 C.F.R. § 103.2(b).

The petition was not accompanied by evidence that the beneficiary qualifies for classification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I, at the time the petition was filed. As the petitioner had not complied with the instructions stipulated in the Department of Labor regulations, at the time of filing of the petition, the petition may not be approved.

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. The appeal will be dismissed.

ORDER: The appeal is dismissed.