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FILE: EAC-04-159-51434 Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**

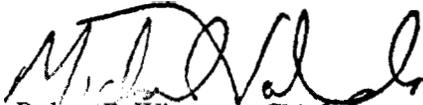
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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, Chief
Administrative Appeals Office

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

The petitioner is a skilled nursing home. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 19, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 [Citizenship and Immigration Services (CIS)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is April 29, 2004. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour, which amounts to \$30,160.00 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. No relevant evidence was submitted on appeal. Other relevant evidence in the record includes a copy of the petitioner's financial report for 2002 and 2003 and a letter from the petitioner dated October 13, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The petitioner states on appeal that it is a non-profit entity with the ability to pay the proffered wage. The petitioner also states that its current assets combined with "assets whose use is limited" are greater than its current liabilities and it had a large amount of cash at the end of 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on February 16, 2004, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a non-profit organization. The record before the director closed on October 14, 2004 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for 2004, if applicable, was not yet due. Since the tax return for 2004, which covers the period of time from the priority date to the date the record closed before the director, was not available at the time the petitioner submitted evidence in response to the RFE, CIS will look at previous years' tax returns to determine the petitioner's ability to pay the proffered wage. The record does not

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

contain the petitioner's Form 990 Return of Organization Exempt from Income Tax. The record does contain a copy of the petitioner's audited financial report for 2002 and 2003.

For the petitioner's audited financial report, CIS considers net income to be the figure labeled (loss) income before adjustment for prior years' items.

The petitioner's audited financial report shows the amounts for (loss) income before adjustment for prior years' items in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	\$73,803.00	\$30,160.00*	\$43,643.00
2003	-\$70,228.00	\$30,160.00*	-\$100,388.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2002 and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are an entity's current assets less its current liabilities. Generally, CIS does not look at a non-profit petitioner's net current assets because this information would not be listed on the Form 990 Return of Organization Exempt from Income Tax. However, since this information is listed on the petitioner's audited financial report, CIS will look at the petitioner's net current assets.

Calculations based on the petitioner's audited financial report yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2002	-\$18,490.00	\$30,160.00*
2003	-\$155,491.00	\$30,160.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2002 and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003.

The petitioner states on appeal that "the position of [the petitioner] is [that] the not-for-profit entity has the ability to pay the offered wage as of the date of this filing and continuing to the present." The record also contains a letter from the petitioner dated October 13, 2004 stating that "[it] has been in business since 1974 and employs 240 employees. Its previous approximate gross income was \$28M and [it had] a net income of \$1M."

The regulation at 8 C.F.R. § 204.5(g)(2), quoted full above, states that “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.” According to the I-140 petition, the individual filing the appeal is the petitioner’s chief financial officer. Thus, the AAO will exercise its discretion and accept the letter from the petitioner dated October 13, 2004 as evidence of the petitioner’s ability to pay the proffered wage.

The petitioner likewise states that “there is a line labeled ‘assets whose use is limited.’ These are current assets which are designated [for a specific] purpose. This number plus our current assets are almost double our current liabilities.” According to the audited financial report, “assets whose use is limited” are “[t]rustee funds held under bond indenture, net of amounts required for current liabilities.” The AAO will not alter the petitioner’s financial report after it has been audited by a certified public accountant and add to the petitioner’s current assets an amount that has been specifically set apart for limited use. In addition, it is questionable whether assets set apart for limited use can be used to pay the proffered wage because nothing in the record indicates that those assets can in fact be used to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also states that “we have cash at the end of the year of \$860,402.00 which is available to pay the hourly wage stated in the petition.” CIS, in calculating the petitioner’s net current assets, takes into account the petitioner’s cash on hand because current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. CIS will not look at the petitioner’s assets, including cash on hand, without also taking into account the petitioner’s liabilities.

After a review of the evidence, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of the petitioner and evidence on appeal has overcome the decision of the director.

Beyond the decision of the director, the issue of whether the petitioner has established that the beneficiary possessed the necessary licensing credentials required by the regulations applicable to the admission of registered nurses under Schedule A, Group I warrants reexamination. 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 director’s decision is silent on whether the beneficiary possessed the necessary licensing credentials, and evidence in the record does not comport with CIS’s qualification requirements.

The regulation at 20 C.F.R. § 656.22(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 the 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.² Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

According to the Form ETA 750 and the I-140 petition, the beneficiary's state of intended employment is New Hampshire. The record in this case does not contain evidence that the beneficiary has passed the CGFNS, has passed the NCLEX-RN examination and has a letter from New Hampshire, or holds a full and unrestricted (permanent) license to practice nursing in New Hampshire.

In the letter dated October 13, 2004, the petitioner states that the beneficiary "[has] sat for the NCLEX-RN examination and successfully pass[ed] the test (evidence of NY license issuance)." The petitioner also states that "[the beneficiary] would not be issued with a New York RN certificate had she not successfully passed the NCLEX and . . . the Texas State Board of Nursing only accepts endorsement (if a foreign-educated has no CGFNS) if the original license was obtained by passing the examination." Evidence in support of those statements includes copies of the beneficiary's registered professional nurse license and registration certificate from New York granted to the beneficiary on June 1, 1999, a copy of the beneficiary's registered nurse license and identification from Texas granted to the beneficiary on September 16, 2004, a copy of relevant sections of New York's regulations, a copy of relevant sections of Texas' regulations, and a copy of relevant sections of New Hampshire's regulations.

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). Therefore, the petitioner must show that the beneficiary possessed the necessary licensing credentials before the priority date. The beneficiary's registered nurse license for Texas was granted on September 16, 2004, four-and-a-half months after the priority date. Thus, the AAO will not look at the beneficiary's license from Texas or relevant sections of Texas' regulations in the record.

According to New York's regulations, the professional education requirement for registered professional nursing includes "a general nursing course of at least two academic years in a country outside the United States and its territories or possessions that is satisfactory to the department and that the licensing authority or appropriate governmental agency of said country certifies to the department as being preparation for practice as a registered professional nurse." This part of the regulation is silent on whether passing the NCLEX-RN examination is necessary. Thus, the beneficiary's license from NY and relevant sections of New York's regulations are insufficient to show that the beneficiary's passed the NCLEX-RN examination.

The record also includes New Hampshire's regulations, which states in pertinent part that "applicants for licensing by endorsement shall . . . [v]erify the successful completion of a nursing educational program . . . [and] [p]rovide documentation that fulfills board requirements of a current practical nursing license in one jurisdiction." Again, this part of the regulation is silent on whether passing the NCLEX-RN examination is

² On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

necessary. Thus, this part of New Hampshire's regulations is also insufficient to show that the beneficiary passed the NCLEX-RN examination.

The petitioner also states in the letter dated October 13, 2004 that "reciprocity allowed registered nurses to practice from one state to another." The fact that the beneficiary may be allowed to practice in New Hampshire as a result of reciprocity does not negate the fact that the beneficiary must meet the requirements set out in the regulations.

Moreover, the petitioner states in the letter dated October 13, 2004 that "we could not submit a copy of the letter from the NCSBN that [the beneficiary] passed the NCLEX examinations because that letter is in Korea and [the beneficiary] is currently working in Saudi Arabia. Also added to the obstacle of submitting this letter is the difficulty of going around (doing mailing, errands, etc) in Saudi Arabia due to the crisis there." The petitioner's assertion regarding the beneficiary's situation, without supporting documentary evidence, is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the Form ETA 750B, dated February 16, 2004, includes the beneficiary's signature. The record also includes other documentation regarding the beneficiary's education and work experiences, including documentation from Saudi Arabia. If the beneficiary, who is currently residing in Saudi Arabia, was able to submit information to the petitioner in 2004, the AAO questions why the beneficiary is unable to contact someone with access to her letter from the NCSBN and provide a copy of the letter to the petitioner.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of whether the petitioner has established that the beneficiary possessed the necessary licensing credentials required by the regulations. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.