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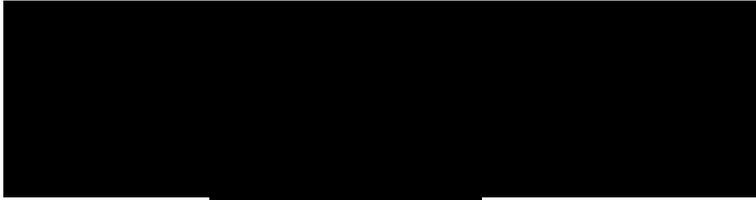
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U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. A3042,  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

P26



FILE:

[Redacted]  
EAC 03 164 52131

Office: VERMONT SERVICE CENTER

Date: APR 19 2005

IN RE:

Petitioner:  
Beneficiary:



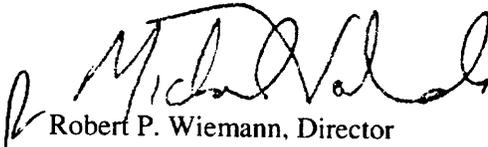
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Acting Center Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The petitioner is an employment/staffing agency. It seeks to employ the beneficiary permanently in the United States as a staff 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 petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

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.

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submitted additional evidence and maintains that the petitioner's financial documentation demonstrates its continuing ability to pay the proffered salary.

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

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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. 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 [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of

Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is April 23, 2003. The beneficiary's salary as stated on the labor certification application is \$25.00 per hour or \$45,500 per annum, based on a 35-hour week. The visa petition states that the petitioner was established in July 2001 and had, as of the date of filing, thirty-two employees. It claims a gross annual income of approximately 2 ½ million dollars.

The petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2002. The corporate tax return indicates that the petitioner files its returns based on a standard calendar year. It shows that the petitioner declared net income of -\$2,403. Schedule L of the tax return shows that the petitioner had \$184,950 in current assets and \$165,635 in current liabilities, resulting in \$19,315 net current assets. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.<sup>1</sup> If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On June 26, 2003, the director requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that this evidence shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner, through counsel, submitted a compilation of the petitioner's financial statements for 2002 and what appear to be internally generated profit & loss and balance sheets for the period ending July 21, 2003. Counsel also provided a copy of the petitioner's federal income tax return for 2001. It shows that the petitioner reported cumulative wages paid of \$412,833. Counsel also advised in a cover letter that the petitioner couldn't provide a Wage and Tax Statement (W-2) issued to the beneficiary because the petitioner did not employ the beneficiary in 2002. Counsel further submitted a letter, dated August 13, 2003 from [REDACTED] Chief Financial Officer," affirming that the petitioner has sufficient gross revenue to pay the proffered wage.

The director denied the petition on January 7, 2004, concluding that the petitioner's 2002 compiled financial statements and 2002 federal tax return failed to sufficiently demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner's 2001 tax return appeared to show sufficient ability to pay the proffered wage, however she emphasized that the petitioner must demonstrate its ability to pay as of the date of filing, and, in that respect, the 2002 tax return is more probative as it is more relevant to the April 23, 2003 priority date.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel submits copies of the petitioner's 2003 financial statements accompanied by an accountant's compilation report, and copies of its 2003 checking account statements. Counsel further submits a letter, dated January 14, 2004, from "[REDACTED]" indicating that while the petitioner's tax return uses a cash-basis accounting method, the petitioner's financial statements use an accrual-basis accounting method. Mr. [REDACTED] states that the 2002 financial statements "provide sufficient evidence to show [the petitioner's] ability to pay offered salaries." Counsel additionally maintains that the petitioner has met its payroll and maintained sufficient bank balances in its checking account, as shown by the 2003 statements submitted on appeal, to pay all of its employees as well as establish its ability to pay the beneficiary's proposed wage offer.

At the outset, it is noted that none of the financial statements offered to the director or submitted on appeal were audited. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. There is no evidence of such employment contained in this record.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will review the net income figure reflected on the petitioner's 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts or cumulative wages paid to other employees exceeded the proffered wage is insufficient. Similarly, showing that the petitioner demonstrated a given level of gross revenue is not sufficient as it is not reasonable to consider gross revenue without also examining the expenses incurred in order to generate that income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority

for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

While the balances in the petitioner's bank statements may also be reviewed, it is noted that bank statements offer a partial profile of a petitioner's financial status as they do not reflect other encumbrances which may affect the petitioner's available resources and are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. Although this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why an annual report, an *audited* financial statement, or the 2002 federal tax return would be inapplicable or otherwise present an inaccurate financial picture of the petitioner during this particular period. The regulation neither states nor implies that such evidence may be considered in lieu of the regulatory requirements. It is further noted that to the extent that bank statements may represent a portion of a petitioner's cash assets during a given time period, these kinds of assets are generally included as part of a more complete profile of a corporate petitioner's current assets contained on Schedule L of the corresponding corporate tax return.

Counsel's reliance on an election of an accrual-basis of accounting in its financial statements rather than a cash-basis of accounting as presented in its 2002 tax return is inapposite. Precedent does not distinguish the results of a petitioner's tax returns or unaudited financial statements based upon its election of an accounting methodology. Counsel cites no legal authority in support of his proposition.

As noted by the director, the petitioner's 2002 federal tax return reflects that neither the petitioner's net income of -\$2,403, nor its net current assets of \$19,315 established its continuing ability to pay the proffered wage of \$45,500 as of the visa priority date.

It is further noted that CIS electronic records indicate that this petitioner has filed over 90 immigrant worker petitions since 2002. It is the petitioner's burden to show that it has had sufficient income to continually pay all salaries as of the priority date(s) of each petition. Although this issue has not been discussed in this case, in view of this record of filing for multiple beneficiaries, the AAO is further persuaded that the evidence contained in this record is not sufficiently convincing to demonstrate that the petitioner has had the continuing ability to pay the proffered salary as of the visa priority date.

Beyond the decision of the director, it is also noted that the petitioner is a staffing agency and not a direct provider of medical services. Part 6 of the visa petition indicates that the alien will work at "65 Jay Street, Newark, New Jersey." The record fails to contain any pre-existing contract for this alien's services between the petitioner and a medical service provider located at this address, which corroborates that a realistic job offer of permanent full-time employment existed as of the priority date of April 23, 2003. It is finally observed that the posting notice contained in the record does not indicate whether the job opportunity notice was posted at the actual location of the alien's employment, rather than only at the petitioner's office.<sup>2</sup> The purpose of requiring an employer to post

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<sup>2</sup> The AAO understands the reference to "facility or location of employment" at 20 C.F.R. § 656.20(g)(1)(ii) to

notice of the vacant position 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 the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* 20 C.F.R. § 656.10.

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.

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mean the actual location of employment; a distinction that becomes significant where the petitioner is not a direct medical care provider itself, but acts as a staffing firm for the third-party medical care providers.