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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 I Street NW
Washington, D.C. 20536



File: WAC 02 170 51339

Office: CALIFORNIA SERVICE CENTER

Date: NOV 14 2003

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



PUBLIC COPY

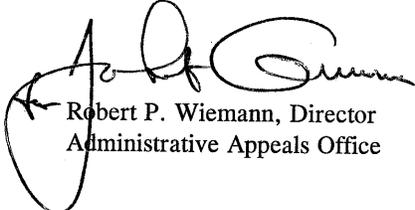
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


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 traveling nurse staffing agency¹ that provides board certified nurses for temporary assignments with health care providers. It seeks to employ the beneficiary permanently in the United States as a travel nurse. In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary as a registered nurse under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petitioner currently employs 449 employees and has a net annual income of \$2,400,000. CIS records reveal that the current petition is one of 439 petitions that the petitioner filed between April 2002 and May 2003.

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of 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. Schedule A includes aliens who will be employed as professional nurses.

The director denied the petition, finding that the petitioner failed to establish that it had the ability to pay the beneficiary's wage.

On appeal, counsel for the petitioner submits a brief.

Section 203(b)(3)(A)(i) of the Act 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.

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

¹ The petitioner states that a traveling nurse's duties are identical to those of a registered nurse, except that the traveling nurse may work in different cities or states depending upon the length of the assignment.

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 turns on the petitioner's ability to pay the proffered wage and on its qualification for a blanket labor certification on behalf of the beneficiary pursuant to Schedule A, each as of the priority date of the filing of the petition. The filing of the I-140 on April 25, 2002 in this case established the priority date. 8 C.F.R. § 204.5(d). For reasons discussed below, the petitioner has failed to establish either its ability to pay the proffered wage or its qualification for the blanket labor certification.

The petitioner submitted copies of its 1999, 2000 and 2001 Internal Revenue Service (IRS) Forms 1120S. The petitioner's tax return for 2001 reflected ordinary income of \$1,258,261. The beneficiary's salary as stated on the labor certification is \$720 per week or \$37,440 per year.

CIS uses a multiple-pronged analysis in evaluating whether the petitioner has the ability to pay the proffered wage. First, CIS checks to see whether the petitioner has employed the beneficiary and paid the proffered wage in the past. If this is not the case, CIS will look to the petitioner's net income, line 21 ("ordinary income") of the Form 1120S. Finally, if the petitioner does not have sufficient net income, CIS will review whether the petitioner had sufficient net current assets to pay the proffered wage. In accordance with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may also consider the totality of the petitioner's business activities and economic circumstances.

To determine the petitioner's ability to pay, CIS examines the petitioner's net income figure as reflected on the 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).

As the petitioner's priority date falls on April 25, 2002, CIS must examine the petitioner's tax return for the 2001 calendar year. The petitioner's IRS Form 1120S for calendar year 2001 presents an ordinary income of \$1,258,261. The evidence on the record indicates that the petitioner has filed 113 immigrant visa petitions in the months of April through July 2002 within the

California Service Center's jurisdiction, 33 of which have been approved. CIS records further indicate that the petitioner has filed 439 I-140 immigrant visa petitions nationwide between April 2002 and May 2003.² The director determined that the petitioner's ordinary income of \$1,258,261 sufficed to pay thirty-three nurses at \$37,440 per year, and that as thirty-three nurse petitions had already been approved, there would not be sufficient funds to pay the beneficiary's salary. The AAO concurs that the petitioner has not established its ability to pay the proffered wage of \$37,440 for the beneficiary in addition to the 33 recently approved employees out of this income.

Contrary to counsel's assertions, CIS cannot consider the petitioner's ability to pay a single beneficiary by itself when the petitioner has filed multiple immigrant visa petitions. CIS records reveal that the petitioner filed immigrant visa petitions for 439 aliens in the course of one year. At the time of filing, the petitioner claimed that it employed 449 individuals. Accordingly, the filed petitions would account for a 97 percent increase in the petitioner's workforce. If the additional 439 alien nurses were to be paid at the same rate as the current beneficiary, the proposed hires would account for an additional \$16,436,160 in payroll liabilities.

The director properly noted the additional petitions that had been filed at the service center. However, rather than determining that the petitioner could pay 33 nurses and approving those petitions, the AAO suggests that a more appropriate course of action would have been to hold all of the petitions until the petitioner established the ability to pay all of the proposed salaries or selected the number of nurse petitions that it wished to pursue.

As an alternative means of determining the petitioner's ability to pay, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ Net current assets identify the

² These records have been incorporated into the record of proceeding.

³ A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year and any other identified current liabilities.

amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

A review of the petitioner's 2001 income tax return demonstrates that the petitioner had current assets at the end of 2001 in the amount of \$117,746 and current liabilities in the amount of \$98,355. Accordingly, the petitioner had net current assets in the amount of \$19,391 at the end of 2001, which constitutes insufficient ability to pay the proffered wage of \$37,440.

The petitioner argues that CIS "overlooked entirely the \$31,349 depreciation amount" and cash on hand. The petitioner cites an unpublished AAO decision for the proposition that "depreciation, taxable income and cash on hand at year end must all be considered when assessing ability to pay." Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the cited case. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c). Finally, in *K.C.P. Food Co., Inc. v. Sava*, 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. *Supra* 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." *Chi-Feng Chang v. Thornburgh, supra* at 537; see also *Elatos Restaurant Corp. v. Sava, supra* at 1054.

The petitioner provided CIS with the following additional items as evidence of its ability to pay the proffered wage: audited financial statements for the years 2000 and 2001, a payroll summary of 449 employees for 2001, a letter from the Branch Banking & Trust Company verifying \$4,000,000 in credit line funds available to the petitioner, and a statement from its chief financial officer.

On appeal, counsel for the petitioner asserts that CIS should consider additional evidence of its ability to pay including projections of future income, the petitioner's credit line funds, and the chief financial officer's statement.

The petitioner states that it contracts with health care providers to supply travel nurses. The petitioner submits a list of the petitioner's contracts with 144 health care providers in the California Service Center's jurisdiction as the basis for its projections of future income. The petitioner provides CIS with a template copy of a contract with one health care provider, and

copies of numerous contracts with some of its health care provider clients. It is noted that none of the contracts of record obligates the health care providers to actually place any of the petitioner's nurses, and thus there is no guarantee that these contracts will generate income. It is noted that the petitioner has filed 439 petitions in a 12-month period, seeking to augment its workforce by 97 percent.⁴ Without evidence that the beneficiary is committed to be placed at a specific facility, this ambitious growth projection is speculative and necessarily raises questions regarding the ability to pay the proffered wage as of the filing date.

The petitioner asserts that "nurse-generated income is acceptable proof of ability to pay." The petitioner states that it pays each nurse \$18 per hour worked and in turn receives from its healthcare provider clients between \$47 and \$68 per hour worked. In essence, the petitioner is claiming each nurse generates available revenue of approximately \$29 to \$50 per hour worked which is sufficient to pay the salary of \$18 per hour. Yet the petitioner also states that it is responsible for the following: the purchase of worker's compensation, employer's liability, general liability, professional liability and unemployment insurance. The petitioner also indicates that it provides each nurse with:

[An] extensive benefits package including free housing, free furniture, free utilities (maximum \$50 per month), paid annual round trip airline ticket to the nurse's native country, medical, dental, disability and life insurance, licensure reimbursement, 401(k) retirement plan, attorneys' fees and all legal costs associated with obtainment of an immigrant visa, Immigration and Naturalization Service and Embassy fees, cost of CGFNS Certificate, TOEFL examination application and review course fees, TSE examination application and review course fees, VisaScreen application fee, NCLEX application and review course fees and orientation to the local community and culture in the United States.

Even if CIS were to accept the petitioner's contracts as evidence of projected income, 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 nurse generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business. Here, the petitioner's projection of future income is speculative because it is based on contracts that do not guarantee either placement or net revenue. The petitioner should have provided evidence that the beneficiary will be placed at a specific health care facility or facilities in the form of a contract or an addendum to a contract between the petitioner and the health care facility

⁴ The petitioner stated that it had 449 employees on its payroll in 2001.

or facilities. Further, to consider contracts as evidence of projected income, the evidence must show that the petitioner has a guaranteed number of placements to generate revenue, and the placements need to name each beneficiary so CIS can evaluate whether and where the petitioner will place each beneficiary.

CIS precedent decisions allow for consideration of factors other than the petitioner's federal income tax return, audited financial statements, or annual reports in certain circumstances. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. Although CIS may consider the totality of the petitioner's circumstances when evaluating its ability to pay, the totality of the evidence in the present case is insufficient to establish the petitioner's ability to pay the beneficiary.

Counsel for the petitioner argues that its \$4,000,000 credit line is acceptable proof of its ability to pay. Counsel for the petitioner cites an unpublished AAO decision as precedent requiring CIS to consider evidence of a credit line as funds available to pay wages. Counsel's argument is not persuasive. Again, unpublished decisions are not binding in the administration of the Act. 8 C.F.R. § 103.3(c). Counsel also cites a published federal district court decision, *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), for the proposition that it is an abuse of discretion to disregard pledges of support in determining the ability to pay issue. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. Here, counsel is asserting that CIS should treat its line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to gift money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1988).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the funds are available at the time of filing the petition. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheets and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a current asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petition must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining a petitioner's ability to pay, a line of credit may properly be considered as a factor in evaluating the totality of the circumstances concerning a petitioner's financial performance in determining its ability to pay. See *Matter of Sonogawa*, *supra*. As in *Matter of Sonogawa*, the AAO may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's annual reports, federal tax returns, and audited financial statements. 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 the instant case, the petitioner has not established its ability to pay considering the totality of circumstances. The petitioner has been in business since 1997 (five years as of the date of filing the petition). The petitioner seeks to double its labor force by filing more than four hundred petitions within one year. The petitioner did not indicate that its ability to pay has been influenced by any uncharacteristic expenditures or losses.

On appeal, the petitioner asserts that the director abused his discretion by refusing to accept its chief financial officer's

statement.

Regarding the statement of the financial officer, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

In a case where the prospective 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.

The director chose to disregard the chief financial officer's statement. In review, the director should have articulated the reason for his decision. Here, the AAO has considered the chief financial officer's statement that the petitioner has the ability to pay, but determines that it is insufficient to establish the petitioner's ability to pay in light of the balance of the evidence on the record.

Beyond the decision of the director, the petition must be denied because the petitioner failed to comply with the regulatory requirements for a blanket labor certification for a Schedule A occupation.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

(a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .

(b) The Application . . . 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 § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under ... 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(i) To the bargaining representative(s) (if any) of

the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

(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 shall be posted for at least 10 consecutive days.

(Emphasis added.)

The regulation at 20 C.F.R. § 656.20(g)(3) provides in pertinent part:

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) State that applicants should report to the employer not to the local Employment Service Office;

(ii) 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;

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

The petitioner submitted a copy of a notice of job opportunity with its petition. The petitioner's president attested that the notice was posted for ten consecutive days. The petitioner failed to indicate where it posted the notice. The evidence is insufficient to establish that the notice was posted at the actual facility or location of the employment where the beneficiary will be assigned as required by 20 C.F.R. § 656.20(g)(1).

As previously noted, the petitioner has submitted contracts that do not obligate the signatory hospitals to place the petitioner's nurses at their facilities. Because the petitioner has failed to identify the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice

requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative offices, the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers at the location of intended employment with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.⁵ The petitioner failed to establish that it fulfilled the posting requirement. The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representatives. Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay, this issue need not be discussed further.

To establish the beneficiary's eligibility for classification as a registered nurse under section 203(b)(3)(A)(i) of the Act, the petitioner should have submitted a contract for a specific beneficiary to work at a specific hospital and evidence that the petitioner posted notice for ten days at that specific hospital or provided notice to the appropriate bargaining representatives.

In a request for additional evidence, the director asked the petitioner to provide evidence that the petitioner would be the beneficiary's employer and the term of employment. Although not part of the director's decision, the evidence indicates that the petitioner is the actual employer and the proffered employment is permanent and not temporary or seasonal. See *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), and *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

⁵ 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).