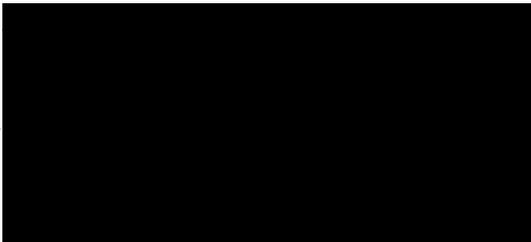


B10

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: WAC-01-277-50478 Office: CALIFORNIA SERVICE CENTER

Date: APR 05 2004

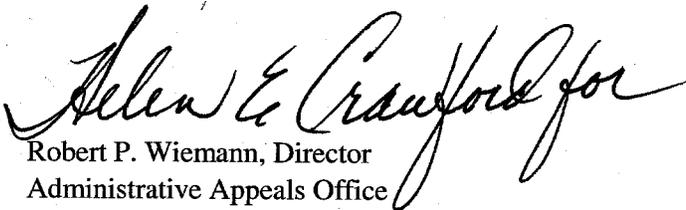
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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: N/A

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, Director
Administrative Appeals Office

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 health care staffing firm. It seeks to employ the beneficiary permanently in the United States as a registered 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 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. § 656.20 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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 either 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 [CIS].

Eligibility in this matter turns on the petitioner's ability to pay the proffered wage and on the petitioner's 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 July 27, 2001 in this case established the priority date. 8 C.F.R. § 204.5(d). The beneficiary's salary as stated on the labor certification is \$17.00 per hour or \$35,360.00 per year. 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 initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 9, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner responded to the RFE with a letter dated November 18, 2002 and with other additional evidence.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and additional evidence.

The petitioner states on appeal that the director's decision reveals a lack of understanding of the operations of the petitioner's business. The petitioner states that nurses hired by the petitioner become employees of the petitioner under two-year contracts and that each nurse works in one of the hospitals operated by one of the major hospital systems which have contracts with the petitioner. The petitioner states that the payments made to the petitioner pursuant to those contracts are the sources of the funds which the petitioner uses to pay the proffered wage to each nurse.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence submitted on appeal will then be considered.

The evidence submitted with the I-140 petition which is relevant to the petitioner's ability to pay the proffered wage consists of a Registered Nurse Employment Agreement between the petitioner and the beneficiary, signed by the beneficiary on February 17, 2000 and signed by the petitioner on February 19, 2000; a Notice of Job Opportunity for Banner Health Care, marked as posted November 1, 2000 and as removed November 30, 2000; a letter dated December 12, 2000 from Banner Health System; an Estimated Market Value Balance Sheet dated March 30, 2000 for the an individual identified by the petitioner as a major investor in the petitioner; and an unaudited financial statement for the petitioner dated February 28, 2001.

Evidence submitted with the I-140 petition relevant to the qualifications of the beneficiary consists of a birth certificate of the beneficiary; a nursing diploma; a college transcript; a nurse certification from Davao City, Philippines; a nursing license; a job description for the beneficiary at St. John Hospital, Davao City, Philippines; a resume of the beneficiary; and a copy of a Certificate dated September 1995 for the beneficiary from the Commission on Graduates of Foreign Nursing Schools (CGFNS) stating that the beneficiary had passed both the nursing and the English language proficiency sections of the CGFNS examination.

The evidence submitted in response to the RFE, all of which is relevant to the petitioner's ability to pay the proffered wage, consists of a Form 1120S United States federal income tax return for an S corporation for the year 2001, a list of employees of the petitioner as of November 11, 2002, and a letter dated November 18, 2002 from the president of the petitioner.

The director found that the Form 1120S for the petitioner for 2001 showed "net income" of \$39,989.00 and net current assets of \$9,745.00. The director was correct in each of those findings, though the proper term for the income of an S corporation after deductions as shown on line 21 of the Form 1120S is not "net income" but "ordinary income."

The director found that the amount of "net income" and net current assets were sufficient to pay for one full-time employee. But the director noted that CIS records indicated that "numerous I-140s have already been filed and approved. . . ." The director therefore found that according to the evidence submitted by the petitioner "there are not enough funds to pay for additional employees at this time."

Since the ordinary income of the petitioner in 2001 was greater than the proffered wage of \$35,360.00, the director was correct in his finding that the petitioner's evidence showed sufficient assets to pay for one additional full-time employee. However, the director was also correct in noting that CIS records indicated numerous I-140 petitions as having been filed and/or approved.

The letter dated November 18, 2002 from the president of the petitioner states that as of that date 103 nurses had been deployed to their work assignments in hospitals in the United States. The president said that petitions had been submitted for 600 nurses, apparently an approximate number. The president said that many of those nurses had not yet arrived in the United States because they had not yet met the visa requirements, namely TOEFL (Test of English as a Foreign Language) and TSE (Test of Spoken English) and that others had dropped out of the process because of the long delays involved.

Nothing in the petitioner's evidence indicates the specific contract or contracts which the petitioner anticipates will serve as the source or sources of the funds to pay the proffered wage to the beneficiary. The letter dated December 12, 2000 from Banner Health System states that that organization plans to petition for a minimum of 250 registered nurses and a maximum of 500 registered nurses during the next twelve months. Yet nothing in that letter indicates that the beneficiary is one of the nurses for whom a petition was planned to be submitted. Moreover, the letter states that Banner Health System plans to submit the petitions and the letter makes no reference to the petitioner.

Similarly, the copy of a job posting notice by Banner Health System lacks any indication that the job is the one for which the beneficiary has been petitioned. Moreover, the job posting is in the name of Banner Health System, not in the name of the petitioner.

Therefore the letter from Banner Health System and the job posting notice provide no evidence that Banner Health System intends to make contract payments to the petitioner for nurses who are to be brought to the United States by the petitioner and who are to become employees of the petitioner.

A financial statement by one of the petitioner's two shareholders is included as evidence. However, CIS may not "pierce the corporate veil" and look to the assets of an owner of the corporation to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Although the petitioner's ordinary income for 2001 was sufficient to pay the proffered wage to the beneficiary, nothing in the evidence provides any assurance that those funds would be used for the beneficiary's salary, rather than for any one of the hundreds of other nurses who, according to the petitioner's president, were also named as beneficiaries on employment-based petitions submitted by the petitioner and who were awaiting their U.S. visas.

The evidence in the record prior to the decision of the director therefore fails to establish that the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains permanent residence.

On appeal the petitioner submits additional evidence, consisting of a letter dated February 28, 2003 from the president of the petitioner and a letter of reference from Southwest Bank of Texas. Portions of the president's letter contain factual information which apparently could have been submitted prior to the decision of the director. Similarly, the information in the letter of reference from Southwest Bank of Texas contains information which apparently could have been submitted prior to the decision of the director. The petitioner makes no claim that this evidence was unavailable prior to the decision of the director, nor offers any other explanation for submitting it for the first time on appeal.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

The petitioner was given reasonable notice by the regulation at 8 C.F.R. § 204.5(g)(2) which is quoted above on page two, by case law, including *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and by the RFE in the instant case of the need for evidence concerning the petitioner's ability to pay the proffered wage. Yet the petitioner failed to submit the needed evidence prior to the decision of the director or to offer any explanation for its failure to do so. For these reasons, the evidence submitted for the first time on appeal will not be considered for any purpose.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, the evidence would not be sufficient to overcome the director's decision. The letter dated February 28, 2003 from the president of the petitioner gives additional details on the petitioner's business operations, but it fails to identify the specific source or sources of funds from which the beneficiary would be paid, such as the specific contract under which the beneficiary would be assigned to a health care provider. The letter of reference from the Southwest Bank of Texas attests to the sound and responsible banking practices of the petitioner, but lacks any specific financial information about the petitioner. Therefore, the evidence submitted on appeal would fail to provide the evidence which was lacking in the record before the director.

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

As discussed above, the petitioner submitted a copy of a notice of job opportunity with its petition, a notice in the name of Banner Health Care of Arizona. The notice fails to identify the petitioner as the employer, though the petitioner's name is listed as one of the two organizations interested parties may contact, along with Banner Health. The notice also fails to contain a statement 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. Therefore the notice does not comply with the requirement of 20 C.F.R. § 656.20(g)(8)(iii), quoted above.

The notice contains hand written notations stating that it was posted on November 1, 2000 and removed on November 30, 2000, but no initials or other identifying information is present to indicate who made those hand-written notations. The evidence contains no indication as to where the notice was posted. The evidence is therefore insufficient to establish that the notice was posted for the required period of time and 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).

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 of 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. *See* 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).

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.

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.

ORDER: The appeal is dismissed.