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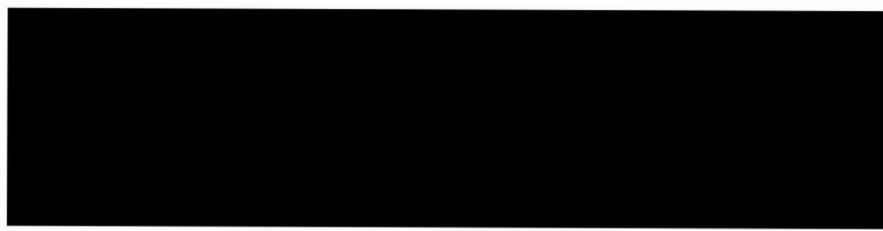


FILE: WAC 04 147 53528 Office: CALIFORNIA SERVICE CENTER Date: 10 2007

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:



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 for
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a nursing registry. It seeks to permanently employ the beneficiary 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, Schedule A, Group I. The petitioner submitted the form ETA 750, Application for Alien Employment Certification, with the form I-140, Immigrant Petition for Alien Worker. 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.

On appeal, counsel submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), 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 April 28, 2004. 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 [s]tate 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 Citizenship and Immigration Services (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 reviews appeals on a *de novo* basis. See *Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

The first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date. 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which for Schedule A occupations is the date the petition was accepted for processing by CIS. 8 C.F.R. § 204.5(d). The priority date in the instant case is April 28, 2004. The proffered wage as stated on the Form ETA 750 is \$32.00 per hour, which amounts to \$66,560.00 annually. On the Form ETA 750B, signed by the beneficiary on April 14, 2004, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1995 and to currently employ 15 workers. In support of the petition, the petitioner submitted its federal income tax return for the tax year beginning 11/01/01, ending 10/31/02.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 11, 2005, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director requested evidence for 2003. The director also requested the following: evidence to show that the petitioner would be employing the beneficiary to fill a specific vacancy; a detailed job description of the proffered position; contracts between the petitioner and its clients; and evidence of the job posting for the proffered position.

In response, the petitioner submitted additional evidence including, in part: a copy of its federal income tax return for the tax year beginning 11/01/02, ending 10/31/03; an employment agreement between the petitioner and the beneficiary; and a letter from the executive vice president of First Call Nursing Services, Inc., asserting that, in accordance with the agreement made between the petitioner and First Call Nursing Services, Inc., the beneficiary will be placed at one or more of the hospitals with whom First Call Nursing Services, Inc. has contracts to place registered nurses.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 26, 2005, denied the petition. The director noted that the petitioner's net current assets were negative in 2002, and its taxable gross income was negative in 2003.

On appeal, counsel asserts that the following additional evidence demonstrates that the petitioner had the continuing ability to pay the proffered wage as of the priority date until the beneficiary is admitted to the United States as a lawful permanent resident: a copy of the petitioner's federal income tax return for the tax year beginning 11/01/03, ending 10/31/04; a copy of a letter from an accountant who prepared the said tax return for the petitioner; and copies of the petitioner's bank statements from 04/2004 through 05/2005.

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).

At the outset, the AAO notes that the record contains a letter dated July 11, 2005 from the executive vice president of First Call Nursing Services, Inc., withdrawing the beneficiary's job offer. As such, the record contains no valid third-party contract to assist the petitioner with establishing its continuing ability to pay the proffered wage beginning on the priority date in 2004. Further, letters from accountants are not among the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. The accountant's letter provides little information beyond that contained in the petitioner's Form 1120 tax returns for 2001, 2002, and 2003, which are discussed herein. Moreover, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Again, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Also, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for tax years 2001 and 2002.¹ The record also contains a copy of the petitioner's 2003 Form 1120 U.S. Corporation Income Tax Return for the tax year beginning 11/01/03 and ending 10/31/04. The record before the director closed on May 6, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence.

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date April 28, 2004.

¹ Financial information preceding a petition's priority date is not necessarily dispositive of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. In this case, the dates covered on the petitioner's 2001 and 2002 tax returns precede the priority date in 2004.

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 *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	-\$1,795.00	\$68,355.00*	-\$68,355.00
2002	\$14,576.00	\$51,984.00*	-\$51,984.00
2003	\$14,980.00	\$51,580.00*	-51,580.00

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

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 a corporate taxpayer's current assets less its current liabilities. 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. 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$11,216.00	\$55,344.00*	-\$55,344.00
2002	-\$152.00	\$66,712.00*	-\$66,712.00
2003	-\$7,363.00	\$73,923.00*	-\$73,923.00

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

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

Counsel states that, according to the petitioner's accountant, the petitioner's unappropriated retained earnings and its net income are available to pay the wages of the petitioner's employees. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Beyond the decision of the director, it is not clear whether the petitioner intends to assign the intended beneficiary of this instant petition to a worksite other than inside of Marin, San Francisco, and San Mateo counties. Because of regulatory provisions obligating the petitioner to undertake certain actions that require a definitive work location, certain additional issues arise on appeal.² Any additional proceedings in this matter must address the specific intended work location of this proffered position and evidence that the proffered wage complies with that geographical location's prevailing wage rate³; that the petitioner posted its posting notice at the intended worksite location⁴; and that the petitioner will remain the actual employer and is offering permanent, full-time employment to the beneficiary⁵.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during any of the years at issue in the instant petition. Therefore, the petitioner has not established that it

² 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).

³ The petitioner submitted a prevailing wage finding from the SCA Database for Marin, San Francisco, and San Mateo counties. If the beneficiary will be assigned to an area outside of Marin, San Francisco, and San Mateo counties, then the petitioner must show evidence that it is offering the prevailing wage rate governing that work location. *See* 20 C.F.R. §§ 656.22(e), 656.20(c).

⁴ Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. *See* 20 C.F.R. §§ 656.20 and 656.22.

⁵ *See* 20 C.F.R. § 656.3; *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968); *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982).

has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has also failed to specify the intended geographic location of the proffered position and meet its regulatory obligations concerning its posting notice, prevailing wage rate, and whether or not the petitioner is the actual employer offering full-time, permanent employment.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.