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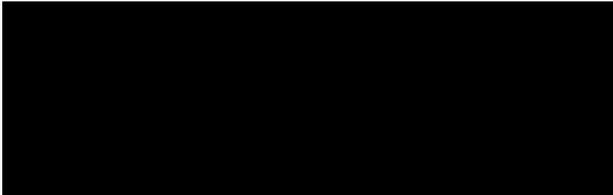
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
WAC 03 006 54127

Office: CALIFORNIA SERVICE CENTER

Date: MAY 13 2005

IN RE: Petitioner:  
Beneficiary:

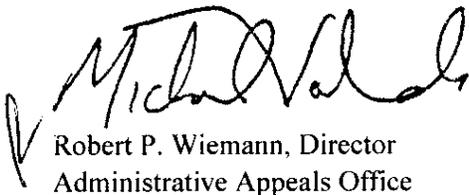


PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, 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 complied with the posting requirements of 20 C.F.R. § 656.20(g)(1).

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.

The regulation at 20 C.F.R. § 656.22 Applications for labor certification for Schedule A occupations, states, in pertinent part,

. . . (b) The Application for Alien Employment Certification form shall include: . . . (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 § 656.20(g)(3) of this part.

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 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 October 8, 2002. The proffered wage as stated on the Form ETA 750 is \$16.30 per hour, which equals \$33,904 per year. The petitioner must also demonstrate compliance with all statutory and regulatory requirements.

As to the location where the beneficiary would work, the Form I-140 petition states, “See Exhibit 2, (Petitioner’s Notice of Available Positions).” The Form ETA 750 states, in the space headed “Address Where Alien Will Work,” also stated “See Exhibit 2, (Petitioner’s Notice of Available Positions).” Exhibit 2 is the posting of the proffered position. As to the location where the beneficiary will work, it states, “RN will report to [the petitioner] at its address at Orange County for daily or weekly assignments at various hospitals or facilities.” A certification attached to that posting states that it was posted at the petitioner’s offices for a period of ten consecutive days. That certification is dated October 3, 2002.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 600 workers.<sup>1</sup> On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the Form ETA 750 submitted with the current petition, the only employment experience the beneficiary claimed pertinent to nursing was employment from October 1999 through July 2001 at the Al-Razi Hospital, in Jenin, Palestine, as its operating room nurse manager.

On another Form ETA 750 submitted to CIS in conjunction with a previous Form I-140 petition filed by a different petitioner for the same beneficiary, the beneficiary stated that he also worked from September 1994 to February 2000 as an operating room nurse at the Radifya Hospital, in Nablus, Jordan. That alleged employment is not mentioned on the current Form ETA 750, although it instructed the beneficiary to list all jobs related to the occupation for which he is seeking certification, which, in this case, is nurse. No explanation for this discrepancy is in the file.

In support of the instant petition, the petitioner submitted a letter, dated October 3, 2002, from its President/CEO. That letter states that the petitioner is able to hire the beneficiary because its gross receipts have grown to \$19.4 million annually.

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

Finally, the petitioner provided a copy of a contract between itself and the beneficiary, information pertinent to the current shortage of registered nurses, and a collated list of invoices of the hospitals with which it does business.

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<sup>1</sup> Two subsequent petitions filed November 22, 2002 (WAC 03 044 50329 and WAC 03 044 51700), stated that the petitioner then employed only 350 workers. Because the Service Center did not inquire about this inconsistency, however, and accord the petitioner an opportunity to explain, today’s decision does not rely, even in part, on that apparent contradiction.

On August 20, 2002, the California Service Center issued a Request for Evidence in this matter. The evidence requested in that notice, however, pertained to the beneficiary's employment claims, and is not directly relevant to the basis for the decision of denial.

In response, however, the petitioner submitted, *inter alia*, a letter, dated October 30, 2002, from its CFO. That letter states the petitioner's Gross Revenue for the years 1998 to 2004 and its Net Income for 1998 to 2003. The CFO admitted that some of those figures are estimated and some are projected. The CFO did not state the source of those net income figures that are neither estimated nor projected. The figures for 2001 and 2002, however, do not match the petitioner's taxable income before net operating loss deduction and special deductions for those same years. The CFO also projects that the petitioner's revenues will continue to grow and states that the petitioner has a \$3.5 million credit line it can use to pay its employees if its clients fail to pay in a timely manner.

On April 10, 2003, the California Service Center issued another Request for Evidence in this matter. The Service Center requested, *inter alia*, copies of the petitioner's Form 941 Quarterly Wage Reports for the previous two quarters, copies of the petitioner's 2002 Form W-2 Wage and Tax Statements and W-3 transmittals, and evidence of the contracts between the petitioner and the clients for whom the beneficiary would work.

In response, the petitioner submitted various documents and a cover letter, dated September 16, 2002. The petitioner did not, however, submit the requested Form 941 Quarterly Wage Reports, the petitioner's W-2 forms, the petitioner's W-3 forms, or any evidence of contracts between the petitioner and the clients for whom the beneficiary would work. The cover letter did not address these omissions.

On December 29, 2003, the California Service Center issued a third Request for Evidence in this matter. The Service Center requested, *inter alia*, (1) evidence that the proffered wage equals or exceeds the prevailing wage for the proffered position, (2) evidence that the position was posted in accordance with the pertinent regulatory requirements, (3) and additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Service Center noted that the petitioner must demonstrate that ability with copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted a letter, dated March 17, 2004, from its president/CEO. In that letter, the president/CEO asks to amend the proffered wage in this case to \$22.33 per hour or \$893.20 per week, which equals \$46,446.40. As to the posting notice, the president/CEO provided another copy of the posting notice and certification that were submitted with the petition, and stated that the notice was posted at the petitioner's place of business in accordance with the regulations.

As to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the petitioner submitted (1) copies of its California Forms DE-166 Magnetic Media Transmittal Sheet Quarterly Wage and Withholding Information for all four quarters of 2003, (2) copies its Form 941 Employer's

Quarterly Federal Tax Returns for the same quarters, (3) computer printouts of its 2003 payroll information, and (4) a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation.

The petitioner's quarterly transmittals show that it paid total subject wages of \$4,789,773.50, \$4,528,805.28, \$4,696,592.54, and \$4,432,702.02 during the four quarters of 2002, respectively. The quarterly tax returns show that the petitioner paid total wages of \$5,031,328.66, \$4,899,140.38, \$5,050,261.99, and \$4,768,683.42 during those same quarters. The payroll printouts show that the petitioner paid gross pay of \$17,153,295.22 to 725 employees.

The petitioner's 2002 tax return shows that the petitioner declared ordinary income of \$584,366 during that year. The corresponding Schedule L shows that the petitioner's current liabilities exceeded its current assets during that year.

The director determined that the evidence submitted did not establish that the petitioner had posted notice of the proffered position at the "facility or location of intended employment" in accordance with the requirement of 20 C.F.R. § 656.20(g)(1)(ii) and did not, therefore, demonstrate that the petitioner was entitled to Schedule A certification of the Form ETA 750. The director denied the petition on June 14, 2004.

On appeal, the petitioner submits another copy of the posting notice in this case, along with a certification that the notice was posted from June 15, 2004 to June 30, 2004 at the St. Jude Medical Center. The list of client hospitals previously submitted indicates that the St. Jude Medical Center is in Fullerton, California. The petitioner states that the beneficiary will be employed full-time at the St. Jude Medical Center. As evidence of that assertion, the petitioner provides a contract between it and the St. Jude Medical Center, which provides for the terms under which any nurses the medical center requests would be employed. St. Jude does not agree, in that document, to employ any full-time nurses.

The regulation at 20 C.F.R. § 656.20(g)(1) provides, as was noted above, that the petitioner must demonstrate that that notice of the proffered position was provided to its employees' bargaining representative, if they are represented by collective bargaining, or, if not, that it was posted "at the facility or location of the employment."

The record contains no indication that the petitioner's nurses are represented by collective bargaining and no evidence that the posting notice was provided to a bargaining representative. The petitioner must demonstrate, then, that the notice was posted at the facility or location of the employment.

The original notice of posting in this matter was posted at the petitioner's administrative offices. The petitioner's administrative offices, however, are not the place where the beneficiary, a nurse, would be employed. That notice, therefore, does not satisfy the requirement that the petition be posted at the location where the beneficiary will be employed. The petition may not be approved on the basis of that posting.

On appeal the petitioner has asserted, but not demonstrated, that it has an agreement with St. Jude Medical Center that the beneficiary will be employed full-time there. This assertion is insufficient to demonstrate that St. Jude's is the location at which the beneficiary would be employed.

The posting at St. Jude's is insufficient for another reason. The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed*. (Emphasis supplied).

The regulations require that the notice be posted for at least ten consecutive days and evidence of such posting be submitted with the Application for Alien Employment Certification. As the job offer notice was posted subsequent to the filing of the Application for Alien Employment Certification and Form I-140, the petition may not be approved on the basis of the amended posting submitted on appeal.

The petitioner has not established that the position was posted in accordance with the requirements of 20 C.F.R. § 656.20(g)(1) and the petition was correctly denied on that basis.

Additional issues exist in this case, though, that were not addressed in the decision below. As was noted above, the posting of the proffered position must be accomplished before the submission of the Form I-140 petition. The posting, ostensibly an attempt to attract U.S. workers to fill the proffered position, may not, therefore, understate the proffered wage. To do so would discourage U.S. workers from applying. The posting would not, in that case, demonstrate that the petitioner was unable, despite diligent efforts, to fill the proffered position with a U.S. worker at the predominant wage. The petitioner's attempt to amend the proffered wage on appeal, to an amount greater than that offered on the posting of the proffered position, therefore, is ineffective. The proffered wage in this case remains \$33,904.

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.

The petitioner submitted evidence showing that the predominant wage for entry-level registered nurses in Orange, California is \$22.33 per hour, or \$46,446 annually. Orange, California is located in Orange County, as is Fullerton, California, where the petitioner now asserts the beneficiary would be employed full-time. The proffered wage is less than the proffered wage in the area of intended employment. The petition should have been denied for this additional reason.

Further, the regulation at 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 employs more than 100 workers. With the petition the petitioner submitted the October 3, 2002 letter from its president/CEO 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.

The petitioner, however, has filed multiple alien worker petitions. CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. This office finds that this large number of petitions was sufficient reason to require additional evidence.

The October 30, 2002 letter from the petitioner's president/CEO contained figures that it alleges were the petitioner's gross and net incomes during various years. Nothing in the record indicates that those figures were taken from copies of annual reports, federal tax returns, or audited financial statements. The unsupported assertions pertinent to the petitioner's income are insufficient to sustain the burden of proof in this matter.

The petitioner has cited its growth during recent years as evidence of its ability to pay the proffered wage. The petitioner has, in fact, shown 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. In view of the large number of alien petitions it has submitted, however, the petitioner must demonstrate, in order to prevail, that it will enjoy vast growth and remain profitable. No evidence was submitted that demonstrates that.

The petitioner argues that its \$3.5 million credit line<sup>2</sup> permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The petitioner implies, however, that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this final contention.

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<sup>2</sup> Although the petitioner's president/CEO stated that the petitioner has this credit line, he provided no additional evidence in support of that assertion.

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.

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 has ever employed 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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$33,904 per year. The priority date is October 8, 2002. Evidence pertinent to the petitioner's finances prior to 2002 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner declared ordinary income of \$584,366 during 2002. That amount is sufficient to pay the proffered wage to 17 beneficiaries with salaries similar to the proffered wage in the instant case. The petitioner, however, has recently filed petitions for 290 petitions. 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. The petition should have been denied on this additional basis.

The California Service Center requested, on April 10, 2003, that the petitioner provide copies of its 2002 Form W-2 Wage and Tax Statements and W-3 transmittals, and evidence of the contracts between the petitioner and the clients for whom the beneficiary would work. The petitioner did not respond to that request. The petition should have been denied for this additional reason.

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 has submitted evidence to demonstrate that the United States has a shortage of registered nurses. 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.

The petitioner failed to demonstrate, that the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). The petitioner failed to demonstrate, in accordance with 8 C.F.R. § 204.5(g)(2), that wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. 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 provide requested evidence. For all of these reasons the petition may not be approved.

**ORDER:** The appeal is dismissed.