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**U.S. Citizenship
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Services**

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FILE:



WAC 03 111 54122

Office: CALIFORNIA SERVICE CENTER

Date: FEB 25 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 director of the California Service Center denied the instant immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The immigrant visa petition is denied.

The petitioner is a nursing registry. It seeks to permanently employ 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 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 petition accordingly.

On appeal, counsel 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 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), also 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 on November 18, 2002. 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, 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. Pursuant to 20 C.F.R. § 656.22, 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 first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. The regulation at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the petition was accepted for processing by CIS on February 25, 2003. The proffered wage as stated on the Form ETA 750 is \$25 per hour, which amounts to \$52,000 annually.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$13,338,967, and to currently employ 150 workers. In support of the petition, the petitioner submitted documentation on the beneficiary's qualifications, as well as a copy of the regulations at 8 C.F.R. § 204.5(g)(2) with regard to petitioners who employ more than 100 employees. In addition, the petitioner submitted a letter from [REDACTED] who stated that the petitioner currently had 150 employees and its gross annual income for 2001 was \$13,338,967.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 23, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner demonstrate its ability to pay the proffered wage as of the filing date by providing copies of its annual reports, federal tax returns, or audited financial statements, from 2002 to the present.

In response, counsel submitted a second letter from its vice president that stated the petitioner's gross annual income for 2002 was \$14,291,254, and that it had 150 employees. Counsel also submitted the petitioner's 2002 IRS Form 1065, Return of Partnership Income. Counsel stated that the petitioner's gross annual income for 2002 was \$14,291,254 and that its cash and cash equivalents, which are used to cover variable expenses such as employee salaries, amount to \$7,601,930 for 2002.

On June 22, 2003, 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. Specifically the director examined the petitioner's negative net income of \$657,105 and negative net current assets of \$2,504,341.¹

On appeal, counsel asserts that the petitioner has the financial ability to pay the proffered wage, and outlines three grounds for this assertion. First, counsel states that, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has provided appropriate financial documents beyond its tax return, to establish the petitioner's ability to pay the proffered wage. Second, with regard to the vice president's letter detailing the petitioner's number of employees and gross annual income, counsel refers to a published AAO decision that examined the evidentiary value of a financial officer's letter. Counsel submits a copy of this AAO decision to the record. Third, counsel refers to a precedent Bureau of Immigration Appeals (BIA) case, *Matter of E-M-*, 20 I & N Dec. (BIA 1989) May 24, 1989, and makes reference to a legacy INS Service Manual, both of which discuss standards of proof. Counsel asserts that the petitioner provided the correct level of evidence necessary to establish its eligibility for the visa in question.

¹ Net income, or ordinary income (loss) is line 22 of the petitioner's tax return. The petitioner's current liabilities are calculated by adding lines 15, 16, and 17 on Schedule L. Based on these figures and the current assets of \$1,667,150, the petitioner's current net assets for 2002 are -\$3,314,030.

Counsel also notes that the state of California as well as the petitioner is experiencing a shortage of nurses and is therefore in great need of the beneficiary's services.

Although, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner submitted a letter from its vice president with regard to its financial capability to pay the proffered wage, the director determined that this letter was not sufficient evidence to establish the petitioner's ability to pay the proffered wage. Although the director did not specify any particular reason why this correspondence was not sufficient, he did request more financial information. Although the director could have requested further documentation with regard to the claimed 150 persons employed by the beneficiary, such as state of California or IRS Quarterly Wage Reports, he did not do so. It should also be noted that the petitioner could have chosen to submit other documentation as outlined in the director's request for further evidence, such as audited financial statements, or annual reports, to establish its ability to pay the wage from 2003 to the present time, or provided an explanation why such documents were not available.

Furthermore, while the director requested evidence from 2002 to the present, an examination of the petitioner's 2002 IRS Form 1065, or 2002 audited financial statement or annual report would not be dispositive in this proceeding. The petitioner has to establish that it has the ability to pay the proffered wage as of the priority date. The date of filing the Schedule A I-140 petition with CIS is considered the priority date. In the instant petition, this priority date is February 25, 2003. Only financial documents that examine the period of time from February 25, 2003 to the present would be dispositive in this matter. Although the petitioner's negative net income and net current assets are not dispositive in these proceedings, these financial figures, without further explanation, would suggest a closer reading of any other subsequent financial documentation submitted by the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003.

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 next 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).

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 the Service 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* at 537. *See also Elatos Restaurant*, 623 F. Supp at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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 total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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 On Form 1065, a corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 out of those net current assets.

The evidence indicates that the petitioner is structured as a limited liability partnership. The petitioner has established that it had negative net income and net current assets in 2002. As previously noted, these figures are not dispositive of the matter; however, the petitioner provided no further documentation as to its ability to pay the proffered wage as of the priority date. It is also noted that the petitioner's 2003 income tax returns were most likely not available in February 2003 when the petitioner filed the instant petition. Given the fact that the record contains no relevant financial documentation with regard to the petitioner's ability to pay the proffered wage in 2003 to the present, the AAO cannot analyze whether the petitioner has sufficient net income or net current assets from 2003 to the present to pay the proffered wage.

In addition, the AAO does not find counsel's assertions submitted on appeal to be persuasive. With reference to the unpublished AAO decision submitted to the record, it is noted that this decision is not a precedent decision, and therefore, is not binding in this matter. Furthermore, the instant petition is not analogous to this petition. The petitioner, in the previous AAO decision submitted more published information, beyond the letter from its financial officer, that detailed its significant business activities and acquisitions that involved some 20,800 employees. The petitioner has only submitted multiple duplicative statements from its chief financial officer, as well as an income tax return that is not dispositive in this matter. In reference to *Matter of E-M-*, this BIA decision is likewise not binding on the AAO, and in addition, pertains to evidentiary levels for documentation submitted for residency purposes. Finally, counsel's reference to a nursing shortage in California and elsewhere is duly noted. 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 its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2003. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date.

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.

It is noted that the petitioner satisfactorily met the requirements for Schedule A petitions, pursuant to 20 C.F.R. § 656.22, with regard to the prevailing wage, notification of available position, and pre-arranged employment. Nevertheless, with regard to the issue of whether the petitioner has the ability to pay the proffered wage, the director's decision will stand, and the petition will 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. The petition is denied.