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FILE: WAC-05-227-50648 Office: CALIFORNIA SERVICE CENTER Date: **JUL 22 2008**

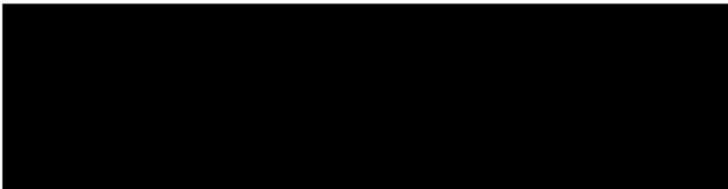
IN RE: Petitioner:



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 dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a medical secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 30, 2006 denial, the single issue in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary.<sup>1</sup> The original Form ETA 750 was accepted on April 2, 2002. The proffered wage as stated on the Form ETA 750 is \$26,000 per year. The Form ETA 750 states that the position requires two years of college, an associate's degree in any field or two years of experience in the job offered or in the related occupation of secretarial position. The I-140 petition was submitted on August 15, 2005. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$6,000,000, and to currently employ 219 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on April 27, 2006, the beneficiary claimed to have worked for the petitioner since August 2004.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal counsel submits a brief and a copy of the AAO May 9, 2006 decision on a different petition. Other relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the instant petition is identical to the one on which the AAO made its May 9, 2006 decision and concluded that the petitioner had proven its financial strength and viability and had the ability to pay the proffered wage based on the assessment of the "totality of circumstances."

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, Citizenship and Immigration Services (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 general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provision further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a

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<sup>1</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</sup> 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).

statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage."

The record contains a letter dated August 5, 2005 from [REDACTED], director of Corporate Human Resources submitted as evidence to establish the petitioner's ability to pay the proffered wage. However, a letter from a HR director cannot meet the requirement set forth by the regulation at 8 C.F.R. § 204.5(g)(2). In addition, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from [REDACTED]. CIS records indicate that the petitioner has filed over 420 immigrant and nonimmigrant petitions.<sup>3</sup> Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Given that the number of immigrant and nonimmigrant petitions reflects an increase of the percentage of the petitioner's workforce, we cannot rely on a letter from a HR director referencing the ability to pay a single beneficiary.

As we decline to rely on [REDACTED] letter, we will examine the other financial documentation submitted. These documents do not clearly support [REDACTED] contention.

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 did not submit W-2 forms, 1099 forms or other documents showing the petitioner paid the beneficiary during the relevant years despite the beneficiary's claim to have worked for the petitioner since August 2004. Therefore, the petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary.

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, 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. 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co.*,

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<sup>3</sup> CIS records show that 321 immigrant and nonimmigrant petitions were filed by the petitioner under the name of Pleasant Care Corp., that 76 petitions were filed under the name of Pleasant Care Corporation, that 6 were filed under the name of Pleasant Care Corp. dba Emmanuel, and that 2 were filed by Pleasant Care Corporation dba.

*Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *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 Chang*, 719 F. Supp. at 537

The record contains copies of Form 1120, U.S. Corporation Income Tax Return, filed by Pleasant Care Corporation for its fiscal years 2001 through 2003. It is noted that the record contains inconsistent information regarding the petitioner's identification. The record shows that Pleasant Care Corporation dba Emmanuel Healthcare-Glendora filed a labor certification application with the DOL on April 2, 2002 and the labor certification was certified by the DOL. On August 15, 2005, the same business entity filed the instant immigrant petition with California Service Center. Therefore, Pleasant Care Corporation dba Emmanuel Healthcare-Glendora was the employer of the certified ETA 750 and is now the petitioner of the instant petition. Pleasant Care Corporation's tax returns show that the petitioner was incorporated on May 22, 1989 and identified with its Federal employer identification number (FEIN) [REDACTED] 9. However, on the Form I-140 petition, the petitioner lists FEIN [REDACTED] and an incorporation date in 1995. Even assuming Pleasant Care Corporation, FEIN [REDACTED] is the petitioner's parent corporation or is otherwise affiliated with the petitioner, and the petitioner has not established that such a relationship exists, we cannot consider the parent corporation's tax returns as evidence of the subsidiary's ability to pay the proffered wage. 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. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

Even if we were to consider Pleasant Care Corporation's ability to pay the proffered wage, the petition may not be approved. According to the tax returns, Pleasant Care Corporation is structured as a C corporation and its fiscal year runs from July 1 to June 30. The priority date in the instant case is April 2, 2002 and the petitioner's fiscal year 2001 covers a period from July 1, 2001 to June 30, 2002. Therefore, Pleasant Care Corporation's 2001 tax return is the one for the year of the priority date in the instant case. The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000 per year from the year of the priority date:

- In the fiscal year 2001 (7/1/01-6/30/02), the Form 1120 stated a net income<sup>4</sup> of (\$944,418).
- In the fiscal year 2002 (7/1/02-6/30/03), the Form 1120 stated a net income of (\$1,088,410).
- In the fiscal year 2003 (7/1/03-6/30/04), the Form 1120 stated a net income of (\$136,406).

Therefore, for the fiscal years 2001 through 2003, Pleasant Care Corporation did not have sufficient net income to pay the proffered wage.

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<sup>4</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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.<sup>5</sup> 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- Pleasant Care Corporation's net current assets during its fiscal year 2001 were (\$8,403,743).
- Pleasant Care Corporation's net current assets during its fiscal year 2002 were (\$12,352,993).
- Pleasant Care Corporation's net current assets during its fiscal year 2003 were (\$19,241,409).

Therefore, for the fiscal years 2001 through 2003, Pleasant Care Corporation did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, Pleasant Care Corporation's net income or Pleasant Care Corporation's net current assets.

Counsel referred to a decision issued by the AAO, but does not provide its published citation. 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, unpublished 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). Moreover, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel's argument concerning the totality of circumstances, however, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

petitioner was incorporated in 1995 and employs more than 200 employees. Their gross income has always been above \$185 million and they pay salaries and wages each year of \$85 million. However, the submitted tax returns show that the petitioner never had positive net income and net current assets in the relevant three years. In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The instant petitioner filed over 400 immigrant and nonimmigrant petitions. The record does not contain any evidence showing that the petitioner paid all the proffered wages to the beneficiaries of its approved and pending petitions. Thus, assessing the totality of circumstances in this individual case, this office cannot conclude that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.