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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
for Administrative Appeals Office

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

The petitioner is an employment staffing agency. It seeks to employ the beneficiary permanently in the United States as a staff 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 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.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. 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.

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 regulation at 8 C.F.R. § 204.5 additionally provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service."

Eligibility in this case is primarily based upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is August 25, 2003. The beneficiary's salary as stated on the labor certification is $25.00 per hour or $48,750 per annum, based on a 37 ½ hour week. The visa petition states that the petitioner was established in 2001 and has 33 current employees. The labor certification application and contract contained in the record reveals that the beneficiary will be assigned to work at the Cliffside Nursing Home, Inc. at 119-19 Graham Ct., Flushing, New

York.

Along with the beneficiary's licensing credentials and job posting documentation, the petitioner initially provided no evidence of its ability to pay the proffered annual wage of $48,750.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 10, 2003 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.

In response, the petitioner, through counsel, submitted copies of an accountants' compilation report consisting of unaudited financial statements for the period ending December 31, 2002, as well as various unaudited financial statements for the period between January and September 2003. The petitioner also submitted a copy of its state quarterly wage report for the period ending September 30, 2003 and a copy of its federal quarterly tax return for the period ending September 30, 2003.

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 January 22, 2004, denied the petition.

On appeal, in support of the petitioner's continuing ability to pay the proffered wage of $48,750, counsel submits a copy of the petitioner's 2002 corporate federal tax return, copies of its bank account statements from January to December 2003, a copy of an unaudited financial statement for the period ending December 31, 2003, a copy of the petitioner's state quarterly wage report for the quarter ending September 30, 2003 listing its employees, and a copy of its Transmittal of Wage and Tax Statement (W-3) for 2003, which shows that it paid 1,532,292.03 in wages in that year. Counsel also includes a letter, dated February 11, 2004, from CPA. Mr. explains that the difference between the figures in the 2003 financial statements and the 2003 federal tax return is that the financial statements were prepared using the accrual method of accounting and the federal tax returns were completed using the cash-basis method of accounting.[1] states that the financial statements can be viewed as providing evidence that the petitioner can pay offered salaries.

The petitioner's 2002 federal tax return shows that it reported net income of -$2,091. Schedule L of this return reflects that the petitioner had $126,826 in current assets and $197,962 in current liabilities, yielding -$71,136 in net current assets. Besides reviewing a petitioner's net income, CIS will also examine a petitioner's net current assets as a source out of which a proffered salary may be paid. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule

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[1] The accrual method of accounting is recognition of revenue when a company has a right to receive it and liabilities/expenses when a company has a legal obligation to pay them. The cash-basis method recognizes revenue when it is received and liabilities/expenses when they are due.

[2] 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.

L of its corporate tax return, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during 2002 however, were negative, as was its reported net income.

Regardless of the accounting method employed, the unaudited financial statements that counsel submitted with the petition and on appeal are not persuasive evidence of its continuing ability to pay the proffered wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. The regulation neither states nor implies that unaudited documents may be submitted in lieu of audited financial statements.

Counsel also asserts that the petitioner had sufficient funds to pay the beneficiary's wage offer as shown by its bank balances in 2003. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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," counsel in this case has not persuasively 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 other than to emphasize that a company tends to spend its revenue before the end of the fiscal year in order to minimize its income and tax obligation. It remains that the 2002 tax return reflects that the funds were not available to pay the proffered wage out of either the petitioner's net income or its net current assets.

In examining a petitioner's ability to pay a proffered wage, CIS generally reviews 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 upon a petitioner's collective wage expense of other employees or gross sales or receipts during a given period is also misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

In view of the foregoing, and based on a review of the financial documentation contained in the record, the AAO cannot conclude that the petitioner has convincingly demonstrated that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.