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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
WAC 03 198 53095

Office: CALIFORNIA SERVICE CENTER

Date: SEP 14 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

The petitioner is a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that it had posted the notice of filing of the Application for Alien Employment Certification (ETA 750) in compliance with 20 C.F.R. § 656.20(g)(1) and (g)(8) 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 original September 22, 2004 denial, the single issue in this case is whether or not the petitioner has established that it posted the notice of filing of ETA 750 in compliance with 20 C.F.R. § 656.(g)(1) and (g)(8).

Section 203(b)(3)(A)(i) of 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. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on June 20, 2003. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

- 1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
- 2) Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The 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. Relevant evidence submitted on appeal includes copies of the beneficiary's payroll summary for the period December 26, 2003 through October 15, 2004; copies of a 2003 Online Wage Library search showing the prevailing wage for Orange County and San Bernardino County, California; a copy of a contract between the petitioner and St. Bernardine Medical Center; and a copy of the page of the Board of Alien Labor Certification Appeals (BALCA) Deskbook showing its interpretation of 20 C.F.R. § 656.22.

Other relevant evidence includes a copy of the contract of employment between the petitioner and the beneficiary; copies of the beneficiary's weekly cashed employment checks for the period December 28, 2003 through February 8, 2004; a letter from [REDACTED] Chief Financial Officer, and the Loan and Security Agreement between the petitioner and Heritage Bank of Commerce; copies of the petitioner's 2002 and first quarter of 2003 Forms DE-6, Quarterly Wage and Withholding Information; a copy of the petitioner's 2002 payroll summary; a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, a list of client hospitals with contracts with the petitioner; copies of citations, 20 C.F.R. § 656.22, 656.10, and 656.20(g)(3); a copy of the beneficiary's current California Registered Nurse License and Visa Screen Certificate; a copy of the petitioner's undated job posting and certification; a copy of St. Bernardine Medical Center (Catholic Healthcare West's San Bernardino Location) current Internet posting for registered nurse (RN) position vacancies; a copy of St. Bernardine Medical Center (Catholic Healthcare West's San Bernardino Location) internet postings for registered nurse (RN) position vacancies posted since April 28, 2003; a copy of the beneficiary's certificate from the International Commission on Healthcare Professions a division of CGFNS, issued November 12, 2003; copies of the beneficiary's diplomas in Advanced Nursing, in Registered Community Health Nursing, in Registered Nursing, and in Registered Midwifery in Kenya; copies of the beneficiary's transcripts from Kenya; a copy of a letter, dated June 16, 2003, from [REDACTED] Senior Medical Officer, Nairobi Hospice, stating that the Hospice had employed the beneficiary from 1994 to 2002; a copy of a letter, dated June 17, 2003, from [REDACTED] The Nairobi Hospital, stating that the Hospital employed the beneficiary as a staff nurse from December 1986 to October 1990; and a copy of the beneficiary's resume. The record does not contain any other evidence relevant to the petitioner's petition for this beneficiary.

Under 20 C.F.R. § 656.20, the regulations require the following:

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

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).

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).

On appeal, counsel states the following:

The USCIS mistakenly stated that we did not comply with the requirements of 20 C.F.R. § 656.22. We believe that we are not required to post our job notice at our client hospital where assigned to because of the following reasons:

- 1) Prior to September 23, 2004, our job posting at our places of business has never been questioned. In fact, we have received more than six hundred twenty-five (625+) approvals on our I-140 petitions on behalf of our registered nurses. . . .
- 2) [REDACTED] was hired as an employee of our company, Westways Staffing Services, Inc., on December 15, 2003. We have been responsible for supervising her work. We have been responsible for paying her wages, housing, and other customary benefits [See Exhibit 1]. Hence we are her employer. This is cited in re *Smith*, 12 I&N Dec 772 (1968, Dist Director), which states, in pertinent part, that “where the petitioning agency pays the beneficiary directly and guarantees the alien full-time permanent employment for 52 weeks a year with fringe benefits; the petitioner in such a case is the actual employer of the beneficiary, and the employment offer is not of a seasonal or temporary nature.” . . .
- 3) Although [REDACTED] physically rendered nursing services at St. Bernardine Medical Center (SBMC), 2101 North Waterman Avenue, San Bernardino, CA 92404, our client hospital, she was not an employee of SBMC. We only assigned her at SBMC on contractual basis. This is stated in our staffing agreement with SBMC. Please refer to the attached copy of our staffing agreement with SBMC [See Exhibit 3].
- 4) Our business viability depends on our ability to fill our registered nurse positions. Therefore, we make sure that all our employees are well aware of our job openings. Our corporate office is located at 2050 W. Chapman Ave., Ste. 122, Orange, CA 92868. All our nursing staff are required to report to work in person or via telephone each work day or week so that they can be assigned to the specific client hospital.
- 5) We have posted this job opportunity in all of our places of business so that any qualified applicant for the job opportunity can be directed directly to us (the employer) or at our employment interviewer. . . . This is discerned from the language of Section 656.21(b)(3), which states, in pertinent part, that the notice “shall be posted in conspicuous places, where the employer’s U.S. workers can readily read the posted notice on the way to or from their place of employment.”
- 6) Our company does not own the hospital facilities where our nursing staff is assigned. We have no right nor do we have any access to their bulletin boards. We

are in no position to post our job notices at our client hospital's facilities. In fact, posting such a notice would be a serious violation of our staffing contract with our client hospitals because there is a conflict of interest. We may only post such notices at the sole discretion of each client hospital.

- 7) Although Section 656.22 states that the job notice must be posted at the "facility or location of employment," the Board of Alien Labor Certification Appeals (BALCA), which interprets the CFR for the Department of Labor, states "the employer must document that it has posted a notice of the job opportunity at its place of business." A copy of the pertinent page of the BALCA Deskbook showing this interpretation is submitted herein [See Exhibit 4].
- 8) The provisions of the BALCA Deskbook are in fact confirmed in the case of *In the Matter of Bison Turf/Fun Co., Inc.* 90 INA 280, 1991 WL 120178 (1991) wherein the Board of Alien Labor Certification Appeals confirmed that the job notice must be posted at the employer's place of business.

Based on the foregoing arguments, we have posted the job notice at our business premises for the required number of days. The regulations do not require us to post the job notice at our client hospital's facilities. However, we are willing to comply with this new requirement of the USCIS in our next filings.

While counsel claims that the petitioner is not obligated to post the job notice at its client hospitals and cites several BALCA cases in support of his contention, counsel does not state how BALCA precedent decisions are binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, the petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because the posting notice was not posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations². It is noted that "workers similarly employed" in the instant petition will be nurses in hospitals, not personnel in the petitioner's administrative offices. It is also reasonable to interpret the Department of Labor guidance as pertaining to businesses where the employees work in the same location, and not to a business where the administrative offices are at a different location than the site of employment. Without more persuasive evidence, the petitioner has not established that it satisfied the regulations with regard to positing of job notices.

Beyond the decision of the director, it is noted that the petitioner has not provided evidence of its continuing ability to pay the proffered wage from the priority date.

² [1] See the Immigration Act of 1990, Pub. L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); see also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. 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)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is June 20, 2003. The proffered wage as stated on the Form ETA 750 is \$22.17 per hour or \$46,113.60 annually.

In support of the petition, a letter from the petitioner's Chief Financial Officer states that the petitioner has experienced continuous growth, and as of December 31, 2003, had generated gross receipts of \$29.0 million and realized a net income of an estimated \$600,000. The letter also states that the petitioner has a \$3.5 million revolving line of credit from the Heritage Bank of Commerce, Heritage Capital Group that can be used if the client hospitals fail to pay it in a timely manner. A copy of the line of credit and a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation, was submitted in support of the Officer's statement.

The petitioner's 2002 tax return reflected an ordinary income or net income of \$584,366 and net current assets of -\$107,397³.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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 wages, 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

³ It is noted that the petitioner's 2003 income tax return was not submitted on appeal, even though no explanation was given as to why it would not have been available.

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 June 12, 2003, the beneficiary did not include the petitioner as a past or present employer. However, the petitioner did provide a copy of its payroll records for the beneficiary indicating that it compensated the beneficiary \$38,939.26 as of October 15, 2004. Therefore, the petitioner has established that it employed the beneficiary in 2004.

As an alternative 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, 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 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2002 were -\$107,397. The petitioner could not have paid the proffered wage of \$46,113.60 in 2002 from its net current assets.

The petitioner's Chief Financial Officer points to the petitioner's line of credit and its total receipts as confirmation that the petitioner has established its ability to pay the proffered wage. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Furthermore, the petitioner's total receipts will not be considered without also considering the petitioner's total liabilities. 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.

It is noted that the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for at the same wage, using the same or similar priority dates, reflected on a Form ETA 750. 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. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided only one tax return, 2002, which does not include the priority date of June 20, 2003. In addition, one tax return is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered or the salaries of the additional workers petitioned for 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 counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed