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FILE: WAC 03 123 51074 Office: CALIFORNIA SERVICE CENTER

Date: **SEP 16 2005**

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a private duty nursing services company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

The regulation 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.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Furthermore, 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 20 C.F.R. § 656.10(a)(2) states that professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 [Applications for labor certification for Schedule A occupations.] (c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the INS, now CIS, issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

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 of location of the employment.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 specifies that the position requires an associate's diploma in nursing and a CGFNS Certificate and/or California RN license.

Here, the Form ETA 750 was accepted on March 19, 2003. The proffered wage as stated on the Form ETA 750 is \$26.00 per hour (\$54,080.00 per year). The Form ETA 750 states that the position requires 11 years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, a federal Form 1120S Tax Return for 2001, compiled financial statements, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center on March 1, 2004, requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Ability to Pay: Provide evidence of the petitioner's ability to pay the beneficiary's 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 the ability shall be either in the form of copies of annual reports, copies of the filed (must be signed) federal income tax returns, or audited financial statements. If the petitioner company has one hundred (100) or more workers the petitioner may also provide a statement from a financial officer of the organization that declares the prospective employer's ability to pay the proffered wage. If the petitioner wishes to use federal tax returns to establish ability to pay, all schedules, attachments, and statements should be included.

.... [Service] records indicate that the petitioner has filed other petitions. The petitioner will be required to demonstrate ability to pay the total wage for all beneficiaries of petitions filed in the same year.

Form DE-6, Quarterly Wage Report: Submit copies of the U. S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees that were filed with the State of California for the first and last quarters of the year 2003 ....

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax return for year 2002, the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all petitioner's employees and other information.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$54,080.00 per year from the priority date:

- In 2001, the Form 1120S stated taxable income of \$58,234.00.
- In 2002, the Form 1120S stated taxable income of \$345,538.00.

The director denied the petition on April 19, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date as the petitioner had filed multiple employment based preference petitions for other beneficiaries in the same year of filing.

On appeal, counsel asserts:

“To establish that Petitioner Nurse Providers has the ability to pay the proffered wage to beneficiaries sponsored for employment, through additional evidence and legal argument.”

On appeal, counsel submits the following copies of information: the petitioner’s Internal Revenue Service (IRS) Form 1120S tax return for year 2002, a letter from petitioner and other documents.

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. The petitioner did not employ the beneficiary according to the record of proceedings.

Alternatively, in determining the petitioner’s ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

For tax years 2001 and 2002, the petitioner would have enough money to pay the proffered wage but not enough money to pay all the wages of the beneficiaries for which the petitioner has employment based preference petitions outstanding.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. Since the petitioner, offered no admissible evidence in the form of federal tax returns from the priority date, this line of investigation is precluded.

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.<sup>1</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner’s filing of Form 1120S federal tax return. The petitioner’s 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.

<sup>1</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the two Form 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following.

- In 2002, petitioner's Form 1120S return stated current assets of <\$2,095.00><sup>2</sup> and \$35,391.00 in current liabilities. Therefore, the petitioner had <\$37,486.00> in net current assets for 2002. Since the proffered wage was \$54,080.00, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120S return stated current assets of \$4,384.00 and \$119,023.00 in current liabilities. Therefore, the petitioner had a <\$114,639.00> in current net current assets for 2001. Since the proffered wage was \$54,080.00, this sum is less than the proffered wage.

Therefore, for the period from the priority date, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date.<sup>3</sup> Counsel offers complied financial statements,<sup>4</sup> state wage and withholding reports, and with the original petition submission, complied financial statements. Counsel cites no legal precedent for this introduction, and, according to regulation,<sup>5</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The unaudited financial statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

The petitioner's accountant reinforces the above statement by qualifying the above-mentioned financial statements thusly:

A compilation is limited to presenting in the form of financial statements information that is the representation of management. I have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

Management has elected to omit all substantially all of the disclosures and the Statement of Cash Flows<sup>6</sup> required by generally accepted accounting principles. If the omitted

<sup>2</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

<sup>3</sup> Petitioner stated that it employed 100 employees in its I-140 petition, but the evidence submitted in the record of proceedings contradicts and states differing and lesser amounts.

<sup>4</sup> A compilation is limited to presenting in the form of financial statements, information that is the representation of management.

<sup>5</sup> 8 C.F.R. § 204.5(g)(2), *Supra*.

<sup>6</sup> In a generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the

disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters.

CIS electronic database records show that the petitioner filed I-140 employment based petitions on behalf of 17 other beneficiaries at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner greater than the subject beneficiary's proffered wage, it is necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to disclose those pending petitions and to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. There is no statement of the intended job location. Petitioner has provided a simple calculation showing an example of its profit margin. Clearly in 2001, petitioner failed to meet that profit projection. Lacking such evidence mentioned above, the record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

Counsel makes the assertion that hiring more nurse employees will result in more revenues and that by implication, the new workers will "pay" their own additional salaries. Counsel's assertion is erroneous. From the evidence submitted, and in light of the multiple petitions now pending, it is apparent that petitioner is relying on future revenues whose receipts may or may not coincide with the employment of each beneficiary should his or her visa petition be approved. Proof of ability to pay begins on the priority date, that is March 19, 2003. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the multiple beneficiaries' future employment will significantly increase petitioner's profits or how each beneficiary will pay for him or herself. Each petition must be examined upon its own merits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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balance sheet and income statement, present an analysis of the financial health of a business.