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U.S. Citizenship  
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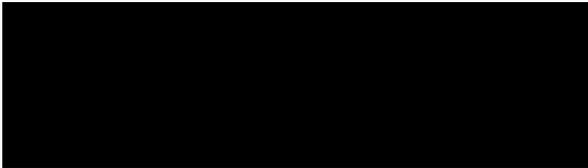


FILE: WAC 02 167 53791 Office: CALIFORNIA SERVICE CENTER Date: JUN 21 2005

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:



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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a nursing registry firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner states that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner asserts that it has had the continuing financial ability to pay the beneficiary's proffered wage and requests reversal of the director's decision.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

*(2) 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 [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is April 22, 2002. The beneficiary's salary as stated on the labor certification is \$16.30 per hour or \$33,904 per annum. The visa petition states that the petitioner was established in 1996 and has 1,109 employees.

As the record initially contained insufficient evidence relating to the petitioner's continuing ability to pay the proffered wage, on August 19, 2002, the director instructed the petitioner to submit its financial evidence related to 2001, as well as further evidence of the business relationship between the petitioner, its customers, and the beneficiary's proposed employment.

The petitioner's response included a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. The petitioner declared a gross income of over 19 million dollars, salaries and wages paid of over 1 million, and claimed a taxable income -\$354,938. A corporate petitioner's current assets and liabilities are shown on Schedule L. Current assets are shown on lines 1(d) through 6(d) of Schedule L. Current liabilities are shown on lines 16(d) through 18(d). The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.<sup>1</sup> Besides net income, CIS will examine a petitioner's net current assets as an alternative method of reviewing a petitioner's ability to pay a proffered wage. 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 as they represent a readily available resource out of which a proffered salary could be paid.

Here, Schedule L reflects that the petitioner's current assets were \$633,676 and its current liabilities were 662,719, resulting in -\$29,043 in net current assets.

The petitioner also provided sample copies of contracts with ten of its health care facility customers as well as a master list of 137 hospitals with which it has contracts to supply medical personnel. The petitioner also submitted a letter, dated August 20, 2002, [REDACTED] is the controller of the petitioning business. She explains the nature of the petitioner's business and further states:

Our company has shown tremendous growth over the last few years. For the period ending December 31, 2001, the company grossed an annual income of 19.5 million dollars. We also have a 2.5 million dollar line of credit with Heritage Capital Group.

Based on the above information, we feel that we have the ability to pay the proffered wage for the nurses we have petitioned.

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

In denying the petition, the director chose not to accept the controller's assurances as to the financial health of the company. The director determined that the petitioner's declared tax loss and lack of net current assets, as shown on its 2001 tax return, failed to demonstrate its ability to pay the beneficiary's proposed annual wage of \$33,904.

On appeal, counsel asserts that the petitioner's tax return does not fully reflect its financial status as it has consistently paid significant amounts as salaries and wages and has experienced rapid growth. Counsel submits a letter from the petitioner's accountant [REDACTED] explains that he has been the petitioner's accountant since 1998 and has seen an increase in the petitioner's revenue from 12 million to nearly 24 million dollars in 2002. He submits two unaudited financial statements in the form of profit and loss statements for 2001 and suggests that if the accrual rather than cash accounting method were used, then the petitioner would show a healthy profit. He maintains that the petitioner has never missed paying all salaries and wages when due.

The regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). The regulation, however, does not mandate that the director accept such a letter in all cases, but allows the director to retain the discretion to reject the assurances of a financial officer in appropriate cases and examine the fundamental documentation required, consisting of either annual reports, audited financial statements or federal tax returns.

In this case, the rejection of [REDACTED] letter as determinative in evaluating the petitioner's continuing ability to pay the proffered wage of \$33,904 per year is appropriate where the petitioner has filed multiple petitions. CIS cannot consider the petitioner's ability to pay a single beneficiary by itself when a petitioner has filed multiple immigrant visa petitions. CIS electronic records show that this petitioner filed 93 petitions in 2002 and 140 in 2004. Such volume of activity supports the director's decision to conclude that the petitioner's 2001 net income of -\$354,938 or net current assets of -\$29,043 was insufficient to demonstrate a continuing ability to pay the proposed wage offer of \$33,904.

It is noted that with reference to the discussion of accounting methods employed to represent the petitioner's ability to pay the proffered wage, no authority is cited by which the election of a particular accounting method should be determinative of a petitioner's ability to pay the proffered wage. Precedent does not distinguish the results of a petitioner's tax returns based upon its election of an accounting methodology. It is further noted that the financial statements submitted on appeal, are not audited as required by the regulation. CIS will not consider unaudited financial statements submitted as a substitution for one of the three prescribed forms of evidence consisting of either audited financial statements, annual reports, or federal tax returns. 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether a petitioner may have employed and paid the beneficiary during the relevant 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. If a petitioner may have employed an alien beneficiary, consideration may be given the amount of wages paid. If the difference between the actual wages paid and the proffered wage can be covered by either a

petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered wage.

If, as in this case, where the petitioner has not employed the alien, CIS will next examine the net income figure reflected on the petitioner's relevant federal income tax returns, 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 or gross income exceeded the proffered wage is insufficient. Gross income may constitute one measure of a petitioner's growth, as the petitioner claims in this case, but consideration of the expenses incurred in order to produce the revenue must also be part of a review of a petitioner's continuing ability to pay a proffered salary. Similarly, showing that the petitioner regularly paid wages to existing employees is insufficient as the additional employee represents additional monies needed. 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.

In this case, as noted by the director, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in a line of credit as mentioned by [REDACTED] letter. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Any existent loans taken pursuant to an available line of credit will be reflected in the balance sheet provided in the federal tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit as a potential debt will not be treated as cash or as a cash asset.

Based on the evidence contained in the record, it cannot be concluded that the petitioner has demonstrated the continuing ability to pay the proffered wage as of the priority date of the petition.

Beyond the decision of the director the petition is also flawed based on several issues related to the petitioner's lack of specificity of a specific geographical location and place of actual employment of the beneficiary. The employment of aliens under Schedule A occupations must not adversely affect the wages and working conditions of U.S. workers similarly employed. See 20 C.F.R. § 656.10. Schedule A regulations do not contain language that certifies the employment of any alien registered nurse anywhere in the United States, at any wage rate. CIS has jurisdiction under 20 C.F.R. § 656.22(e). The regulations at 20 C.F.R. § 656.20(c)2) state that a labor certification application must clearly show that the wage offered meets the prevailing wage rate, and references 20 C.F.R. § 656.40.

In this case, in response to the director's August 19, 2002, request for additional evidence in order to ascertain the nature of pre-existing contracts between the beneficiary and her prospective duty station, the petitioner responded that the alien will engage in a seven-week clinical preceptorship program at one of three locations, and, upon completion, she may work at one of 137 hospitals with which the petitioner has contracts. This presents a

problem with the regulations describing the procedure to post a job notice. The regulations at 20 C.F.R. § 656.20(g)(1) state:

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 intended employment.
- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of 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 C.F.R. § 516.4 or occupational safety and health notices required by 20 C.F.R. § 1903.2(a).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. Because the petitioner, whose business is to contract with third-party clients, has failed to actually identify the beneficiary's actual "facility or location of the employment," it raises a question as to how the petitioner can comply with the regulations governing the posting of the job notice. By merely posting the notice of the position at the petitioner's administrative office, it does not appear that the petitioner has complied with the requirement.

It is further noted that by not identifying a specific geographical location where the proffered position will be performed, the petitioner has not demonstrated that its proffered wage meets the prevailing wage rate, which is based on the area of intended employment. The regulation at 20 C.F.R. § 656.20(c) requires a prospective U.S. employer in Schedule A labor certification cases to make certain certifications. Relevant 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); and 20 C.F.R. § 656.40.

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.