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U.S. Citizenship
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Services



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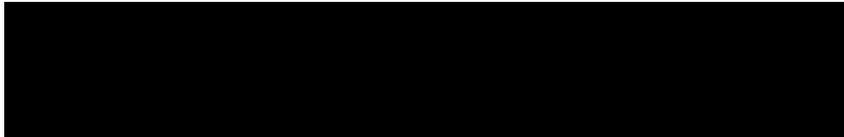
Office: CALIFORNIA SERVICE CENTER

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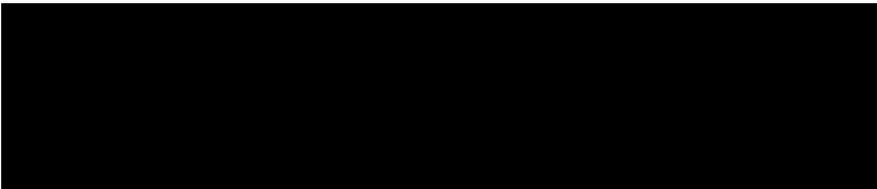
Petitioner:

Beneficiary:



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

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to sponsor 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 denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel states that the petitioner is capable of paying the proffered wage, based on documents previously submitted. Counsel submits no further documentation.

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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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. The petitioner states it has a gross annual income of \$9,225,000 on its visa petition. 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, in effect prior to November 28, 2005, 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).

The regulation at 8 C.F.R. § 204.5(g)(2) also 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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on August 1, 2003. The proffered wage as stated on the Form ETA 750 is \$24.50 per hour, which equals \$50,960 per year.

On the petition, the petitioner stated that it was established in 2001 and that it employs 168 workers. The petitioner also stated that it had a gross annual income of \$9,225,000 and a net annual income of \$15,000. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted a letter from [REDACTED] its administrator, who stated that the petitioner had in excess of 100 employees and had the financial capability to pay the proffered wage to the beneficiary. This letter was dated July 21, 2003. Counsel also submitted letters from [REDACTED] that stated the petitioner had no bargaining representative and that a copy of the notice for filing an immigrant visa petition for foreign registered nurses was posted for ten days in the staff lounge.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or to demonstrate that the beneficiary was qualified to perform the job duties, on January 7, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, originals of signed and filed federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested such evidence for the years 2002 to the present. The director also requested evidence that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination or was licensed to practice nursing in the state of intended employment.

In response, the petitioner submitted a copy of the beneficiary's license to practice nursing in the state of California, as well as her diploma from Silliman University, The Philippines, and her Filipino foreign nursing license. With regard to the petitioner's ability to pay the proffered wage, counsel submitted documents that it identified as the petitioner's financial statement from the year 2002 to the present. This document has a cover sheet with the letterhead of [REDACTED] Corporation, address unknown, and was signed by [REDACTED] Vice President of Finance. Mr. [REDACTED] stated that the financial statements included a statement of operations and

a balance sheet for the years ending December 2002 and December 2003. Mr. [REDACTED] initialed each page of the document.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 1, 2004, denied the petition. The director stated that Citizenship and Immigration Services (CIS) did not accept unaudited financial statements, and based on the evidence in the record, determined that the petitioner did not have the ability to pay the proffered wage as of the 2003 priority date to the present.

On appeal, counsel refers to the financial ability letter that [REDACTED] submitted with the initial petition. Counsel then states that the regulations at 8 C.F.R. § 204.5(g)(2) allow organizations with at least 100 employees to submit a statement from a financial officer related to its ability to pay the proffered wage. Counsel also states that the petitioner submitted copies of its 2002 profit and loss statement and balance sheet certified by its corporate financial officer that showed the petitioner had gross income of \$9,215,888 and a net income loss of \$450,043. In addition, counsel stated that the petitioner's profit and loss statement in 2003 indicated gross income of \$9,735,841 and a net income of \$257,548. Counsel states that the petitioner not only enjoyed a six per cent increase in its gross revenues in 2003, but also moved from a previous net loss to positive income. Based on these 2003 figures, counsel asserts that the petitioner's finances could cover the proffered wage.

Counsel also states that the petitioner's losses in 2002 can be attributed in large part to its dependence on agency or temporary staff nurses. Counsel finally states that the totality of circumstances which includes the magnitude of the petitioner's operations in employing over 100 workers, its gross income of close to ten million dollars, and the statutory language pertaining to large employers at 8 C.F.R. § 204.5(g)(2) are factors sufficient to reverse the director's decision.

Although the Form I-290B submitted by counsel also states that he will be sending a brief and/or evidence to the AAO within 30 days, and the record contains a letter from counsel dated May 27, 2004, stating that he needs more time to respond, no further evidence or submissions are found in the record. Therefore, the AAO will evaluate the merits of the petition as the record as presently constituted.

In addition, counsel refers to the regulation at 8 C.F.R. § 204.5(g)(2), that stipulates that companies with over 100 employees may submit a letter from a financial officer with regard to the petitioner's ability to pay the proffered wage. CIS retains the discretion to require corroborative documentation in addition to such a letter as to the number of employees and their actual employment by the petitioner.

In his decision, the director stated that CIS does not accept unaudited financial records. This statement is well founded. The response to the director's request for evidence included unaudited financial statements prepared by a business identified as [REDACTED] Corporation for the petitioner.¹ Although counsel asserts that these statements are certified by a financial officer, the initialing of each page by a financial officer does not constitute an audit of the petitioner's financial operations. The unaudited financial statements that counsel submitted are not persuasive

¹ The relationship between the petitioner and [REDACTED] Corporation is not established in the record. CIS computer records only reflect that [REDACTED] Corporation has numerous I-140 petitions pending at the Nebraska and California Service Centers.

evidence. 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. It is also noted that the petitioner provided no further explanation or clarification as to why it could not or would not submit its federal income tax returns, as requested by the director. Therefore there is no financial evidence in the record with which to evaluate the petitioner's ability to pay the proffered wage, beyond the gross and annual income figures mentioned on page two of the I-140 petition. These figures, without more persuasive evidentiary documentation, are not sufficient to establish the petitioner's ability to pay the proffered wage. Therefore the appeal is dismissed, and the petition is denied.

As previously stated, CIS does not accept unaudited financial statements as evidence to establish that the petitioner has the ability to pay the proffered wage. The petitioner did not submit sufficient documentation to examine the petitioner's net income or total current assets. The petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

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.