

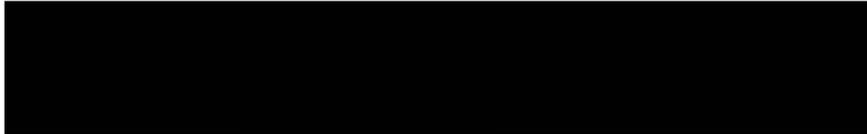
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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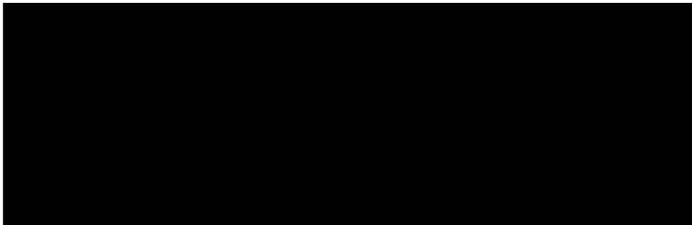
Date:

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 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 remanded for further consideration.

The petitioner is a health care services organization. It seeks to employ the beneficiary permanently in the United States as a medical and health services manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the experience requirements of the labor certification as of 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 July 14, 2005 denial, the single issue in this case is whether or not the petitioner established that the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational 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

showing that the minimum of a baccalaureate degree is required for entry into the occupation.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 11, 2002.

Citizenship and Immigration Services (CIS) must look to the job offer portion of the 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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary have four years of high school, four years of college, a BS in Nursing, and two years of experience in the job offered as a medical and health services manager. Block 15 provides no further details regarding the requirements of the job education or job experience.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of nurse assistant must have four years of high school, four years of college, a BS in Nursing, and two years of experience in the job offered.

In the instant case, the petitioner submitted a copy of the beneficiary's undated resume, a certification of employment, dated March 18, 2005, from [REDACTED], Supervisor, of Los Banos Doctors Hospital in the Philippines, and a certification of employment, dated March 15, 2005, from [REDACTED], Pediatrician, of Luciana – Tababan's Pediatric Clinic in the Philippines.

The beneficiary's undated resume reports that the beneficiary's education consists of six years of elementary school, four years of high school, and five years of college resulting in a BS in Nursing from St. Michael's College in the Philippines. The undated resume also states that the beneficiary has been employed by the petitioner¹ from July 2001 to the present as a Care Plan Coordinator. The undated resume reflects the beneficiary serving as a volunteer secretary for the petitioner at [REDACTED] from June 2000 to July 2001; working as a nurse from July 1999² through December 1999 for [REDACTED] Medical Clinic in the Philippines; working as a nurse assistant staffing supervisor from July 1995 through July 1996 for Los Banos General Hospital in the Philippines; working as a manager/owner from June 1995 through December 1999 for [REDACTED]'s Party Needs and Catering Services in the Philippines; and working as an administrative assistant to the managing director/entertainment and activity director from March 1993 through May 1994 for Monte Vista Resort Hotel and Restaurant in the Philippines.

¹ It is noted that the address where the beneficiary is employed is [REDACTED] and not the address shown on the ETA 750A of [REDACTED] where the beneficiary is scheduled to work. No explanation was provided as to why there is a different address for where the beneficiary is currently employed and where she is scheduled to work.

² This date is believed to be a typographical error. It is believed that the date should read July 1996.

The employment certification, dated March 18, 2005, from [REDACTED], Supervisor, of Los Banos Doctors Hospital in the Philippines states that the beneficiary was employed by the Hospital as an assistant staffing supervisor from July 5, 1995 to July 10, 1996.

The employment certification, dated March 15, 2005, from [REDACTED], Pediatrician, of the [REDACTED] Pediatric Clinic in the Philippines states that the beneficiary was employed by the clinic as a nurse (50%) of her time and as a clinical staffing supervisor (50%) of her time from July 15, 1996 to October 15, 1999.

The director denied the petition noting that the petitioner failed to establish that the beneficiary met the minimum requirements at the time that the request for certification was filed and that the petitioner failed to resolve the inconsistencies in the record.

On appeal, counsel states:

The Center Director erred in determining that the beneficiary did not have the two years experience in the job offered as beneficiary submitted documentation in the form of a letter-certification from her previous employer, [REDACTED] Pediatric Clinic in Los Banos, Laguna, Philippines, verifying that beneficiary was employed from July 1996 to October 1999 as a Clinical Staffing Supervisor and Nurse. . . .

Appellant requested notice be made that beneficiary's employment with [REDACTED] Pediatric Clinic as "Clinical Staffing Supervisor/Nurse" was an occupation with combination of duties, made necessary by the relatively small size of the business of the pediatric clinic. Further, the statement of working as a Nurse fifty percent (50%) of the time and as Clinical Staffing Supervisor fifty percent (50%) of the time is argued to be descriptive rather than truly determinative of the actual time devoted to the duties performed for each job. Beneficiary performed the duties of Clinical Staffing Supervisor on a full-time basis, to wit: "help in the orientation of nurses and clinic personnel; plan the duties of each nurse and other clinic personnel; direct the staff performance in their duties to ensure that medical standards were complied with; and supervise the daily scheduling and patients and staff to ensure adequate staffing." (See Certification of Employment, [REDACTED] Pediatric Clinic dated March 15, 2005.) Given the business necessity of the employer, [REDACTED] Pediatric Clinic, it is reasonable to find that the employer had normally employed persons for that combination of duties as Clinical Staffing Supervisor and Nurse.

The certification of employment does not contradict the Form ETA 750, the resume of the beneficiary, and Form G-325A submitted, because the job designation as "Nurse" included combined duties and responsibilities properly in the occupation of "Clinical Staffing Supervisor." The submitted certification of employment expressly states that beneficiary's position was designated as "Clinical Staffing Supervisor/Nurse." In *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. & (D.C.C. 1988), the circuit court held that "submission of affidavits is sufficient to prove the employee-beneficiary meets the requirements of the job."

The beneficiary met all of the requirements of the job offered when the request for certification was accepted for processing by any office within the employment service system of the Department of Labor, and therefore must be considered qualified for the position. See

Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1966) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg. Comm. 1977).

While the two employment certifications would have been more compelling if they had been notarized to verify the identity of the author, they do meet the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A) which states:

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.

In addition, the AAO is in agreement with counsel that the beneficiary met the experience requirements of the labor certification at the time of the priority date. The letters are written by employers and give those employers' names, addresses, and title, and provide descriptions of the training the beneficiary received. The employment certifications show that the beneficiary was employed by Los Banos Doctors Hospital as an assistant staffing supervisor in the Philippines from July 5, 1995 to July 10, 1996, or one year and five days. The employment certifications also show that the beneficiary was employed by [REDACTED] Pediatric Clinic in the Philippines from July 15, 1996 to October 15, 1999 with 50% of her time as a clinical staffing supervisor and the remaining 50% of her time as a nurse, or three years and three months. Taken together, the employment certifications reveal that the beneficiary had obtained 1 ½ years as a clinical staffing supervisor with [REDACTED] Pediatric Clinic (50% of 3 years is 1 ½ years) and one year as an assistant staffing supervisor with Los Banos Doctors Hospital. The AAO is convinced that even though the beneficiary was employed as an assistant staffing supervisor with Los Banos Doctors Hospital, she would have still performed supervisory duties in that position. Therefore, the petitioner has established that the beneficiary met the experience requirements of the labor certification at the time of the priority date of April 11, 2002.

Beyond the decision of the director, another issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage from the priority date and continuing to the present. 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 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 April 11, 2002. The proffered wage as stated on the Form ETA 750 is \$39.40 per hour or \$81,952 annually.

Relevant evidence submitted includes copies of the petitioner's 2002 and 2003 Forms 1120S,³ U.S. Income Tax Returns for an S Corporation, copies of the beneficiary's 2001 through 2004 Forms W-2, Wage and Tax Statements, a copy of the beneficiary's 2003 Form 1099-MISC, Miscellaneous Income, and copies of the beneficiary's pay stubs for July 1, 2001 through December 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 and 2003 Forms 1120S reflect ordinary incomes or net incomes of \$3,122 (from Schedule K) and \$22,254 (from Schedule K), respectively. The petitioner's 2002 and 2003 Forms 1120S also reflect net current assets of \$0 and \$60,574, respectively.

The 2001 through 2003 Forms W-2, issued by the petitioner, at the [REDACTED] 94015 address, for the beneficiary reflects wages earned by the beneficiary of \$18,055, \$35,150, and \$29,183.36, respectively.

The 2003 Form 1099-MISC, issued by the petitioner, at the [REDACTED] 5 address, for the beneficiary reflects wages earned by the beneficiary of \$30,500.

The 2004 Form W-2, issued by the petitioner, at the [REDACTED] address, reflects wages earned by the beneficiary of \$28,376.71.

The beneficiary's pay stubs show that she was paid her wages by the petitioner at the [REDACTED] 5 address from July 1, 2001 through February 29, 2004 and by the [REDACTED] address from March 1, 2004 through January 31, 2005.

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).

³ We note the name and address changes of the employer and the status of all entities ([REDACTED] 5 and [REDACTED] 1 [REDACTED]). Any future proceedings should clarify where the beneficiary will work, for whom the beneficiary will work, and the current status and relationships of all entities.

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 March 22, 2002, the beneficiary claims to have been employed by the [REDACTED] (complete address not given) since July 2001. However, counsel has provided Forms W-2 and a Form 1099-MISC, issued by the petitioner (at two different addresses) for the beneficiary indicating that the petitioner employed the beneficiary from 2001 through 2004. Therefore, the petitioner has established that it employed the beneficiary from 2001 through 2004.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$81,952 and the actual wages paid to the beneficiary of \$18,055, \$35,150, \$59,683.36, and \$28,376.71, respectively in 2001 through 2004. Those differences would have been \$63,897 in 2001, \$46,802 in 2002, \$22,268.64 in 2003, and \$53,575.29 in 2004. In addition, CIS records reveal that the petitioner has filed an additional eight Forms I-140 (two have already been approved) subsequent to the instant case, and, therefore, the petitioner must show that it had sufficient funds to pay all of the wages, including the additional eight employees petitioned for.

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. *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

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. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the petitioner's net incomes from Schedule K for 2002 and 2003 were \$3,122 and \$22,254, respectively. The petitioner could not have paid the difference of \$46,802 between the proffered wage of \$81,952 and the actual wages paid to the beneficiary of \$35,150 from its net income in 2002. In addition, the petitioner could not have paid the difference of \$22,268.64 between the proffered wage of \$81,952 and the actual wages paid to the beneficiary of \$59,683.36 from its net income in 2003. Furthermore, the petitioner has not shown that it had sufficient funds to pay the salaries of the additional eight employees petitioned for as the petitioner has not submitted its 2004 or subsequent tax returns.

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 2002 and 2003 net current assets were \$0, and \$60,574, respectively. The petitioner could not have paid the difference of \$46,802 between the proffered wage of \$81,952 and the actual wages paid to the beneficiary of \$35,150 from its net current assets in 2002. However, the petitioner could have paid the difference of \$22,268.64 between the proffered wage of \$81,952 and the actual wages paid to the beneficiary of \$59,683.36 from its net current assets in 2003, provided that the petitioner had not filed the additional eight petitions or demonstrated that it paid full wages to the beneficiaries of those petitions.

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.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of ability to pay the proffered wage. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's July 14, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.