

Information related 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



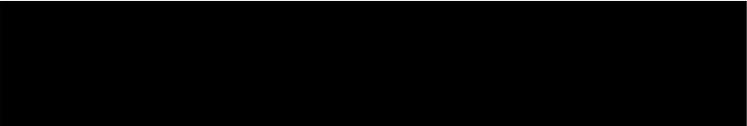
B6

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2005
WAC 03 042 54492

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

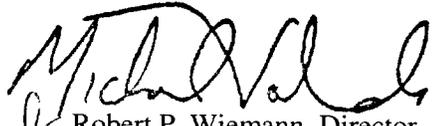
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 November 18, 2002. The proffered wage as stated on the Form ETA 750 is \$18.40-19.25 per hour, which amounts to \$38,272 to \$40,040 annually. The petitioner later amended the Form ETA 750A to reflect a hourly rate of \$22.17, or \$46,113 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$19.9 million, and to currently employ 650 workers.

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 March 3, 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 provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage from November 21, 2002. The director acknowledged that the I-140 petition indicated that the petitioner employed more than 100 workers; however, the director noted that Citizenship and Immigrations Services (CIS) records indicated that the petitioner had filed multiple I-140 petitions in 2002, and that the petitioner would be required to show ability to pay the total wage for all prospective beneficiaries filed in the same year. In addition, the director requested copies of the petitioner's payroll summary for 2001, and W-3 forms evidencing wages paid to employees to establish the total number of nurses that the petitioner employed

The director noted that the petitioner was a nursing registry and requested evidence to show that the petitioner would employ the beneficiary to fill a specific vacancy. The director requested a copy of the contract between the employer and the prospective employees, as well as contracts between the petitioner and the clients where the beneficiary would perform services. The latter contracts should indicate the number of nurses to be hired, and the terms of employment. With regard to the prevailing wage, the director stated that it was not clear that the proffered wage of \$18.40 to \$19.25 was consistent with the prevailing wage for a registered nurse in Southern California, and requested evidence to establish that the proffered wage equaled or exceeded the local prevailing wage. The director stated that an acceptable form of evidence would be fully processed Employment Development Department (EDD) prevailing wage request. Finally, the director noted that the Form G-28, Notice of Entry of Appearance as Attorney or Representative, was not signed by the petitioner, and thus, was not valid as submitted.

In response, counsel submitted the following materials:

The petitioner's unaudited balance and statement of earnings for 2002.

IRS Form 1120S, the petitioner's federal income tax return for 2002. This document listed the petitioner's ordinary income for 2002 as \$584,366.

Form 941, Employer's Quarterly Federal Tax Return, for quarters ending in March, June, September, and December of 2002. According to these documents, the petitioner had the following number of employees for each quarter: 558, 539, 558, and 558.

Copies of contracts between the petitioner and the Kaiser Foundation Hospitals (Kaiser), Catholic Healthcare West (CHW), and Tenet Healthsystems Hospitals, Inc.(Tenet) to provide temporary nursing services in California. The Kaiser contract is valid as of December 1, 2001, the Tenet contract is valid as of July 1, 2002, and the CHW is valid as of December 15, 2002.

Notice of Available Positions document, which is addressed to all the petitioner's employees. This notice states that the petitioner has 217 vacancies for fulltime/permanent registered nurses as of March 19, 2003. The rate of pay is stated as \$22.17.

A letter from the petitioner's chief executive officer, that stated the job posting notice was posted in a conspicuous place at all of the petitioner's offices for ten days. This certification was dated March 20, 2003.

An employment contract between the petitioner and the beneficiary. The contract is dated April 1, 2003, and stipulated that the beneficiary will work in the employer's client facilities as a nurse for a period of not less than two years after the employee receives her green card and work permit. The contract does not identify the beneficiary's specific work place.

A computer printout of a U.S. Department of Labor Online Wage Library that indicated that the prevailing wage for a level 1 registered nurse in El Dorado County, Placer County and Sacramento County was \$22.78 an hour. The petitioner also submitted a second set of DOL online wage library reports on the prevailing wage for registered nurses in Orange County. These two pages indicated that the hourly wage for a Level 1 registered nurse in Orange County was \$21.31.

The petitioner's statement to CIS to amend its ETA750 A and the I-140 to show an hourly wage of \$22.17 an hour for the beneficiary's position.¹

On April 30, 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 ordinary income, \$584,366, in the petitioner's 2002 federal income tax return. Although the director noted that the petitioner showed enough ordinary income for twelve fulltime employees at a proffered wage of \$47,384, he also indicated that the petitioner filed many more than twelve I-140 petitions in 2002 that had been approved. The director did not find the evidence sufficient to establish that the petitioner had sufficient funds to pay additional employees.

On appeal, counsel asserts that the method of matching up the potential salaries that could be covered by the petitioner's 2002 ordinary income fails to recognize the nature of the business the petitioner is engaged in. Counsel states that the premium paid to the petitioner for each nurse that it places in various facilities is the source of the profit or income that the petitioner reports in its tax returns. Counsel point outs Section F of the San Diego Hospital contract to show a sample remuneration paid to the petitioner under a typical staffing contract. Counsel also asserts that a comparison of the 2001 and 2002 incomes of the petitioner shows the continued growth of the

¹ The annual salary for this hourly wage is \$46,113.

company. Counsel states that while 2001 saw a net loss of \$354,938 on revenues of \$19,490,215, revenues rose 31%, while net income rose 171%. Counsel cites to *Matter of Sonogawa*, and identifies two factors unique to the petitioner's loss in 2001. First, the petitioner switched from the accrual method of accounting to the cash method. Second, a major contracting hospital filed for bankruptcy in that year and the petitioner was unable collect over \$300,000 in staff salary owed by the facility. Counsel further asserts that these one-time occurrences make the petitioner's situation similar to that of the petitioner in *Sonogawa*. Counsel compares the wages and labor costs of the petitioner for 2001 and 2002 to show that there was a \$2,584,000 increase. Counsel states that the petitioner has sponsored or petitioned 86 foreign nurses with varying degrees of success. Counsel also submits a document entitled Westways Staff Services, Inc. List of Sponsored Nurses 2002. This two-page document lists 85 nurses as sponsored by the petitioner. A supplemental list of sponsored nurses tracks their employment process and indicates that 60 nurses have been approved. Counsel submits an invoice aging report to document that the petitioner is able to meet the payroll of all its nursing staff because it usually receives payment from the contracting facilities within 30 days. Counsel also states that the petitioner maintain a line of credit for \$3.5 million dollar with Heritage Capitol Group and submits documentation of this line of credit. Counsel finally states that the petitioner is not a "mom and pop" operation with marginal revenues and income, and that a corporation whose revenues were \$19,4890,215 in 2001 and \$25,344,729 in 2002 should not be considered marginal.

In addition, counsel submits a contract between San Diego Hospital Association and the petitioner dated February 4, 2003. Counsel draws attention to Attachment F of this document that indicates San Diego Hospital Association Hospital (SDHA) is billed 40 dollars an hour for a medical surgical nurse on a day shift, with an incremental one dollar increase in the hourly wages for afternoon, night, and weekend nurses.

At the outset, the AAO notes that two of the four third-party contracts either submitted in response to the director's request for further evidence or on appeal post-date the priority date.² The wage rates contained in the San Diego Hospital contract would therefore not be able to establish any profit levels or premiums that the petitioner would have received in November 2002, for placement of nurses in medical facilities. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, while the petitioner may show evidence of future profiting, all the contracts submitted do not assist it with establishing its continuing ability to pay the proffered wage beginning on the filing date of November 18, 2002.

The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover each nurse's salary. As noted previously, the San Diego Hospital rates of reimbursement for the petitioner are not dispositive of the petitioner's levels of profits as of the priority date, and furthermore, the petitioner did not submit sections of the contracts that outline the rates of reimbursement for Catholic Healthcare, Kaiser, or Tenet contracts. Thus, the petitioner has not provided sufficient evidence to establish a reasonable expectation of increasing profits through executed contracts. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, however, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business, such as recruitment costs,

² The contract with Catholic Healthcare West (CHW) became effective on December 14, 2002, according to its Article 5.1, after the petitioner filed the instant petition on November 2002. The contract with San Diego Hospital Association (SDHA) commenced on February 1, 2003. Kaiser and Tenet both had valid contracts with the petitioner at the time of filing the instant petition.

temporary housing or housing allowances, workmen's compensation, among other items listed in the beneficiary's contract. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase, and that the petitioner has the ability to pay the proffered wage. Counsel asserts that the true measurement of the petitioner's ability to pay the proffered wages for nurses being petitioned as well as U.S. nurses already on staff is reflected in the wages and labor costs, not in the examination of net profit alone. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of his assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage.

Also, the unaudited financial statements that counsel submitted with the petition 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.

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 2002.

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.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2002 shows the following amount of ordinary income: \$584,366. While this is sufficient to establish that the petitioner had the ability to pay the beneficiary's proffered wage of \$46,113, as stated previously, in its response

of the director's request for further evidence, the petitioner identified 85 registered nurses that it petitioned for in the year 2002. 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 director specifically stated that the petitioner had to establish sufficient financial resources to pay the proffered wage for all petitions submitted in the same year, namely, 2002. The current net income would only suffice to cover the salaries of some 12 registered nurses earning an annual salary of \$46,113. The payment of salaries for either the 80 petitioned nurses or the 60 registered nurses whose petitions appear to be approved per the petitioner's staffing report identified in this petitioner, and/or the different numbers of petitions identified in CIS computer records, would necessitate a much larger net income. Therefore the petitioner did not establish that it had the ability to pay the proffered wages.

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.³ On a corporate tax return, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its 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 out of those net current assets. The petitioner submitted the following information for tax year 2002:

	2002
Ordinary Income	\$ 584,366
Current Assets	\$ 3,952,387
Current Liabilities	\$ 4,059,784
Net current assets	\$ -107,397

The petitioner has negative current assets for 2002. Thus, the petitioner cannot establish the ability to pay the proffered wage for either the beneficiary or the entire group of 85 beneficiaries for whom the petitioner claimed it petitioned in 2002 or the 60 beneficiaries that the petitioner claimed had received I-140 petition approvals. Thus, the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date based on the evidence contained in the record of proceeding for the year 2002.

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.

Beyond the decision of the director, however, the petitioner's submission of employment contracts with third-party clients on appeal illustrates its intention to assign the intended beneficiary of this instant petition to a worksite other than its general location in Orange County, California. Because of regulatory provisions obligating the petitioner to undertake certain actions that require a definitive work location, certain additional issues arise on appeal.⁴ Any additional proceedings in this matter must address the specific intended work location of this proffered position and evidence that the proffered wage complies with that geographical location's prevailing wage rate⁵; that the petitioner posted its posting notice at the intended worksite location⁶; and that the petitioner will remain the actual employer and is offering permanent, full-time employment to the beneficiary⁷. As noted previously, the petitioner did not identify any particular work site for the beneficiary. A supplement to the petitioner's I-140 states that the beneficiary will be filling vacancy 40, however, there is no further clarification of this statement or identification of a specific work place that would provide sufficient evidence to resolve this issue.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has also failed to specify the intended geographic location of the proffered position and meet its regulatory obligations concerning its posting notice, prevailing wage rate, and whether or not the petitioner is the actual employer offering full-time, permanent employment.

The AAO notes that the petitioner asserts and provides some evidence that CIS approved other petitions that had been previously filed by the petitioner on behalf of other registered nurses. Although the director acknowledged in his request for further evidence, that the petitioner had filed multiple petitions for registered nurses in 2002, the director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same assertions and documentation that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

⁴ 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).

⁵ The petitioner submitted a prevailing wage rate form certified by the Department of Labor for Orange County, California, which governs its general office's location, as well as another DOL wage rate form for three other counties. *See* 20 C.F.R. §§ 656.22(e), 656.20(c). Nevertheless, the beneficiary's work location is not identified.

⁶ Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment, not at the petitioner's corporate offices. *See* 20 C.F.R. §§ 656.20 and 656.22. In addition, the fact that the certification is dated 2003, brings into question whether the notice was posted prior to the filing of the instant petition.

⁷ *See* 20 C.F.R. § 656.3; *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968); *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982).

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.