U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 134 53403 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2005

IN RE: Petitioner: [redacted]
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: SELF-REPRESENTED

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, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification 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.

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

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 granting 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.

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 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 March 25, 2003. The proffered wage as stated on the Form ETA 750 is $22.17 per hour, which equals $46,113.60 per year.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 531 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated March 20, 2003, from its president and CEO. That letter states that the petitioner has the ability to pay the proffered wage, citing an increase in the petitioner's gross receipts from 2000 through 2003, and its 2002 ordinary income. A letter from the

petitioner's CFO/Controller, dated March 6, 2003, states that she believes that the petitioner has more than sufficient assets to pay the proffered wages of the beneficiaries for whom it has petitioned.

That letter also asserts that the petitioner has a $3 million line of credit from Heritage Bank of Commerce.[1] In support of that assertion the petitioner submits a letter, dated August 7, 2002, from Heritage Bank of Commerce. That letter confirms that the petitioner has a credit line, but states that it is a "low six figure" line. This office notes a considerable discrepancy between the petitioner's assertion the petitioner's evidence.

The petitioner provided a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of $584,366 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Finally, the petitioner provided a copy of a contract between itself and the beneficiary and a Master Hospitals List.

On May 20, 2003, the California Service Center requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. Specifically, the Service Center requested IRS printouts of the petitioner's tax returns for each year since 2002.

In response, the petitioner submitted an IRS printout for 2002. The 2002 printout confirms that the petitioner declared ordinary income of $584,366 during that year. The petitioner also submitted a copy of its Form 941 Employer's Quarterly Tax Return for the first quarter of 2003, which shows that the petitioner paid over $5 million in wages during that quarter.

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 August 30, 2003, denied the petition. In that decision, the director relied upon figures from the petitioner's 2001 and 2002 income tax returns.[2]

On appeal, the petitioner states, "I assume that the use of the [figures from the petitioner's] 2001 Federal Income Tax Return was inappropriate." The petitioner further states, "I also assume that [use of figures from] the 2002 Federal Income Tax Return was appropriate because the priority date was so close to the tax year of 2002.

The petitioner also noted that it employs 100 or more employees and, in accordance with 8 C.F.R. § 204.5(g)(2), submitted the statement of a financial officer attesting to its ability to pay the proffered wage. The petitioner cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) that a reasonable expectation of

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[1] This office possesses files pertinent to other alien petitions filed by the petitioner. Some of those files contain similar letters from the petitioner's CFO/controller, dated during the same month, which state that the petitioner's credit line is $3.5 million.

[2] This office notes that the record of proceedings in this case did not then contain a copy of the petitioner's 2001 tax return. The director must have referred to a copy of that return found in the record of one of the other petitions then before the Service Center. On appeal, however, the petitioner submits a copy of that return. A copy of that return is now in the record.

increasing profits can demonstrate a petitioner's ability to pay the proffered wage. The petitioner argues that its expectation of a vast increase in profits is reasonable.

The petitioner has shown considerable growth in recent years. Clearly, this growth is fueled by the indisputable shortage of nurses in the United States. No reason exists to assume that the petitioner will cease to grow. The petitioner's assertion, however, is that it will enjoy vast growth and remain profitable. In view of the fact that the petitioner is seeking approval of a large number of petitions, the petitioner must demonstrate the truth of that assertion in order to prevail.

The petitioner's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is unconvincing. The petitioner in *Sonegawa* sought approval of a single petition. In that case the Regional Commissioner found that the unusual circumstances were sufficient to show that the petitioner would become profitable enough to pay the wage proffered in that single petition. The petitioner in the instant case must demonstrate that its profitability will *vastly* improve so as to cover the approximately 140 petitions filed during 2003. Nothing in the record, however, supports that assertion. Assuming that the petitioner's business will flourish so markedly that it will be able to continue to add numerous employees to its payroll and remain profitable is pure speculation.

The petitioner argues that its credit line permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The petitioner notes that the banks willingness to extend it credit is based on its history of creditworthiness.[3] That, too, is likely correct. The petitioner further argues, however, that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this final assertion.

The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients. That does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage on a more permanent basis. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. Although the credit line permits the petitioner to withstand delays and interruptions, the petitioner must show the ability, over a longer period, be it 60 days or a year or more, to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

Finally, the petitioner argues that the United States has an acute shortage of nurses and that humanitarian considerations require approval of the instant petition. That the United States has a shortage of nurses is confirmed by the DOL having placed registered nurses on the list of Schedule A occupations. That shortage does not, however, obviate the petitioner's obligation to demonstrate conformity with the statutes and regulations governing the instant visa category. Notwithstanding that the United States has a shortage of registered nurses, the petitioner must still demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

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[3] On appeal the petitioner asserts that its credit line is for $3.5 million, but without reference to its previous assertion that its credit line is for $3 million. Further, the petitioner does not explain the discrepancy between those two assertions and the bank letter, stating that the credit line is in the low six figures, or approximately one-tenth the size asserted by the petitioner.

With its appeal brief, the petitioner submits a copy of a letter, dated October 29, 2003, from its accountant. That accountant states that the petitioner's tax returns are not valid indices of its financial condition because, in order to reduce tax liability, they were prepared on a cash basis, rather than on an accrual basis. The accountant states that, had the payables and receivables been included on the petitioner's 2001 tax return, it would have reflected a profit of $178,000. The accountant notes that the petitioner's receipts and profits both rose during 2002, and asserts that this was a direct result of employing more nurses.

As additional evidence the petitioner submits (1) 21 pages of invoice data sorted by invoice date and grouped by client, (2) monthly bank statements from June 2002 to September 2003, and (3) information pertinent to the petitions recently submitted and those approved. The petitioner urges that the data demonstrates its ability to pay the proffered wage to the nurses it already employs and to additional nurses, including the instant beneficiary.

The accountant's assertion that the net income shown on the petitioner's tax return is a poor index of its cash position is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

Having elected to demonstrate its ability to pay the proffered wage with its tax returns, however, the petitioner is bound by those returns. If the tax returns fail to show the ability to pay the proffered wage, then the petitioner has failed to show its ability to pay the proffered wage unless it submits reliable evidence of additional funds available to the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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. In the instant case the petitioner did not establish that it has ever employed the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 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. [redacted] 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $46,113.60 per year. The priority date is March 25, 2003. Evidence pertinent to the petitioner's finances prior to 2003 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

No copies of annual reports, federal tax returns, or audited financial statements were submitted pertinent to 2003. With the petition, however, the petitioner submitted the letters from its president/CEO and its CFO/controller stating that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that such a letter may suffice to demonstrate the petitioner's ability to pay the proffered wage. Although 8 C.F.R. § 204.5(g)(2) also states that CIS may require additional evidence in appropriate cases, the director did not explicitly state his reason for finding that the instant case was an appropriate instance to disregard the statements of the president/CEO and the controller/CFO and require additional evidence.

The director observed, however, that the petitioner has filed multiple alien worker petitions. In fact, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. The petitioner currently has more than fifty cases on appeal. This office finds that this large number of petitions was sufficient reason to require additional evidence.

The director based his decision on figures from the petitioner's 2001 and 2002 income tax returns. Because the priority date is during 2003, figures pertinent to the petitioner's financial performance during 2001 and 2002 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because those returns are the only reliable documentary evidence contained in the record pertinent to petitioner's ability to pay the proffered wage, however, they shall be accorded some evidentiary value.

During 2001 the petitioner declared a loss. If the petitioner had been obliged to pay the proffered wage during 2001 it would have been unable to pay any portion of it out of its income during that year. The

petitioner ended the year with negative net current assets. The petitioner would likewise have been unable to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner declared ordinary income of $584,366 during 2002. As the director observed, that amount is sufficient to pay the proffered wage to 13 beneficiaries with salaries similar to the proffered wage in this case. The petitioner, however, has recently filed petitions for 290 petitions. The petitioner's 2002 ordinary income, although substantial, is insufficient to show the ability to pay the proffered wages of such a large number of beneficiaries. The petitioner's 2002 ordinary income is insufficient to demonstrate the ability to pay the proffered wage.

Counsel argues that, since the petitioner's 2002 ordinary income was sufficient to pay the wages of 13 bennies, CIS should approve at least 13 petitions. The petitioner's submission on appeal and CIS computer records both show that more than 13 of the petitioner's many petitions were approved during 2002. The petitioner has not demonstrated the ability to pay the proffered wage of any more beneficiaries than have already been approved.

Counsel argues, "Since . . . numerous petitions have already been approved and are receiving wages, this is prima facie evidence by cash flow data that the petitioner has the ability to pay the wages of any cases currently filed and denied."

Counsel's argument is unconvincing. That the petitioner is paying the wages of its current employees is evidence that it is able to pay those wages, but no more. That the petitioner is paying wages to its current employees does not demonstrate the petitioner's ability to pay wages to a large number of additional potential employees.

The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case, though, that were not addressed in the decision below.

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

> 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 or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the

> posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains no indication that the petitioner's nurses are represented by collective bargaining. The Form ETA 750 states, at Item 7, Address Where Alien Will Work, "see Exhibit 2 (Petitioner's Notice of Available Positions)." Exhibit two is the posting of the proffered position. That posting states that the beneficiary will "report to client facilities as directed by Petitioner." The certification attached to that posting states that it was posted at the petitioner's offices for a period of ten consecutive days. The certification does not state the dates during which the notice was posted. The certification itself, however, is dated March 20, 2003, a date prior to the priority date.

The beneficiary will not be employed at the petitioner's offices but at some other location. The posting was not, then, posted at the place of employment as required by 20 C.F.R. § 656.20(g)(1). The petition should have been denied for this additional reason.

The petitioner's failure to name the facility at which the beneficiary will be employed raises yet another issue. The petitioner is required, by 8 C.F.R. § 204.5(g)(2), to demonstrate that the proffered wage is at least as high as the predominant wage. The regulation at 20 C.F.R. 656.40(a)(2)(i) states that the predominant wage is the average wage paid to workers similarly employed in the area of intended employment. In the absence of any statement in the record of the actual location at which the beneficiary would work, this office is unable to determine whether the petitioner is offering the beneficiary the average wage for similarly employed workers in the area of intended employment.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. For this additional reason, the petition should have been denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petitioner also failed to demonstrate, in accordance with 8 C.F.R. § 204.5(g)(2), that wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. The

petitioner failed to demonstrate that it is able to pay the wage proffered to the beneficiaries for whom it has petitioned. The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). For all of these reasons the petition may not be approved.

ORDER: The appeal is dismissed.