

**identifying data deleted 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



136

FILE: WAC 03 123 51189 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2005

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: 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 private duty nursing services company. 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.

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 19, 2003. The proffered wage as stated on the Form ETA 750 is \$26 per hour, which equals \$54,080 per year.

On the petition, the petitioner stated that it was established during 1984 and that it employs 100 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 state that the petitioner will employ the beneficiary at 3250 Wilshire Boulevard, Suite 1314, Los Angeles, California.

In support of the petition, the petitioner submitted a letter, dated February 18, 2003, from its immigration specialist. That letter stated that the petitioner has the ability to pay the proffered wage. The petitioner provided its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows ordinary

income of \$58,234 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner also submitted its compiled 2001 financial statements, which show net income from operations of \$399,739 during that year.

On March 1, 2004, the California Service Center issued a request for, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested copies of the petitioner's California Form DE-6 Wage Reports for the first and last quarters of 2003.

The petitioner responded with a letter, dated March 5, 2004, which stated that it had not yet filed its 2003 tax return. The petitioner provided the requested DE-6 forms and a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The 2002 tax return also shows ordinary income of \$345,538. The Schedule L attached to the 2002 return shows that at the end of that year the petitioner's current liabilities exceeded its current assets. The DE-6 forms show that the petitioner employed 70 workers during the first quarter of 2003 and 46 workers during the last quarter of 2003, but did not employ the beneficiary during either 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 April 19, 2004, denied the petition. The director noted that the petitioner's 2002 net income of \$345,548 would be sufficient to pay the proffered wage to six new employees, but that the petitioner has recently had petitions for eight alien workers approved.

On appeal, the petitioner submits a fee schedule from California's Department of Health Services stating that \$40.57 is the hourly rate that department authorizes for registered nurses. The petitioner also submits a letter dated June 16, 2004 and labeled Exhibit B, from its Administrator. That letter states, based on the proffered wage of \$26 per hour, the income derived and expenses allegedly incurred by one of its nurses working 40 hours in a given week. By the Administrator's calculations, the petitioner derives \$56.24 in gross profit per week from each nurse it is able to employ. In a brief, the petitioner argues that the petitioner will, therefore, reap a profit by employing the beneficiary. The petitioner also argues that its current assets should be included in the calculation of its ability to pay the proffered wage.

The petition, which was submitted during the first quarter of 2003, states that the petitioner employs 100 workers. That threshold number relates to the regulation at 8 C.F.R. § 204.5(g)(2) stating that, in such a case, the statement of a financial officer may suffice to show the ability to pay the proffered wage. The Form DE-6 Wage Report for the first quarter of 2003, however, fails to support the assertion that the petitioner employed 100 or more workers during that entire quarter, let alone at any given time during it. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp v. I.N.S.*, 153 F.Supp. 2d 7, 15 (D.D.C. 2001). This office declines to find the petitioner's assertion, that it employs 100 workers, to be credible. The petitioner will be obliged, pursuant

to 8 C.F.R. § 204.5(g)(2), to demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

Further, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition, and the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). The evidence exposes that some information provided on the petition was not entirely truthful. The credibility of the remaining information and evidence provided necessarily suffers.

The petitioner's reliance on the compiled financial statements submitted is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's has asserted that it earns a profit on each nurse it employs. The petitioner implicitly argues, therefore, that it should not be required to demonstrate its ability to pay the beneficiary's proffered wage out of previous years' net incomes, as hiring the beneficiary and selling her labor to facilities or individuals will necessarily yield a profit. In support of that assertion counsel submits what purport to be the weekly income to be derived and the weekly expenses to be incurred by hiring the beneficiary. The petitioner's argument has, in the abstract, considerable merit.

However, this office questions the accuracy of the petitioner's figures. The petition states that the beneficiary is currently in the Philippines. The figures provided do not include an allowance for the initial expenses of hiring the beneficiary, which include, for instance, transporting her from her home country. The petitioner may be omitting from its calculations other expenses involved in hiring the beneficiary. Without accurate evidence pertinent to the petitioner's expenses this office cannot find persuasive the petitioner's assertion that it will reap a profit from hiring the beneficiary.

Typically, 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 employed and paid 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, ordinarily 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).

The proffered wage is \$54,080 per year. The priority date is March 19, 2003.

The director stated that eight petitions submitted by the instant petitioner have recently been approved. Those petitions are not currently available to this office. This office, however, has ten other appeals from denials of Form I-140 petitions now pending before it, each at the same proffered wage as that in the instant case. The proffered wages in the approved cases are likely the same.¹ In order to win approval, the petitioner must show, at the very least, the ability to pay the proffered wages of the eight recently approved petitions and that of the instant petition.² Those proffered wages, in the aggregate, equal \$486,720.³

The petitioner has provided tax returns for 2001 and 2002. Those documents, of course, contain no information directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date. The appeal in this matter, however, was submitted during 2003. Having not yet closed out the year, the petitioner's 2003 tax returns and other end-of-year data were clearly unavailable. Information from the 2001 and 2002 returns will be accorded some evidentiary value in this case, as it is the only evidence from which this office may extrapolate.

The petitioner's tax return shows that during 2001 it declared \$58,234 in ordinary income. If the petitioner had been obliged to demonstrate the ability to pay the wages proffered to the beneficiaries of the eight approved petitions and the proffered wage in the instant case, it would have been unable to show that ability with its ordinary income. At the end of that year, the petitioner had negative net current assets. The petitioner would have been unable, therefore, to show the ability to pay any portion of those wages out of its net current assets. The petitioner has not submitted reliable evidence of any other funds available to it with which it might have paid the proffered wage during that year. The evidence submitted does not indicate that the petitioner was able, had it been obliged, to pay the proffered wage during 2001.

The petitioner's 2002 tax return shows that it declared \$345,538 in ordinary income. If the petitioner had been obliged to demonstrate the ability to pay the wages proffered to the beneficiaries of the six approved petitions and the proffered wage in the instant case, it would have been unable to show that ability with its ordinary income. At the end of that year, the petitioner had negative net current assets. The petitioner would have been unable, therefore, to show the ability to pay any portion of those wages out of its net current assets. The petitioner has not submitted reliable evidence of any other income available to it with which it might have paid the proffered wage during that year. The evidence submitted does not indicate that the petitioner was able, had it been obliged, to pay the proffered wage during 2002.

The petitioner has not demonstrated that it was able to pay the proffered wage during 2001 and 2002. Extrapolating from that evidence, the only reliable evidence in the record pertinent to ability to pay the

¹ In the event that this inductive conclusion is incorrect and results in denial of an otherwise approvable petition, that error may be redressed on a motion.

² The petitioner might be obliged to demonstrate the ability to pay the proffered wages of the ten aliens for whom it has appeals pending as well as any aliens for whom it has petitions pending at the Service Center. This office, however, need not reach that issue.

³ \$54,080 x 9.

proffered wage, this office must find that the petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petition may not be approved.

An additional issue exists in this case that was not cited in the decision of denial. Both the petition and the Form ETA 750 state that the petitioner will employ the beneficiary at its offices on Wilshire Boulevard in Los Angeles. The nature of the petitioner's business makes obvious that its corporate offices is not the actual location at which the beneficiary would work. Rather, the beneficiary would work at patients' homes or at a nursing facility. This raises the issue of whether the notice of the proffered position was posted in accordance with the regulations

20 C.F.R. § 656.20(g)(1) states, 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 of location of the employment.

The record contains no evidence that the petitioner's employees are represented by collective bargaining or, if they are, that the notice was provided to their bargaining representative. The evidence shows that the notice was posted at the petitioner's corporate offices, which is not the location of the proposed employment. That the posting does not comply with the regulations is another reason the petition cannot be approved.

The petitioner's failure to identify the location at which the beneficiary would work raises yet another issue, whether the proffered wage is equal to the prevailing wage for the position at the location of employment.

The regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.⁴ Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

⁴ Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e).

Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b)(3), shall be determined as follows:

....

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

....

b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment"

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.⁵ The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), employees in OWL Level I positions are:

(B)eginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.

They may assist staff performing tasks requiring skills equivalent to a level II and may perform high-level work for training and development purposes.

⁵ The city, state, and county of the employment location must be known order to identify the prevailing wage rate.

These employees work under close supervision and receive specific instruction on tasks and results expected.

The level I job can require education and/or experience, but it does not require an advanced level of understanding to perform the job duties. Level I includes entry level jobs, but may also include some supervised activities, which exceed those normally, considered as entry level.

The proffered position resembles an entry-level nursing position as it does not specify an advanced level of training or experience or supervisory duties. This office finds that the proffered position is a skill Level I position for prevailing wage purposes.

The DOL OWL states that the prevailing wage for a Level 1 registered nurse in Los Angeles is \$46,446. Thus, if the petitioner had demonstrated that it intended to employ the beneficiary in Los Angeles it would have demonstrated that it is offering the prevailing wage to the beneficiary. The prevailing wage rate is impossible to determine, however, because the petitioner failed to state the location at which it would employ the beneficiary. Thus, the petitioner failed to meet its evidentiary burden that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers. For this additional reason the petition may not be approved.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.