



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2006
WAC 03 224 52950

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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 sustained. The petition will be remanded.

The petitioner is a private care hospital firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse supervisor. As required by statute, a duplicate Form ETA 750, Application for Alien Employment Certification seeking Schedule-A designation, accompanied the petition. 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.

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 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) 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 30, 2003. The proffered wage as stated on the Form ETA 750 is \$1,000 per week, which amounts to \$52,000 annually. On the Form ETA 750B, signed by the beneficiary on June 17, 2003, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on July 30, 2003. On the petition, the petitioner claimed to have been established on 1990, to currently have 200 employees, to have a gross annual income of \$14.4 million, and to have a net annual income of \$96,840.

In support of the petition, the petitioner submitted:

- A Form G-28 signed by the petitioner and counsel;
- An approved Form I-140 for another petitioner on behalf of the beneficiary as a Schedule A registered nurse;
- A Schedule-A in duplicate for the proffered position signed by the petitioner and the beneficiary;

- An undated letter by the petitioner's president certifying that it can pay the proffered wage of \$25 an hour to the beneficiary, and that the wage represents the prevailing wage "for Registered Nurses in the area;" and
- The petitioner's certification that it has complied with the required posting of a notice of filing the labor certification application for the proffered position on the beneficiary's behalf;
- A May 2, 2002 California board of nursing certificate issued to the beneficiary that she holds an unrestricted state license to practice in the state as a registered nurse, and a comparable license issued to the beneficiary on March 29, 2000 by the New York Education Department;
- A Korean national license certificate issued to the beneficiary stating she had passed the national exam on January 30, 1999, and became registered as a nurse on April 17, 1999;
- A graduation certificate evidencing the beneficiary graduated from Hanyang University in Seoul, Korea, on February 26, 1999, with a B.S. In Nursing degree; and,
- A certificate of completion of a 15-week course in advanced English as a foreign language commenced September 3, 2001.

In a request for evidence (RFE) dated January 5, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested "this evidence for the years 2002 to the present."

In response to the RFE, counsel submitted:

- Counsel's March 23, 2004 letter indicating the petitioner's tax returns for 2002 and 2003 showed a gross income of \$14.4 million for 2002, and of \$16.3 million for 2003;
- The petitioner's Form 1120 tax return for 2002 with a taxable income of \$191,556 and 2003 with a taxable income of \$52,067;
- A CPA's March 2004 letter to counsel indicating the petitioner's books showed a net income of \$50,939 for 2003 ending December 31, adding, "See Schedule M-1 line 1. The letter states the petitioner paid wages of \$6.2 million for the year, apparently referring to 2003. The CPA states, "Based upon the corporation's current financial condition, it was able to pay the wages of [the beneficiary]."

The director determined in a decision dated April 1, 2004, that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence, and accordingly denied the petition. In his decision, the director noted that the petitioner had filed at least four other petitions and could not demonstrate its ability to pay the wages of the beneficiary along with the other four aliens.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the director erred by finding the petitioner had not established the ability to pay the proffered wage despite its Form 1120 for 2002 showing a net taxable income of \$56,959, which was more than the \$52,000 a year in proffered wage.¹ Counsel asserts the director failed to document his charge that the

¹ The petitioner's taxable income for 2002 has little bearing here since the petition's priority date is July 30, 2003. Further, line 28 of the return lists taxable income of \$191,556.

petitioner had gained approval of “numerous I-140’s,”² implying that the petitioner would have to establish ability to pay for beneficiaries of other approved I-140s. Counsel also asserts the petitioner would save \$480,000 a year spent on temporary nursing staff to meet state staffing ratios, noting the petitioner still managed to make a profit.

Counsel submits on appeal the following documents:

- The petitioner’s March 31, 2004 letter from its “accounting manager” advising CIS that it has been paying about \$120,000 a month to different temporary staffing agencies, naming American Nursing Services, At Home Nursing, Care Systems, Direct Health Services, Absolutely Fabulous Nursing, Nurses On Call, Community Nurse, Service First, FAST Nursing, and Pelican Nurses; and,
- The petitioner’s letter of April 15, 2004, to CIS purporting to enclose documentary information³ about its hospital operation; the beneficiary’s current employment with the petitioner; six different financial documents; and the loss of two of its workers, who the letter reports said that “the INS has advised that they have no obligation to work for the Petitioner any more.”

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The I-140 petition states in Part 5 that the petitioner was formed in 1990, and employs 200 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted above, states that where a petitioner 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. A review of the petitioner’s tax returns for 2002 and 2003 reveals that the petitioner was established in 1990, and is a viable business. In 2002, it had gross receipts of \$14,405,171, paid salaries and wages of \$5.8 million, with nothing in the record indicating that it paid the beneficiary any wages. In 2003, the petitioner had gross receipts of \$16,273,460, paid salaries and wages of \$6.2 million, and nothing in the record detailing the amount the petitioner paid the beneficiary in wages despite the petitioner’s above-noted letter of March 31, 2004.

In regard to the petitioner’s multiple petitions the director mentioned, CIS records reveal the petitioner has filed a total of 18 Form I-140 petitions, of which CIS has approved nine. As many as three of the beneficiaries have since become lawful permanent residents. If it were assumed that the petitioner would have to pay the six beneficiaries of the approved petitions prevailing wage rate of \$22-an-hour for non-supervisory registered nursing posts, or \$45,760 annualized. With the petitioner having to pay the six staff nurses \$45,760 each, plus the \$52,000 for the instant beneficiary, the petitioner may need to establish its ability to pay a total of \$326,560 in wages of those beneficiaries.

² The director first raised multiple petitions issue in the decision.

³ None of the specified documentation appears in the record.

It appears the petitioner's tax return for 2002, however, can only establish the ability to pay \$191,556, or the wages of three such nursing beneficiaries, while for 2003, the petitioner's taxable income can only establish its ability to pay up to \$56,959 in wages.

However, this office notes that the director did not list the issue of multiple approved petitions in the RFE. The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The petitioner shall document each approved or pending Form I-140 petition CIS has received on or after October 23, 2002, establishing the proffered wage for the beneficiary of each such petition, for the purpose of determining ability to pay the proffered wage in the instant matter. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.