

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

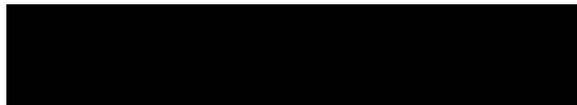
PUBLIC COPY

B6



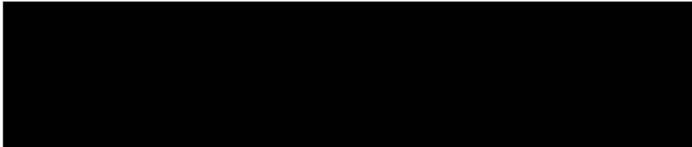
File: WAC-04-194-50278 Office: CALIFORNIA SERVICE CENTER Date: **SEP 28 2006**

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:



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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home health care service. The petitioner seeks to employ the beneficiary permanently in the United States as a nurse, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.” The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). 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 [s]tate of intended employment.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. 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.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on June 30, 2004, which is the priority date. The proffered wage as stated

on Form ETA 750A for the position of a nurse is \$25.20 per hour, 40 hours per week, which equates to an annual salary of \$52,416.¹ On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: December 11, 2001; gross annual income: \$1,185,734; net annual income: none listed; and current number of employees: 33.

The Service Center issued a Notice of Intent to Deny (NOID) on January 12, 2005, requesting that the petitioner submit: a copy of the letter from the employer to the bargaining representative, or notice that the job offer was posted at the employment location, as well as evidence of the petitioner's ability to pay the beneficiary the proffered wage as listed on the Form ETA 750A job offer. The petitioner timely responded. The director then denied the petition on March 7, 2005 on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. The petitioner appealed and the matter is now before the AAO.

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 appeal².

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

The evidence in the record of proceeding regarding the petitioner's ability to pay the proffered wage to the beneficiary includes the petitioner's U.S. Federal Tax Returns for the years 2002, and 2003. The record also contains Quarterly State Wage Reports for the quarters ending March 31, 2004, June 30, 2004, and September 30, 2004.

We shall first examine the petitioner's ability to pay based on prior wages paid, if any, consider the petitioner's net income, and net current assets. We will then consider the petitioner's additional evidence submitted, and address the petitioner's additional arguments raised on appeal.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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 beneficiary presently resides in the Philippines and, if the I-140 Petition were approved, would complete her permanent residence processing at the U.S. Consulate or Embassy in the Philippines prior to coming to the United States. Since the beneficiary is presently in the Philippines, the petitioner has not previously employed the beneficiary, and would be unable to present documentation that it has paid the beneficiary.

¹ The petitioner initially listed \$21.53 per hour, 40 hours per week, which equates to an annual salary of \$44,782.40, but raised the proffered wage and re-posted the position in response to the Service Center's Notice of Intent to Deny issued on other grounds.

² 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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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*, 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 the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,416 per year from the priority date. The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Line 21 indicates ordinary income as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$58,678 ³
2002	-\$137,665

As the petitioner's net income is negative for 2002, and 2003, the net income would not allow for payment of the beneficiary's proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

³ We note that the petitioner did not submit its 2004 federal tax return, which would not have been available at the time of filing the I-140 Petition but should have been available at the time of filing the appeal. Further, we note that the priority date is June 30, 2004, so that the petitioner would need to demonstrate its ability to pay the proffered wage in 2004 until the date that the beneficiary obtains permanent residence. The petitioner alternatively could have submitted an audited financial statement to meet compliance with regulatory provisions regarding ability to pay, but did not do so. In the absence of other information, we shall examine the petitioner's tax returns for their instructive value.

⁴According 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.

Following this second analysis, the petitioner's Federal Tax Returns shows that the petitioner lacks the ability to pay the required wage.

<u>Tax year</u>	<u>Net current assets</u>
2003	-\$35,311
2002	-\$85,507

The tax returns for the petitioner demonstrate significant negative net current assets in the years 2002, and 2003 as well.

The petitioner additionally submitted quarterly wage and withholding reports submitted to the California Employment Development Division (EDD) for the quarters ending March 31, 2004, June 30, 2004, and September 30, 2004. The EDD reports demonstrate that the petitioner has paid other workers, but is insufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage. The EDD reports do, however, document that the petitioner has been reducing its staff. The petitioner submitted a list of 48 workers, including 18 registered nurses with its March 31, 2004 report; the June 30, 2004 report reflected 38 workers and 15 registered nurses; and the December 31, 2004 report reflected only 29 employees, 9 were registered nurses. Whether the petitioner cut staffing in order to increase profit, decrease expenses, or the changes in staffing were the result of high turnover is unclear.

On appeal, counsel contends that start-up losses are normal for new businesses. The petitioner initially formed its business in 2001. While we acknowledge that start-up losses may be normal and expected for a new business, the petitioner is still required to demonstrate its ability to pay the beneficiary the proffered wage based on 8 C.F.R. § 204.5(g)(2).

Counsel further contends that the petitioner's shareholders are "supporting the funding of the business" as the 2003 tax return exhibits that the shareholders advanced \$360,670 to the business. First, we note that CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners or shareholders to satisfy the corporation's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Second, despite the significant shareholder advance, the petitioner's net income and net current assets were both negative and would not evidence the petitioner's ability to pay the beneficiary the proffered wage. Further, the petitioner did not submit any documentation to demonstrate its ability to pay the proffered wage for 2004, the year of the priority date.

Counsel asserts that the business has demonstrated that it is a "fully operational, viable, ongoing business establishment," and as a "stable business entity," the petitioner can pay the proffered wage. Viability does not equate to demonstrating the petitioner can pay the proffered wage. Despite the business' growth and viability, counsel estimates that the business will suffer an estimated \$100,000 loss in 2004. While the business may be viable, the petitioner has not submitted any documentation to demonstrate its ability to pay the beneficiary the proffered wage.

As an additional contention, counsel notes that nurses are in short supply in California and that the shortage of nurses has hindered the petitioner's ability to generate more profits. Further, counsel acknowledges that the

petitioner now employs most of its nurses on a part-time basis, three nurses are employed full-time, while 17 were employed part-time. Despite this fact, counsel contends that the offer to the beneficiary will be for full-time employment. While we agree that there may be a shortage of nurses, not just in California, but throughout the country, which has led DOL to classify registered nurses as a Schedule A position, this fact does not obviate the petitioner's burden of demonstrating that it can pay the beneficiary the proffered wage.

Counsel contends that the petitioner will be able to pay the beneficiary based on the additional profits that the beneficiary's employment will provide. While we acknowledge that the beneficiary's employment might generate additional revenue, the petitioner has not provided any estimates of the number of anticipated patients that she would see, and revenue dollars the beneficiary's work would generate. The petitioner must document its assertions. Assertions alone absent 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)). Further, the petitioner must show sufficient revenue to demonstrate its ability to pay the proffered wage first.

The petitioner has failed to provide any tax returns or other accepted financial documentation to allow us to conclude that the petitioner has the ability to pay the beneficiary the proffered wage in the year 2004 or after.

Further, the petition should also be denied based on the petitioner's failure to properly document that the beneficiary had the required work experience for the position offered in the certified Form ETA 750. 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*, 229 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).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires seven years and five months of experience in the job offered, as a nurse, with duties including: "evaluating and assessing patient/client status by reviewing and implementing the plan of care; administering medication and treatment as prescribed by the physician; initiates and applies appropriate preventative, therapeutic and rehabilitative nursing procedure and techniques and maintains communication regarding patient/client care with the physician and supervisory personnel; completing and submitting accurate clinical notes regarding patient's and client's condition and care given." The petitioner listed a Bachelor of Science degree in Nursing as the educational requirement in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on March 15, 2004, the beneficiary listed that she worked for: (1) Gov. Faustino N. Dy. Sr. Memorial Hospital, Ilagan Isabela, Philippines, from June 2002 to the present (March 15, 2004, the date of signature) as an Operating Nurse; (2) Tumauni District Hospital, Tumauni, Isabela, Philippines, from November 1997 to May 2002 as a Staff Nurse; and (3) Makati Medical Center, Suite 319, Makati City, Philippines, from January 1997 to March 1997. The beneficiary did not list on the forms the number of hours worked for any of the positions.

8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(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.

The petitioner submitted the following letters to document the beneficiary's work experience.

Letter from the Department of Health, Tumauni District Hospital, Tumauni, Isabella, Philippines
Position title: Staff Nurse, Tumauni District Hospital
Dates of employment: November 1997 to May 31, 2002
Hours worked: not listed
Description of duties: not listed

Letter from the Provincial Health Officer, Province of Isabella, Illagan, Philippines
Position title: Operating Room Nurse, Gov. Faustino N. Dy, Sr. Memorial Hospital
Dates of employment: June 1, 2002 to the present (dated April 29, 2003)
Hours worked: not listed
Description of duties: not listed

The petitioner additionally forwarded a number of certificates to demonstrate additional training that the beneficiary received in addition to her Bachelor's degree in Nursing.

The letters that the petitioner provided, assuming the beneficiary worked full-time, which is not stated, would document only 4.7 years to 4.8 years of experience for the first letter, and the second letter only 11 months. This would document at the maximum a total of 5 years and 7 months, as opposed to the required 7 years and 5 months listed on the ETA 750A. Further, the letters are substantially lacking in that they do not provide the beneficiary's job duties, and further do not list whether the beneficiary was employed on a full-time or a part-time basis. Based on the evidence provided, the petitioner has failed to document that the beneficiary has the experience required on the ETA 750A job offer.

Accordingly, the petitioner has failed to meet the regulatory requirements, which state that the beneficiary must have met the requirements for all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). The petition should have been denied on this basis as well.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.