



U.S. Citizenship
and Immigration
Services

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FILE: WAC 01 153 55623 Office: CALIFORNIA SERVICE CENTER Date: 11/18/14

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:



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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a nursing registry firm. It seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I.

On April 5, 2002, the director 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, March 29, 2001.

The AAO dismissed the petitioner's appeal on November 8, 2002. The AAO reviewed the financial information contained in the petitioner's 2000, Form 1040, U.S. Individual Income Tax Return and held that the petitioner's adjusted gross income of -\$7,361, including a business income of -\$103,434, was insufficient to cover the beneficiary's annual proffered wage of \$49,920. The AAO also found that the evidence did not support the application of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence.

In this case, counsel submits copies of the petitioner's 2001 checking account statements, asserting that they demonstrate the petitioner's ability to pay the proffered wage of \$49,920. Counsel refers to a past appeal sustained by the AAO and asserts that its reference to checking accounts should mandate a similar decision in the instant case. That case does not represent a binding precedent as described in 8 C.F.R. § 103.3(c). In this case, it is noted that the petitioner's 2001 monthly balances ranged from a low of \$43.38 to a high of \$39,684.69. The petitioner's 2001 tax return or an audited financial statement for this period has not been submitted, so it cannot be determined if these statements represent additional funds beyond those that may be included in a tax return or an audited financial statement.

Bank statements illustrate only a portion of a petitioner's financial status. They may show revenue and some expenses, but do not establish the full extent of a petitioner's assets and liabilities. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner's evidence shall be either copies of annual reports, federal tax returns, or audited financial statements. It neither states nor implies that bank statements, unaudited documents, or other evidence may be submitted in lieu of this documentation. Thus, as also noted in the director's decision, the petitioner's unaudited profit and loss statement and balance sheet purporting to show its 2001 financial status, hold little independent evidentiary weight, as they appear to be the sole representations of the petitioner's management.

Counsel has additionally submitted copies of the petitioner's 2001 state quarterly wage reports and 2001 W-3, Transmittal of Wage and Tax Statements. She maintains that they illustrate the petitioner's ability to pay the

beneficiary's salary. Although these documents reflect sums paid to existing employees, the petitioner's net income must be sufficient to bear the added expense of the beneficiary's salary as a new employee.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel also asserts that the denial of the petition will deprive the petitioner of the ability to provide enough nurses to fulfill its staffing agreements with medical service providers. Counsel submits copies of several of the more recent agreements with her motion to reopen. There is little first-hand evidence to support this statement, and counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. While the regulations describe special procedures applicable to shortage occupations, they do not exempt a petitioner engaged in this field from establishing its ability to pay the proffered wage. Counsel further asserts that the nurses provided to third party medical facilities will generate additional revenue for the petitioner. Although only two of the executed contracts, provided with counsel's motion, contain rate schedules, it is clear that while the petitioner would pay a proffered wage of \$24.00 per hour to its nurses, it would charge \$17.00 per hour more to Lakewood Medical Center and between \$14.00 and \$16.00 more per hour to LAMMC to provide nurses. While this suggests additional gross income generated for the petitioner, the evidence fails to establish an accurate estimation of net income or demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business.

For similar reasons, counsel's renewal of her assertion that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) should apply is not persuasive. As stated in the AAO's decision of November 8, 2002, *Sonogawa* relates to petitions filed during uncharacteristically unprofitable years within a framework of profitable or successful years. That case rested upon unique financial circumstances. This case does not present a similar fact pattern. The figures presented in one federal tax return for the year 2000 in the instant matter do not suggest an uncharacteristically unprofitable year due to unusual business circumstances surrounded by a framework of profitable years.

Upon review, the petitioner has been unable to present convincing additional argument or evidence to overcome the findings of the director and the prior AAO decision. The petitioner has not demonstrated its ability to pay the proffered as of the priority date of the petition.

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.

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ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition remains denied.