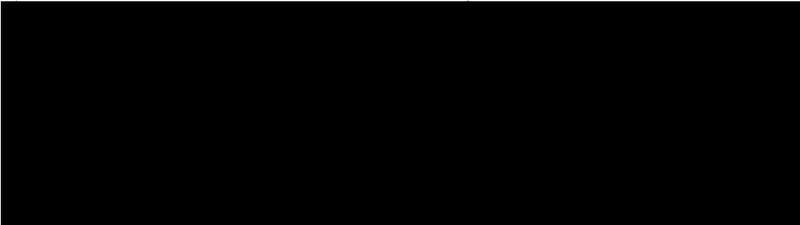




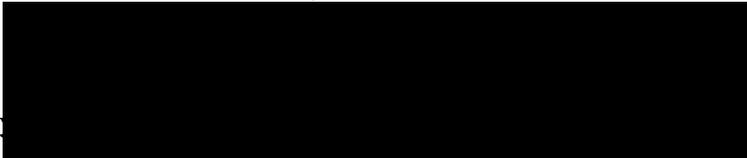
U.S. Citizenship
and Immigration
Services



B6

FILE: WAC 02-216-50392 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:

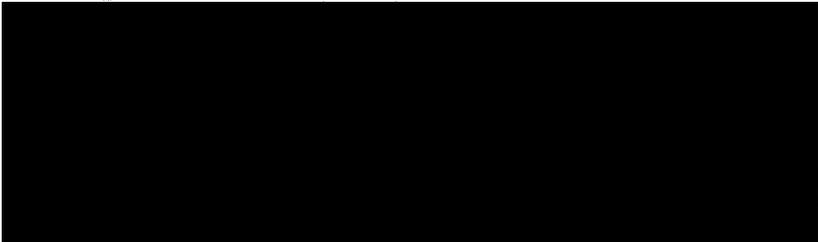


Beneficiary

MAY 21 2004

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:



identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare provider staffing services corporation. The petition indicates that the petitioner, at the time of filing, employs 500 employees and has a net annual income of \$209,774.00. It seeks to permanently employ the beneficiary in the United States as a registered nurse. 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 failed to establish its ability to pay the proffered wage to the beneficiary because its taxable income and net current assets were lower than the proffered wage.

On appeal, counsel submits a brief and new evidence consisting of contracts between the petitioner and third-party clients. Counsel asserts that the petitioner has the ability to pay the proffered wages as evidenced by the petitioner's expectations of revenue based on contracts with third party clients.

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.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on June 21, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

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 Citizenship and Immigration Services (CIS) 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).

According to its cover letter, petition, and recruitment flyers, the petitioner identifies healthcare professionals to outsource to third party clients according to contractual arrangements. If the beneficiary will be outsourced to an employment site different from the petitioner's headquarters, then more information is required prior to analyzing the employment-based immigrant visa petition and concomitant analyses such as whether or not the proffered wage meets the prevailing wage rate, and whether or not the notice meets specific requirements delineated under 8 C.F.R. § 656.20(g)(1). While the director's decision did not address these issues, they will be addressed in this decision on appeal.¹

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is permanent and not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition.

The petitioner has failed to establish that it is the actual employer and the proffered employment is permanent and not temporary or seasonal.

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The petitioner did not submit contracts or any information or documentation that clearly delineates its relationship with third-party client health care facilities with respect to the instant visa petition. Under certain circumstances, contracts may illustrate pre-arranged, full-time employment at a third-party client worksite for specifically named health care professionals.² Additionally, under certain circumstances, contracts may also

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

² Fixed-term contracts in certain circumstances have been upheld as pre-arranging permanent employment. See *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968)(a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients which guaranteed permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits"). See also *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992)(permanent employment is established when a constant pool of employees are available for temporary assignments); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), (for a temporary

establish an employer-employee relationship between the petitioner and specifically named health care professionals, if, for example, the contracts delineate the petitioner's responsibility to directly pay salaries and provide fringe benefits to the nurses.³

The record of proceeding, however, does not contain any documentation or information such as a contract or an appendix to a contract that clearly delineates the scope of the beneficiary's employment. A review of the petitioner's recruitment flyers in the record of proceeding and its cover letter with the visa petition indicates that it outsources its healthcare professionals and the beneficiary would most likely not be working at its staffing agency headquarters. However, the visa petition and labor certification applications forms fail to identify the beneficiary's work location. Supporting letters do not provide this information either. Thus, it is impossible to determine if the petitioner or the petitioner's third-party clients would be the beneficiary's actual employer or if the petitioner has the ability to offer pre-arranged, full-time, permanent employment for the beneficiary. The petitioner also failed to provide documentation concerning the beneficiary, itself, and/or a third-party client, that unequivocally states that the petitioner is the beneficiary's actual employer and all details concerning the scope of the proffered employment, such as a specific third-party worksite to which the beneficiary would be assigned. Thus, the petitioner failed to establish that the position offered to the instant beneficiary is a pre-arranged, permanent, full-time position and that the petitioner is the actual employer for failure to provide enough information concerning the scope of employment terms as set forth under 20 C.F.R. §§ 656.22 and 656.3. It is also unclear if the petitioner retains employment over its healthcare professionals or if it facilitates permanent employment with a third-party client. The petitioner also never made clear where the beneficiary would work, rendering it impossible for CIS to clearly analyze the visa petition. The petitioner is reminded that it has the burden of proving its eligibility for the immigration benefit it is seeking. See Section 291 of the Immigration and Nationality Act.

The petitioner has failed to establish the ability to pay the proffered wages.

The second issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulations at 8 C.F.R. § 204.5(g)(2) state the following in 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

help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand).

³ *Matter of Smith, supra*, at 773, has held that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary.

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 for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is June 21, 2002. The beneficiary's salary as stated on the labor certification and Form I-140 is \$16.85 per hour, which equates to \$35,048.00 per annum.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage and no evidence that it had complied with the notice requirement of 20 C.F.R. § 656.20(g)(1).

Therefore, the director, on September 16, 2002, requested additional evidence. The director requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director's notice also stated that if the petitioner employs more than 100 workers, a statement from a financial officer of the company indicating that the petitioner has the ability to pay the proffered wage would suffice. The director also noted that the petitioner's petition was filed without evidence of compliance with 20 C.F.R. § 656.20(g)(1), which will be discussed below. The director requested evidence of compliance.⁴

In response, counsel returned the notice and its U.S. Corporation Income Tax Return for 2001, which is the tax return that would have been available at the time of filing and the director's request for evidence. The tax return demonstrates that the petitioner reported \$29,288 in taxable income before net operating loss deduction and special deductions and its current liabilities outweighed its current assets. The director denied the petition because the petitioner could not pay the proffered wage out of its taxable income or net current assets.

On appeal, counsel states, in part, that the petitioner has the ability to pay the proffered wage based, in part, upon its reasonable expectations of future financial profit and lines of credit.

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 Sonogawa*, 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-

⁴ The director also requested evidence that the beneficiary is offered full-time, permanent employment, which was discussed above.

established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 621 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 726 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 an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the 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.

After a review of the petitioner's tax return, the AAO concurs with the director's decision that the petitioner's taxable income and net current assets illustrate an insufficient ability to pay the proffered wage.

The petitioner failed to establish a reasonable expectation of revenue enabling it to pay the proffered wage.

As the director correctly determined, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, in determining the petitioner's ability to pay the proffered wage. The regulations provide for the consideration of factors other than the petitioner's federal income tax return, audited financial statements, or annual reports in certain circumstances. Under 8 C.F.R. § 204.5(g), the regulations state the following, in part: "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]."

An analysis of the petitioner's additional evidence follows to determine if the petitioner's totality of circumstances enables it to pay the proffered wages.

The petitioner's contracts demonstrate a reasonable expectation of revenue, however, fail to provide evidence of net revenue after expenses.

The petitioner states that it proposes to pay the beneficiary \$16.83 per hour worked (time and a half for overtime), and at least one of its contracts reveal that it receives from its healthcare clients between \$38.74 and \$64.25 per hour worked for each nurse depending on specialty. In essence, the petitioner may be generating approximately

⁵ 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.

\$20.00 per hour worked. Yet, the record of proceeding illustrates that the petitioner also purchases worker's compensation, professional liability, and health insurance. Its recruitment flyers shows that it may provide housing, transportation, legal fees, education/licensure fees, etc.

The petitioner has produced evidence of a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover its nurse's salaries. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, however, 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.

The petitioner failed to identify a geographical location where the proffered position will be performed and thus fails to satisfy that its proffered wage meets the prevailing wage rate.

In this case, the prevailing wage rate is impossible to determine since the petitioner failed to provide details concerning the geographical location of the beneficiary's employment, since OWL's system requires designation of a geographical location where the employment will be performed. It does not clearly specify where the beneficiary will work on any of the forms or documentation provided. The petitioner has a clear burden to establish that its immigrant visa petition meets all statutory and regulatory requirements. *See* Section 291 of the Act. Section 203(b)(3)(C) of the Act makes clear that an immigrant visa may not be issued until a determination is made by the Secretary of Labor that overcomes the inadmissibility bars found at section 212(a)(5)(A) of the Act. Section 212(a)(5)(A) of the Act states the following:

Labor certification and qualifications for certain immigrants. –

(A) Labor certification. –

- (i) In general. – Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –

....

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. *See* 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa

petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulations at 20 C.F.R. § 656.20(c)(2) state that a labor certification application must clearly show that the wage offered meets the prevailing wage rate and references 20 C.F.R. § 656.40 (discussed above). Thus, a petition that fails to prove that its proffered wage does not adversely affect the wages and working conditions of United States workers similarly employed results in a denied visa petition and an inadmissible beneficiary. In other words, a petition that offers a salary that fails to meet the prevailing wage rate as determined by the Department of Labor (DOL) will be denied.

Since the petitioner failed to specify the geographical location where the proffered employment will be performed, however, it is impossible for CIS to evaluate whether or not the proffered wage meets the prevailing wage rate as established by DOL. Thus, the petitioner failed to meet its evidentiary burden that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers.

The petitioner failed to submit a posting notice that complies with regulatory requirements.

The regulations at 20 C.F.R. § 656.20(g)(1) state the following:

In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 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. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains a notice meeting some of the content requirements delineated in 20 C.F.R. § 656.20(g)(3)⁶, however, there is no documentation concerning where the notice was posted, which does not conform to the

⁶ The regulation at 20 C.F.R. § 656.20(g)(3) states the following: Any notice of the filing of an Application for Alien Labor Certification shall: (i) state that applicants should report to the employer, not to the local Employment Service office; (ii) [s]tate 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; and (iii) [s]tate 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.

regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. Because the petitioner 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).⁷ If the petitioner merely posted the notice at its administrative office(s), 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 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.⁸ The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). Additionally, the regulations at 20 C.F.R. § 656.20(g)(3)(iii) also require a petitioner to "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." However, the posting notice refers persons with documentary evidence to a CIS office. Therefore, the petitioner fails to meet the requirements delineated under 20 C.F.R. § 656.20(g)(3).

To summarize, the AAO finds the evidence inadequate to establish eligibility for an immigrant visa under section 203(b)(3)(A)(i) of the Act and corresponding regulations and case law for failure to designate the hospital or facility where the beneficiary would work through an executed contract dated prior to filing the visa petition, failure to establish the ability to pay the proffered wages through evidence of sufficient net current and future income, and failure to comply with the posting notice requirements.

As always, 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. The petition is denied.

⁷ The posting notice lists the employment location as Cedar Sinai Medical Center in Los Angeles, CA. One of the petitioner's third party client contracts is with the Cedar Sinai Medical Center in Los Angeles, CA. The petitioner, however, has not made clear that this will be where the beneficiary will perform services as a registered nurse.

⁸ 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).