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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC 02 239 50853

Office: CALIFORNIA SERVICE CENTER

Date: AUG 12 2005

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

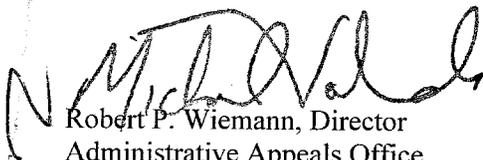
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

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 supplemental medical staffing company. It seeks to employ the beneficiary permanently in the United States as a staff nurse. 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. The director denied the petition accordingly.

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

The regulation 8 C.F.R. § 204.5(g)(2) states 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 20 C.F.R. § 656.10(a)(2) states that professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 [Applications for labor certification for Schedule A occupations.] (c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

20 C.F.R. § 656.20(g) states, in pertinent part:

(1) 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 of location of the employment.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 specifies that the position requires a diploma in nursing and CGFNS Certificate and/or California RN license or eligible to obtain such license.

Here, the Form ETA 750 was accepted on July 23, 2002. The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, approved by the Department of Labor, a copy of petitioner's Employer's Annual Federal Unemployment (FUTA) Tax Return for 2000, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on October 18, 2002, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 the ability shall be either in the form of copies of annual reports, audited financial statements, copies of the original signed federal income tax returns submitted to the Internal Revenue Service. If federal tax returns are used to establish ability to pay the beneficiary's wage, all schedules, attachments, and statements should be included with the return.

* * *

The Service acknowledges that the I-140 petition indicates that the petitioner employs more than 100 workers. Still, one of the above listed forms of evidence is requested. Note: Service records indicate that the petitioner has filed multiple I-140 petitions with priority dates that fall in the same year as this petition. The petitioner will be required to show ability to pay the total wage for all prospective employees.

Nurse Contractors: Provide evidence to show that the petitioner will be employing the beneficiary to fill a specific vacancy. Include the contract between the petitioner and the clients where the beneficiary will perform services ... These contracts should indicate the number of nurses to be hired, and the term of employment.

Form DE-6, Quarterly Wage Report: Submit copies of the U. S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last 2 quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees"

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120 tax returns for year 2001 as well as petitioner's letter, and copies of Agreements for Supplemental Staffing Agencies, Form DE-6 and other information.

The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,360.00 per year from the priority date.

- In 2001, the Form 1120 stated taxable income of \$70,670.00.

Counsel also submitted copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all petitioner's employees for the quarter ending June 30, 2002, and, submitted a list of the company employees and their job titles and duties.

The director denied the petition on January 31, 2003, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

The I-140 Petition was denied for the reason that the Petitioner did not show the capacity to pay beneficiary's proffered wage. Petitioner contends otherwise. Submitted income tax return will show salaries/wages (cost of labor) paid to employees amount to more than \$4,000,000.00.

Additional evidence pursuant to recent decided cases will also support Petitioner's capacity to pay the proffered wage to beneficiary.

On appeal, counsel submits the following copies of additional information: a complied balance sheet and income statement for the period ending September 30, 2002; Forms DE-6, DE-7 and 941; a certification by the petitioner's chief financial officer with list of employees; staffing agreements; the petitioner's Internal Revenue Service (IRS) Form 1120 tax return for year 2001; California Corporation Franchise or Income Tax Returns for 1999 and 2000, as well as the petitioner's 2002 and 2003 bank statements.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, 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. 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax return¹ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,360.00 per year from the priority date.

¹ The regulation 8 C.F.R. § 204.5(g)(2) requires evidence of the ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. State tax returns are

- In 2001, the Form 1120 stated taxable income of \$70,670.00.

Since tax year 2001 was before the priority date, it has little probative value in the determination of the ability to pay, and, even if it did, \$70,670.00 would not be enough money to pay all the wages of the five beneficiaries for which the petitioner has employment based preference petitions outstanding.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. Since the petitioner, offered no admissible evidence in the form of federal tax returns from the priority date, this line of investigation is precluded.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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. . Since no admissible evidence in the form of federal tax returns was offered by the petitioner, from the priority date, this line of investigation is precluded.

Therefore, for the period from the priority date, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in her brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel offers complied financial statements,³ bank account statements, a certification from the petitioner's financial officer, staffing agreements, state wage and withholding reports, and, a state wage related reconciliation report, "Employer's Quarterly Federal Tax Return for the quarter ending December 31, 2002. Counsel cites no legal precedent for this introduction, and, according to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. The CIS may, in its discretion, accept a statement from the financial officer of the petitioner if the petitioner employs 100 employees. In this case, the director raised the issue of multiple petitions and requested evidence of the ability to pay according to regulation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12).

not an acceptable form of evidence. There was no explanation by petitioner why the federal tax returns from the priority date were not submitted upon request by the Service Center, or, if the state and federal returns for the same years, that are not in the record, contained the same data.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ A compilation is limited to presenting in the form of financial statements, information that is the representation of management.

⁴ 8 C.F.R. § 204.5(g)(2).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The unaudited financial statements that petitioner submitted are not persuasive 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. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

The petitioner's accountant reinforces the above statement by qualifying the above-mentioned financial statements thusly:

A compilation is limited to presenting in the form of financial statements information that is the representation of management. I have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit substantially all of the disclosures and the Statement of Cash Flows⁵ required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements 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. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel introduces a certified letter from the financial officer of petitioner that the petitioner has 300 workers on its payroll, and, to introduce the assertion that "... we have the ability to pay the proffered wage."

⁵ In a generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, presents an analysis of the financial health of a business.

However, as noted above, petitioner has not presented any admissible evidence of its ability to pay the proffered wage to the beneficiary or any additional workers.

The regulation 8 C.F.R. § 204.5(g)(2) also states in pertinent part:

Ability of prospective employer to pay wage. ... 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 that 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.

Given the record as a whole and the petitioner's history of filing petitions mentioned below, we find that CIS need not exercise its discretion to accept the letter from petitioner. CIS records indicate that the petitioner has filed five Form I-140 petitions with the Service Center contemporaneously with the subject petition. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that it has the ability to pay all the combined salaries in addition to its present workforce. Given this circumstance, we cannot rely on a letter from the petitioner financial officer referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on petitioner's letter, we will examine the other financial documentation submitted. These documents do not support petitioner's contention that it has the ability to pay the proffered wage.

CIS electronic database records show that the petitioner filed or has pending I-140 petitions on behalf of five other beneficiaries during the same year as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

Counsel asserts that additional evidence was to be submitted on appeal to show the petitioner's ability to pay and therefore, its financial viability. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. Since the petitioner has failed to come forward with admissible evidence, and it has not explained this serious omission, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's has not submitted annual reports, federal tax returns, or audited financial statements to demonstrate that petitioner has the ability to pay the proffered wage from the priority date, nor explain why such evidence was not submitted. Petitioner has failed to come forward with admissible evidence in this matter.

Petitioner, although requested to submit federal tax returns from the priority date, failed to do so and also failed to explain this non-compliance with the Request for Evidence. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its federal tax returns from the priority date. The federal tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.