

identifying data classes to
prevent clearly unwarranted
invasion of personal privacy

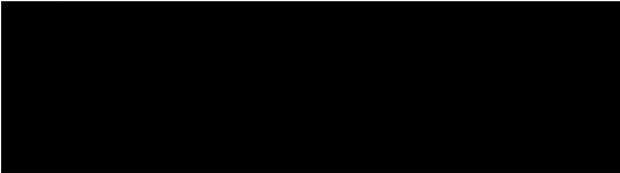
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: EAC 04 215 51470 Office: VERMONT SERVICE CENTER

Date: AUG 19 2005

IN RE: 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an employment agency. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner was established on September 8, 2003. 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, that petitioner had not established that the beneficiary qualifies for an occupation listed in Schedule A, Group I (Title 20, Code of Federal Regulations, part 656), and the petition was not otherwise supported by a certification by the Department of Labor, or evidence that the alien's occupation is within the Labor Market Information Pilot Program. 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.

The proffered wage as stated on the Form ETA 750 is \$52,2200.00 per year. The Form ETA 750 states that the position requires 15 years and six months experience.

With the petition, counsel submitted the original Form ETA 750, approved by the Department of Labor, 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 Vermont Service Center on September 10, 2004, 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:

Submit the 2003 United States federal income tax return(s), with all schedules and attachments, for your business. If your business is organized as a corporation, submit the corporate tax returns. If the business is organized as a sole proprietorship, submit the owner's individual tax return (Form 1040) as well as Schedule C relating to the business.

As an alternative you may submit annual reports for 2003, which are accompanied by, audited or reviewed financial statements.

Submit evidence that notice of filing the Application for Alien Employment Certification (Form ETA 750, parts A&B) was provided to the bargaining representative of the employees or to the employees. This is required by 20 CFR 656.20(g)(1) for persons seeking Schedule A labor certifications. The evidence to submit must be one of the following:

1. A copy of the letter from the employer to the bargaining representative(s) [if any] of the 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.
2. If there is no bargaining unit, copies of the job offer that was posted at the facility or employment location.

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 1120S tax returns for year 2003 as well as the job posting notice entitled "Employment Opportunity."

The director denied the petition on February 23, 2005 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:

1. "Whether District Director erred by determining that the employer failed to demonstrate its ability to pay proffered wages to the beneficiary."
2. "Whether District Director's decision to deny the I-140 Petition was arbitrary and capricious"

On appeal, counsel submits the following copies¹ of additional information: beneficiary's International Commission on Healthcare Professions certificate dated June 29, 2004 certifying that the beneficiary has met all the requirements of section 212(a)(5)(C) of the Immigration and Nationality Act; a CGFNS certificate issued July 14, 2004; a Federal Republic of Nigeria issued license naming the beneficiary "Nurse Midwife" as well as a certificate of registration certifying the beneficiary is a registered nurse and Notification of registration in Nigeria as a midwife; copies of two newspaper ads placed by petitioner for "RNs, LPNs, CNAs, per diem and full time;" and, an "Agency Staffing Agreement" dated January 4, 2005 with exhibits,

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 return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,250.00 per year from the priority date.

- In 2003, the Form 1120S stated a taxable income loss of <\$52,980.00>.²

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.³ A

¹ There is an unreadable International English Language Testing System Test Report Form included in the exhibits.

²The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

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 1120S 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. The Schedule "L" was submitted in blank.

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 net current assets or taxable income.

Counsel asserts in his brief accompanying the appeal that there is another ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel offers two contracts with a hospital and nursing home to provide nurses, one dated in 2005 after the priority date and it is not probative of the ability to pay the proffered wage. Without more information relating to recruitment costs, costs of benefits that are the responsibility of the petitioner to pay, and other overhead costs, the simple fact that the hospital is paying the agency a fee greater than the proffered wage is not sufficient to demonstrate the ability to pay. 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. According to the one tax return provided, the petitioner has no income, or other assets of any kind to report. It has not come forward with any evidence other than the contracts that would provide that it is a viable business with the ability to pay the proffered wage.

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Since the petitioner has failed to come forward with admissible evidence, and 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.

³ 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.

⁴ 8 C.F.R. § 204.5(g)(2).

On the second issue the director found that petitioner had not established that the beneficiary qualifies for an occupation listed in Schedule A, Group I (Title 20, Code of Federal Regulations, part 656), and, the petition was not otherwise supported by a certification by the Department of Labor, or evidence that the alien's occupation is within the Labor Market Information Pilot Program. On appeal the petitioner presented evidence that the beneficiary through licensing and by satisfying the CGFN requirements and obtaining a certificate, is qualified for the occupation. The petitioner has established that the beneficiary possesses the necessary licensing credentials required by the regulations applicable to the admission of registered nurses under Schedule A, Group I. As a registered nurse, the occupation is within the Labor Market Information Pilot Program as a shortage occupation.

The burden of proof in these proceedings to prove the ability to pay the proffered wage 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.