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MAR 16 2005



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:  
WAC 02 201 53874

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

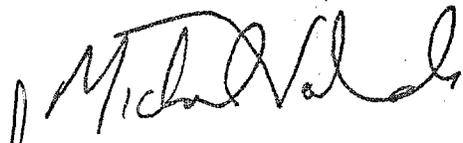
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, 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, 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 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.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.20(g) states, in pertinent part:

- (1) 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 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). The petitioner must also demonstrate that it complied with the other regulatory requirements. Here, the petition was filed with CIS on June 6, 2002. The proffered wage as stated on the Form ETA 750 is \$16.30 per hour, which equals \$33,904 per year.

On the petition, the petitioner stated that it was established on January 30 1996 and that it employs 1,109 workers.<sup>1</sup> On the Form ETA 750, Part B, signed June 4, 2002 by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated June 4, 2002, from its president/CEO. That letter states that the petitioner has the ability to pay the proffered wage, stressing that its gross receipts have grown to \$19.4 million annually. The petitioner 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.

The petitioner submitted a Notice of Filing describing the proffered position. That notice states that the proffered wage is \$16.30 per hour. A certification submitted with that notice states that the notice was posted for ten business days in a conspicuous location in the petitioner's offices. The notice is undated. The certification is dated June 4, 2002.

On November 13, 2002 the California Service Center issued a Request for Evidence in this matter. The Service Center requested, *inter alia*, (1) evidence of a contract with the specific facility at which the beneficiary would be employed, (2) copies of the petitioner's W-3 transmittals from 2001 to the present, and (3) copies of annual reports, federal tax returns, or audited financial statements showing that the petitioner has the ability to pay the proffered wage.

That request also stated that, if the petitioner employs 100 or more workers, then it may submit the statement of a financial officer of the company stating that it has the ability to pay the proffered wage.

In response, the petitioner submitted a list of the hospitals to which it provides nurses, copies of the petitioner's California Forms DE-166 Magnetic Media Transmittal Sheet Quarterly Wage and Withholding

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<sup>1</sup> In subsequent petitions, the petitioner has claimed to employ 350, 504, 531, and 550 workers. This office questions these discrepant figures. Because this issue was never previously raised, however, this office shall not rely on it in today's decision.

Information for all four quarters of 2002, and a computer generated payroll summary. The petitioner also provided a computer-generated spreadsheet of invoice information and its unaudited financial statements as of August 31, 2002.

The petitioner's Form DE-166 Transmittal Sheets show that the petitioner paid total subject wages of \$3,444,522.60, \$3,797,842.01, \$3,935,966.13, and \$4,422,393.43 during the four quarters of 2002, respectively, for a total of \$15,600,724.17.<sup>2</sup> The payroll summary purports to show that the petitioner's total payroll expense from January 2002 through December 2003 was \$14,436,858.67.

The hospital list submitted by the petitioner contains the names of 137 hospitals with which the petitioner ostensibly contracts.

As to its ability to pay the proffered wage, the petitioner asserted that it contracts with 137 hospitals, and that it realizes a profit on each nurse it is able to employ. The petitioner added that although it declared a loss of \$354,938 during 2001, the loss is misleading because it does not include the petitioner's accounts receivable. In support of that assertion the petitioner submitted a letter, dated January 23, 2003, from the petitioner's accountant.

The accountant's states that the accountant is an independent accountant with no interest in the outcome of the instant petition. It also states that the loss the petitioner declared during 2001 does not accurately reflect the petitioner's financial strength because the petitioner reports taxes on a cash basis, rather than pursuant to the accrual method. The accountant stated that if the petitioner's 2001 profit were stated pursuant to accrual accounting, it would be \$178,000.

That the accountant's statement does not constitute an audited financial statement. Further, the accountant did not include the calculations that led him to that figure. Further still, as was noted above, the petitioner's 2001 end-of-year current liabilities were greater than its end-of-year current assets, which include its accounts receivable. Because those calculations were not provided, however, this office is unable to review them. The evidentiary weight of the letter from the accountant is diminished.

The petitioner did not directly respond to the Service Center's request for evidence of a specific vacancy the beneficiary is to fill. In a letter, dated January 23, 2003, which accompanied the submissions, however, the petitioner's president/CEO stated that the beneficiary is guaranteed full-time employment so long as he performs satisfactorily.

This office notes that a contract between the petitioner and the beneficiary was provided in response to the Request for Evidence. That contract states that

At the sole discretion of the Employer, employment may commence either (a) upon receipt by [the beneficiary] of his/her work permit, or (b) upon change in [the beneficiary's] status to

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<sup>2</sup> That amount, split between the 1109 workers the petitioner claims to employ, equals approximately \$14,000 per worker.

permanent resident. Note: The filing of the Immigrant Petition for Alien Worker I-140) does not guarantee immediate employment of [the beneficiary] by the [petitioner].

On March 25, 2003, the Director, California Service Center issued a Notice of Intent to Deny in this matter. In that notice the director observed that the petitioner had failed to provide the requested evidence of its ability to pay the proffered wage.

In response, the petitioner submitted a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return states that the petitioner declared ordinary income of \$584,366 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In addition, the petitioner submitted a copy of its Form 941 Employer's Quarterly Tax Return for the first quarter of 2003. That return shows that the petitioner paid wages in excess of \$5 million during that quarter.

The petitioner also submitted a letter, dated April 4, 2003, from its CFO/controller. That letter states that the petitioner has the ability to pay the proffered wage, citing the amount of its gross receipts, the growth of its gross receipts since 1998, and its ordinary income during 2002. In addition, that letter stated that the petitioner has a \$3.5 million credit line with Heritage Bank of Commerce, Heritage Capital Group.

The petitioner offered no evidence in support of the assertion that it has a \$3.5 million credit line. In other cases before this office, however, the petitioner submitted a letter dated August 7, 2002, from Heritage Capital Group. That letter confirms that the petitioner has a credit line, but states that it is a "low six figure" line. This office notes a considerable discrepancy between the assertion in the instant case and the evidence submitted in other cases.

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. In that decision, the director relied upon figures from the petitioner's 2001 and 2002 income tax returns.

On appeal, the petitioner asserts that CIS need not limit its consideration to the petitioner's tax returns. The petitioner states that between March 17, 2003 and August 31, 2003 the petitioner paid the beneficiary gross wages of \$11,099.28. In support of that assertion the petitioner provides 14 photocopies of cancelled checks drawn by the petitioner to the beneficiary's order. The earliest of those checks is dated March 28, 2003 and the most recent September 5, 2003. The checks are each dated one week apart, except that no checks were submitted for April 25, June 6, June 27, July 4, July 11, July 18, July 25, August 1, August 8, August 15, or August 22. The checks range in amount from \$207.39 to \$1,150.46, and, contrary to the petitioner's assertion, total only \$8,538.83.

The proffered wage in this case is \$16.30 per hour. If the beneficiary worked 40 hours in a given week at that wage he would earn \$652. Of the 14 photocopied checks submitted, nine are for amounts less than \$652. Either the petitioner was not employing the beneficiary at the proffered wage or the petitioner was not employing the beneficiary full-time during those weeks.

Further, although the petitioner gave no reason for the eleven weeks for which no paychecks were submitted, their absence appears to suggest that the petitioner did not employ or compensate the beneficiary at all during those eleven weeks.

The petitioner also submits a copy of an Employment Understanding and Agreement between it and the beneficiary. The proposition that the petitioner intended to support with that document is unclear.

Subsequently, the petitioner submitted a brief to supplement the appeal. In that brief the petitioner states that "Since [the] priority date was in 2003, the CSC's use of the 2001 Federal Income Tax Return to support its decision to deny the petition was inappropriate." The petitioner continued, "I also assume that the 2002 Federal Income Tax Return was appropriate because the priority date was so close to the tax year of 2002."

This office notes that the priority date is June 6, 2002, and is not during 2003, as the petitioner asserts. Use of the petitioner's 2002 tax returns was appropriate. In the instant case, this office shall not consider data from the 2001 return.

The petitioner cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) that a reasonable expectation of increasing profits can demonstrate a petitioner's ability to pay the proffered wage. The petitioner argues that its expectation of a vast increase in profits is reasonable.

The petitioner cites *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986) and *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985) for the proposition that CIS may consider other evidence in addition to the petitioner's tax returns. This office agrees, and adds that, in the event that evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp.* at 1054.

As additional evidence the petitioner submits monthly bank statements from June 2002 to September 2003 and a printout of information pertinent to the petitions recently submitted and those approved.

The petitioner states that it is submitting, at Exhibit 1, a statement of its CFO.<sup>3</sup> The petitioner states that, as the petitioner employs 100 or more workers, the letter is intended to satisfy the requirement in 8 C.F.R. § 204.5(g)(2) of a letter from a financial officer of the company stating that the petitioner has the ability to pay the proffered wage.

Although whether or not the letter from the accountant is a letter from a financial officer of the company is unclear, the record contains two previous letters that are. Those letters are the June 4, 2002 letter from the

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<sup>3</sup> Exhibit 1, however, is a letter from the same accountant who previously stated, in the letter of January 23, 2002 described above, that he is an independent accountant. The accountant's assertion conflicts with the petitioner's assertion that the accountant is its CFO, unless the accountant was placed in that position in the interim. Further, a letter of April 4, 2003 described the writer of that letter, who was not the accountant, as the petitioner's CFO/controller. Again, absent an explanation, the evidence appears to conflict.

petitioner's president/CEO and the April 4, 2003 letter from the CFO/controller. Both of those letters state that the petitioner has the ability to pay the proffered wage.

The evidence demonstrates that the petitioner has experienced considerable growth in recent years. Clearly, this growth is fueled by the indisputable shortage of nurses in the United States. No reason exists to assume that the petitioner will cease to grow. The petitioner's assertion, however, is that it will enjoy vast growth and remain profitable. In view of the fact that the petitioner is seeking approval of a large number of petitions, the petitioner must demonstrate the truth of that assertion in order to prevail.

The petitioner's citation of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is unconvincing. The petitioner in *Sonogawa* sought approval of a single petition. In that case the Regional Commissioner found that the unusual circumstances were sufficient to show that the petitioner would become profitable enough to pay the wage proffered in that single petition. The petitioner in the instant case asserts and, in order to prevail, must demonstrate, that its profitability will *vastly* improve so as to cover the salaries of the beneficiaries of the approximately 93 Form I-140 petitions filed during 2002. Nothing in the record, however, supports that assertion. Assuming that the petitioner's business will flourish so markedly that it will be able to continue to add numerous employees to its payroll and remain profitable is speculation.

The petitioner argues that its credit line permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The petitioner notes that the banks willingness to extend it credit is based on its history of creditworthiness. That, too, is likely correct. The petitioner further argues, however, that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this final contention.

The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients. That does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage on a more permanent basis. 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. Although the credit line permits the petitioner to withstand delays and interruptions, the petitioner must show the ability, over a longer period, be it 60 days or a year or longer, 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, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

That a commercial lender has accorded the petitioner a large credit line is an indication that the bank adjudges that the petitioner will probably remain solvent and able to repay its debts. That is not the same determination now before this office. As was noted above, this office must ask whether the petitioner can grow very rapidly and be profitable. The commercial lender made no decision on that issue and, if it had, this office would not be bound by the lender's assessment.

The petitioner has 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 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. The petitioner currently has more than fifty cases on appeal. This office finds that this unusually large number of petitions was sufficient reason to require additional evidence.

The petitioner also argues that the United States has an acute shortage of nurses and that humanitarian considerations require approval of the instant petition. That the United States has a shortage of nurses is confirmed by the DOL having placed registered nurses on the list of Schedule A occupations. That shortage does not, however, obviate the petitioner's obligation to demonstrate conformity with the statutes and regulations governing the instant visa category. Notwithstanding that the United States has a shortage of registered nurses, the petitioner must still demonstrate the continuing ability to pay the proffered wage beginning on the priority date and compliance with all other aspects of the regulations.

The letter from the petitioner's accountant shall be considered, notwithstanding that he is not apparently a financial officer of the company. That accountant states that the petitioner's tax returns are not a valid index of its financial condition because, in order to reduce tax liability, they were prepared on a cash basis, rather than on an accrual basis. The accountant states that, had the payables and receivables been included on the petitioner's 2001 tax return, it would have reflected a profit of \$178,000. The accountant notes that the petitioner's receipts and profits both rose during 2002, and asserts that this was a direct result of employing more nurses.

The accountant's assertion that the net income shown on the petitioner's tax return is a poor index of its cash position is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

Having elected to demonstrate its ability to pay the proffered wage with its tax returns, however, rather than with copies of annual reports or audited financial statements, the petitioner is bound by those returns. If the tax returns fail to show the ability to pay the proffered wage, then the petitioner has failed to show its ability to pay the proffered wage unless it submits reliable evidence of additional funds available to the petitioner.

Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

Counsel's reliance on the amount of the petitioner's gross receipts and the amount it pays in wages to its current employees is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is

insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>4</sup> or otherwise increased its net income,<sup>5</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

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 the beneficiary during 2002. The petitioner established that it employed the beneficiary during 2003 and paid him \$8,538.83.

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

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<sup>4</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>5</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage. In this case, although counsel asserted that hiring the beneficiary would increase the petitioner's profits, he provided no calculations that demonstrate that assertion. Any such calculation would necessarily need to include not just the income to be derived from selling the beneficiary's services and the wages to be paid to the beneficiary, but also recurring costs of employing the beneficiary, such as increased administrative costs, and any initial costs that would be incurred in hiring the beneficiary.

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 \$33,904 per year. The priority date is June 6, 2002. As was noted above, the petitioner has not established that it paid the beneficiary any wages during 2002. The petitioner is therefore obliged to demonstrate that it had the ability to pay the beneficiary the entire proffered wage during that year.

The petitioner declared ordinary income of \$584,366 during 2002. That amount is sufficient to pay the proffered wage to approximately 17 beneficiaries with salaries similar to the proffered wage in the instant case. The petitioner, however, has recently filed petitions for 290 aliens. 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's 2002 ordinary income is insufficient to demonstrate the ability to pay the proffered wage. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case, though, that were not addressed in the decision below.

The photocopied paychecks submitted in this case make clear that the petitioner was not, during the period when those checks were issued, employing the beneficiary full-time at the proffered wage. That presents no problem to approval. The petitioner is not obliged to employ the beneficiary full-time at the proffered wage until the beneficiary is in the United States and the petition is approved.

The contract submitted in this case, however, makes clear, in the portion set out above, that the petitioner is contemplating not necessarily employing the beneficiary full-time even upon satisfaction of those two conditions.

The petitioner is reminded that aliens entering the United States pursuant to the instant visa category are not a pool of potential employees, to be employed and paid if and when the petitioner locates a suitable placement. Rather, the petitioner, by submitting the visa petition, is offering them full-time employment that is to

commence upon approval of the petition and entry into the United States, whether or not the petitioner is then able to place them at a client facility.

Further, 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 7, Address Where Alien Will Work, "see Exhibit 2 (Petitioner's Notice of Available Positions)." Part 6 of the Form I-140 petition also refers to Exhibit 2 for the location where the beneficiary will work. Exhibit 2 is the posting of the proffered position. That posting states that the beneficiary will "report to client facilities as directed by Petitioner."

The certification attached to that posting states that it was posted at the petitioner's offices for a period of ten consecutive days. The certification does not state the dates during which the notice was posted. The certification itself, however, is dated June 4, 2002.

The location at which the petitioner would employ the beneficiary is unknown. Both the petition and the Form ETA 750, however, as well as the nature of the petitioner's business, make clear that the beneficiary will work at a hospital or nursing facility, rather than at the petitioner's offices. The record contains no evidence, then, that the job notice was posted at the prospective 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. The list of the petitioner's client hospitals indicates that the petitioner employs its nurses at 137 facilities throughout California and in some locations in Nevada. Further, the petitioner has not indicated that, in the future, it will

limit assignment of its nurses, or of the beneficiary in the instant case, to those locations. 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, in accordance with 8 C.F.R. § 204.5(g)(2), that the wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. The petitioner failed to demonstrate that it is able to pay the wage proffered to the beneficiaries for whom it has petitioned. 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). For all of these reasons the petition may not be approved.

**ORDER:** The appeal is dismissed.