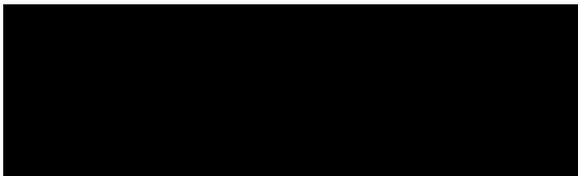




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy**



AB6

FILE: WAC 03 090 50682 Office: CALIFORNIA SERVICE CENTER Date:

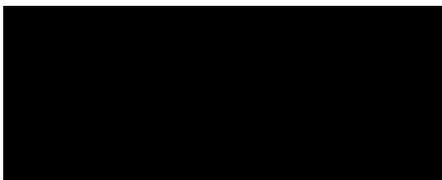
IN RE: Petitioner:
Beneficiary:



JAN 24 2005

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)

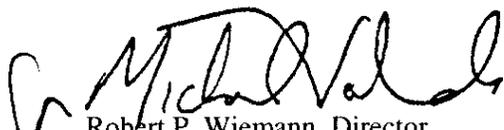
ON BEHALF OF PETITIONER:



PUBLIC COPY

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, 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 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 January 28, 2003. The proffered wage as stated on the Form ETA 750 is \$30 per hour, which equals \$62,400 per year.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 504 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since August 2001.

In support of the petition, counsel submitted a letter, dated December 30, 2002, from the petitioner's controller. That letter states that the petitioner has the ability to pay the proffered wage, citing the petitioner's 2001 gross receipts and a \$2.5 million credit line.

Counsel also provided a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes based on the calendar year and declared a loss of \$354,938 as its ordinary income during 2001. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Finally, counsel submitted a 2001 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary \$10,383.13 during that year.

On May 7, 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, counsel submitted an IRS printout for 2002. In a letter dated July 7, 2003 counsel stated that IRS printouts for subsequent years were unavailable. The 2002 printout shows that the petitioner declared ordinary income of \$584,366 during that year.

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 the decision the director stated that the petitioner does not currently employ the beneficiary.

On appeal, counsel states that the petitioner does, in fact, currently employ the beneficiary. Counsel further states that CIS "as a matter of record and as a matter of course has routinely issued either a Request for Additional Evidence or a Notice of Intent to Deny before it denies any petition or application." Further still, counsel states that no request for additional evidence was issued in this case. Counsel implies that CIS was obliged to issue such a notice in this matter prior to denying the petition. Counsel offers no authority and no additional reasoning in support of that implicit assertion.

Counsel also submits a 2002 W-2 form and a September 26, 2003 payroll statement. The W-2 form shows that the petitioner paid the beneficiary \$42,417.53 during 2002. The payroll statement shows that the petitioner had paid to the beneficiary \$27,172 for work done during 2003 through September 21, 2003.

Initially, this office notes that, counsel is incorrect in implying that CIS always issues a Request for Evidence or a Notice of Intent to Deny prior to denying a petition. Further, contrary to counsel's assertion, the Service Center issued a Request for Evidence in this matter on May 7, 2003, as was stated above.

Further still, the regulation at 8 C.F.R. § 103.2(b), which applies to all applications and petitions filed with CIS, states, in pertinent part, that, "An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form."

The regulation at 8 C.F.R. § 204.5(g) *Initial evidence*, applies to petitions for employment-based immigrants, such as the instant petition. As is noted above, that regulation states that evidence of the petitioner's ability to pay the proffered wage is part of the initial evidence pertinent to this visa category. The regulation stipulates that a petition under this category "must be *accompanied by* evidence that the prospective United States employer has the ability to pay the proffered wage." [Emphasis supplied.]

The regulation does not require the Service Center to issue a request for any initial evidence the petitioner declined to provide with the petition.

Counsel's reliance on the petitioner's credit line is misplaced. 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. The petitioner must show the ability 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 part of the calculation of the funds available to pay the proffered wage.

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, contrary to the statement in the decision of denial, the petitioner has submitted sufficient evidence to establish that it employed and paid the beneficiary \$10,383.13 during 2001 and \$42,417.53 during 2002. In addition, a payroll statement shows that the petitioner had paid the beneficiary \$27,172 during 2003 for work through September 21, 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, 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. *Chi-Feng Chang* at 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 \$62,400 per year. The priority date is January 28, 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. Although a payroll statement was submitted, that statement indicates that the petitioner was paying the beneficiary less than the proffered wage. The petitioner cannot show that it was able to pay the proffered wage through that payroll statement alone.

With the petition, however, counsel submitted the December 30, 2002 letter from the petitioner's controller stating that the petitioner 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 controller's statement 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. 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 documentary evidence contained in the record of the 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 is unable to demonstrate the ability to pay any portion of the proffered wage out of its net current assets.

The decision of denial states that the petitioner also finished 2002 with negative net current assets. This office is unable, however, to extract information pertinent to the petitioner's net current assets from the 2002 IRS printout. Because the record contains no information from which the petitioner's 2002 net current assets can be extracted, the petitioner's net current assets will not be considered in the determination of the petitioner's ability to pay the proffered wage during 2002.

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. The petitioner, however, has recently filed petitions

for 290 petitions. The petitioner currently has more than fifty cases on appeal. 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 has not demonstrated the ability to pay the proffered wage.

An additional issue exists in this case, though, that was 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 13, that the petitioner will "Report to client facilities as directed by the employer" and work there. The beneficiary will not, therefore, be employed at the petitioner's Orange, California address, but at some other location. A certification submitted with the job posting in this matter states that it was posted at the petitioner's offices. It 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 failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). 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. For both reasons the petition may not be approved.

ORDER: The appeal is dismissed.