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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

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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:

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.

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 revoked the petition's approval accordingly.

On appeal, the petitioner 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 March 14, 2003. 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 March 14, 2003. The proffered wage as stated on the Form ETA 750 is \$22.17 per hour, which amounts to \$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 \$25,300,000, and to currently employ 531 workers. In support of the petition, the petitioner submitted a letter of support; a notice of available positions addressed to all the petitioner's employees; certification of the posting of the vacancy notice by the petitioner's chief executive officer; a verification from the petitioner that the beneficiary will have a position of registered nurse immediately available to her upon issuance of her employment authorization; a contract of employment between the petitioner and the beneficiary, dated March 3, 2003; a brochure about the petitioner's business operations; a list of 137 hospitals or medical centers that the petitioner identified as its clients; the state of California Form DE-6, Quarterly Wage and Withholding Information for the last three quarters of 2002; and the petitioner's 2002 Form 1120S federal income tax return. The petitioner also submitted documentation with regard to the beneficiary's qualifications.

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 30, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide original IRS computer printouts, and certified copies of income tax returns from the year 2001 to the present. The director also stated that the petitioner could submit additional evidence to establish the ability to pay the proffered wage in the form of copies of annual reports and audited financial statements. The director also stated that although the petitioner had indicated that it employed more than 100 workers, in view of the multiple I-140 petitions filed by the petitioner, further documentation of the petitioner's ability to pay the proffered wage for all prospective beneficiaries of petitions filed in the same year was needed. Finally, the director stated that the petitioner was a nurse registry and that as such the petitioner was requested to provide evidence that the petitioner would be employing the beneficiary to fill a specific vacancy. In particular the director asked that the petitioner provide evidence of contracts between the petitioner and the clients where the beneficiary would perform nursing services. The director requested that these contracts should indicate the number of nurses to be hired, and the terms of their employment.

In response, the petitioner submitted IRS computer printouts of its federal income tax returns for 2001 and 2002, along with copies of Form 1120S, U.S. Income Tax Return for an S Corporation, for both years.¹ Counsel's accompanying cover letter indicates that the petitioner is offering permanent full-time employment to the beneficiary. The petitioner also submitted a letter from [REDACTED] Chief Financial Officer, who reviewed the petitioner's gross annual revenues from 1998 to the beginning of 2003. [REDACTED] stated that from 1998 to 2002, the petitioner's gross annual revenues more than doubled, and that the projected gross revenue for the end of 2003 was \$30,700,000 based on the historical average growth rate of 21%. [REDACTED] also forecast the

¹ Financial information preceding a petition's priority date is not necessarily dispositive of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. In this case, 2001 and 2002 precede the priority date in 2003.

petitioner's future business revenues from 2003 to 2009. In addition, [REDACTED] stated that the petitioner had a \$3,500,000 line of credit with the Heritage Bank of Commerce that the petitioner could use if its client hospitals failed to pay in a timely manner. The petitioner also submitted a document entitled "Second Amendment to Loan and Security Agreement" which documented the line of credit for \$3,500,000 with Heritage Bank. With regard to business operations in 2003, the petitioner submitted documents entitled "Customer Analysis Report of Billings" from January 1, 2003 to May 31, 2003, that listed the hours billed by the petitioner, hours of work paid by the client hospitals, and the profits realized in these transactions. The petitioner also submitted a report generated by Heritage Bank that examined the aging invoices of the petitioner's clients as of May 15, 2003. This document indicated that the majority of the petitioner's invoices were paid within 30 to 60 days. The petitioner submitted Form 941 Employer's Federal Tax Return, for the first quarter of 2003, which indicated the petitioner had 626 employees and paid out \$5,031,328 in wages and tips, during this quarter. The petitioner also submitted Form DE-6 for the last three quarters of 2002, and the first quarter of 2003. Finally, the petitioner submitted staffing agreements/contracts between itself and the following hospitals: Beverly Hospital, Tenet HealthSystems Hospitals, St. Jude Medical Center, and Sharp Memorial Hospital.

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 September 4, 2003, denied the petition. The director relied upon figures from the petitioner's 2001 and 2002 income tax returns.

On appeal, counsel asserts that the beneficiary has been working for the petitioner since September 1, 2003. The petitioner asserts that since it has demonstrated that it is paying the salary of the beneficiary, it has demonstrated the ability to pay the proffered wage. The petitioner also states that corporate income tax returns are not the only evidence germane to the ability of the petitioner to pay the proffered wage. The petitioner also notes that it had a net income of \$584,366 in 2002 and since the petitioner's net income is higher than the beneficiary's proffered wage of \$46,114, the petitioner has established his ability to pay the proffered wage. The petitioner also presents other documents that it describes as supporting documents. Included in these documents is a check for the beneficiary for \$735.85 issued by the petitioner, and an amendment to an agreement for supplemental staffing agencies signed and put into effect on May 1, 2003, between Tenet HealthSystem Hospitals, and the petitioner. The last exhibit of this agreement lists eight hospitals who are participating ostensibly in the agreement. Coastal Communities Hospital is listed as one of the participating hospitals. According to the petitioner, this document demonstrates the beneficiary's regular registry agreement with Coastal Communities Hospital in Santa Ana, California. Finally the petitioner submits a copy of the beneficiary's EAD card.

At the outset, the AAO notes that all the third-party contracts submitted by the petitioner are either expired or post-date the priority date.² 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, the contracts do not assist it with establishing its continuing ability to pay the proffered wage beginning on the priority date in March 2003. In addition, the submission of a pay stub for the beneficiary for one week of work in September 2003 does not establish the petitioner's ability to pay the proffered wage as of March 14, 2003. The pay stub in no way establishes anything beyond the fact that the beneficiary received a paycheck for one week's work.

² The contract with Tenet HealthSystem Medical, Inc. (Tenet) became effective on either July 2002, or May 1, 2003, according to its introductory paragraph and Recital A. The contract with San Diego Hospital Association (SDHA) commenced on September 30, 2001 and expired on September 30, 2002, according to Article 6.8. The contract with Beverly Hospital (Beverly) was entered into on July 1, 2003 and was good for one year according to Recital 9. The contract with St. Jude Medical Center (St. Jude) was entered into on June 1, 2003.

Nevertheless, 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. 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, housing, or transportation, or similar expenses. 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).

With the petition, the petitioner submitted the letters from its president/CEO and its CFO/controller stating that it 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 statements of the president/CEO and the controller/CFO and require additional evidence.

The director observed, however, that the petitioner had 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 unusually large number of petitions was sufficient reason to require additional evidence.

With regard to the petitioner's financial resources in 2003, information of which would be dispositive of the instant petition, the chief financial officer in her letter submitted in response to the director's request for evidence, addresses the petitioner's gross annual revenues and their increase from 1998 to 2002. However, neither CIS nor the AAO utilizes gross annual revenue figures in determining the petitioner's ability to pay the proffered wage. In addition, the chief financial officer also referred to the petitioner's line of credit with Heritage Bank as a backup resource for payment of salaries should the client hospitals not pay their invoices in a timely manner. However, 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 the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. 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). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the 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 cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a

petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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. On appeal, the petitioner states that it employed the beneficiary in September 2003 and provided documentation of her pay stub. However, this documentation does not establish that the petitioner paid the beneficiary the proffered wage as of the priority date, namely, March 14, 2003. Thus, the petitioner did not establish that it paid the beneficiary the proffered wage from the priority date to the present time.

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, CIS 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.

The petitioner's net income in 2002 was \$584,366. The federal income tax return for 2003 was not available at the time of filing the petition, nor was submitted by the petitioner at any point during the proceeding. Thus, the record is devoid of any information on the petitioner's net income in 2003. While the petitioner's net income in 2002 is not dispositive, the AAO will analyze this net income figure for further clarification. The petitioner's net income of \$584,366 in 2002 could pay the proffered wage as long as not more than 12 similar petitions with similar proffered wages are pending. However, in his request of further evidence, the director clearly stated that the petitioner was required to provide evidence that it could pay the proffered wages of all beneficiaries of petitions filed by the petitioner in the same year. In his denial, the director again referred to multiple petitions submitted by the petitioner. As previously stated, 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 petitioner did not provide sufficient evidence to establish that it could pay the proffered wages of 140 additional beneficiaries whose petitions were filed in 2003 based on its net income for the year 2002 or partially projected net income for 2003.

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 its federal income tax returns for 2001 and 2002. Although these returns are not dispositive of whether the petitioner could pay the beneficiary the proffered wage in March 2003 to the present, no other documentation such as audited financial statements or annual reports are contained in the record, therefore, the petitioner's federal income tax returns do provide some weight to the proceedings, and will be examined in this proceeding.

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 submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ -354,938	\$ 584,366
Current Assets	\$ 633,676	\$ 3,952,387
Current Liabilities	\$ 662,719	\$ 4,059,784
Net current assets	\$ -29,043	\$ -107,397

Thus, for the years 2001 and 2002, the petitioner had negative net current assets.⁴ Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net current assets. Accordingly, the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date to the present time.

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.⁵ Any additional proceedings in this matter must address the specific intended work location of this

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.

⁴ As stated previously, the financial information for 2001 and 2002 is not dispositive in this matter. Nevertheless, the AAO will examine the figures for further clarification.

⁵ 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

proffered position and evidence that the proffered wage complies with that geographical location's prevailing wage rate; 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.

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. 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, and permanent employment.

With regard to the beneficiary's actual work location, on appeal the petitioner submits an attachment to an agreement between Tenet and itself, as evidence that the beneficiary's place of employment is Coastal Communities Hospital. This documentation is unpersuasive in establishing the beneficiary's actual employment there. Furthermore, if this hospital were indeed designated as the beneficiary's work site, the notice of job availability would have been posted at this hospital, rather than at the petitioner's corporate offices.

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.

novo basis).

⁶ Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. *See* 20 C.F.R. §§ 656.20 and 656.22.

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).