identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2004
WAC-02-268-53677

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
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved on October 24, 2002 by the Director, California Service Center, who subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on December 11, 2002. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) on May 9, 2003. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

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 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 revoked the petition's approval 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 Immigration and Nationality Act (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 August 26, 2002. 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 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 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 is the date the petition was accepted for processing by Citizenship and Immigration Services (CIS) on August 26, 2002. The proffered wage as stated on the Form ETA 750 is $22.00 per hour for a thirty-six hour work week, which amounts to $41,184 annually[1]. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on September 19, 1992, to have a gross annual income of $5,378,052, and to currently employ 380 workers. In support of the petition, the petitioner submitted the following relevant documents: its employment contract with the beneficiary, an example contract with a health care provider, the first page of its 2001 federal corporate tax return on Form 1120[2], and a copy of its quarterly wage report for the quarter ending April 30, 2002. The petitioner's tax return indicates that it made $5,374,247 in gross revenues as reported on Line 1c, paid $4,225,307 in wages as reported on Line 13, and netted $53,365 in taxable income before net operating loss deduction and special deductions as reported on Line 28.

The director approved the petition on October 24, 2002. While adjudicating the beneficiary's adjustment of status application, the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and, on December 11, 2002, the director issued a notice of intent to revoke approval of the petition. The director stated that the petitioner's net income and net current assets[3] only cover the proffered wage for the beneficiary; however, since the petitioner had filed numerous petitions, it could not cover the salaries of them all, and thus cannot demonstrate its ability to pay the proffered wage for the instant petition.

In response, the petitioner submitted a letter from counsel; the petitioner's checking account statements evidencing balances of $388,168.86, $22,040.57, and $65,341.53; the petitioner's quarterly wage reports for the quarters ending December 31, 2002, September 30, 2002, June 30, 2002, and March 31, 2002, evidencing total wages paid to its employees for the year of 2002 in the amount of $3,688,357.97; copies of contracts between the petitioner and third party clients; copies of Form W-2, Wage and Tax statements issued to its employees; and activity logs of its nursing staff. Counsel's letter, in pertinent part, states the following:

> [The petitioner] is a nursing registry that has many open contracts with several medical facilities to provide Nurses as needed by the numerous medical facilities. Many of the assignments are long term meaning that can last eight months or more.

---

[1] The proffered wage on the visa petition is $792 per week, which also equates to $41,184 annually.

[2] Since 2001 precedes the petition's priority date of 2002, the petitioner's 2001 tax return is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

[3] It is unclear from where the director obtained information concerning the petitioner's 2001 net current assets since the record of proceeding does not contain a complete tax return that includes Schedule L, the section where the petitioner would report its net current assets. Additionally, see footnote 2, *supra*.

> In some cases, the assignments are up to three years. We have enclosed copies of a few of the contracts. A full time nurse is a nurse that works three or more 12 hour shifts per week. Thus, a full time Nurse would approximately work 156 shifts or more per year. Of the nurses that were employed by [the petitioner], when we filed the I-140, no more than 18 of the staff were full time nurses. The rest of the employees are a combination of nurses that work for other facilities and just obtain some extra work or they are nurses who do not wish to work on a full time basis for many reasons including the raising of children . . . We have enclosed a daily activity report for the company for 2002 for all of their nurses. This sheet also indicates how many shifts each nurse worked for 2002.
>
> . . . .
>
> In your letter, [CIS] indicates that numerous I-140 petitions were previously approved. From company records, we have determined that the company in the past ten years has petitioned no more than 20 nurses total. Currently, only 5 nurses are still under a two year contract with the company. Of the other 15 nurses, four work for the company and the other 11 nurses have left for other professional pursuits. Thus only five petitioned nurses under contract are currently working for the company.

Additionally, counsel references both the petitioner's bank balances and the amount of wages paid by the petitioner each quarter as between $800,000 and $1 million as evidence of its ability to pay the proffered wage of $22.00 per hour. Counsel asserts that the director may not base its revocation upon *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), since CIS had sufficient information to determined that the petitioner could pay the proffered wage, unlike the facts of *Ho*.

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 9, 2003, revoked approval of the petition. The director noted the wages paid to its staff and divided by the number of employees calculating a figure that reflects salaries paid that fall below the prevailing wage rate. The director also stated that the petitioner's net income and net current assets only cover one proffered wage but numerous petitions remain pending at CIS.

On appeal, counsel asserts that the director erred by assuming its staff were all full-time employees even after it submitted evidence of the number of shifts worked per employee. The petitioner submits an audited balance sheet for the period ending September 30, 2002 showing that the petitioner's net income for that period was $100,924 and its net current assets were $770,639.

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition

> based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Counsel's reliance on the balances in the petitioner's bank accounts 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," 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 establish that it employed and paid the beneficiary the full proffered wage in 2002.

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). Showing that the petitioner's gross receipts 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's net income for nine months in 2002 was $100,924 based upon the audited balance sheet submitted on appeal. This could pay the proffered wage as long as multiple petitions are not pending.

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] On a corporate tax return, 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 net current assets during the year in question, 2002, were $770,639, as reflected by its audited balance sheet submitted on appeal.

The AAO has accessed an internal CIS database and determined that the petitioner has 59 denied petitions one of which is also pending before this office[5]; one withdrawn petition; two approved petitions; two revoked petitions including the instant petition; and nine pending petitions. Thus, counsel's asserted figures do not comport with CIS data. Nevertheless, the fact remains that the petitioner must illustrate an ability to pay the proffered wages of thirteen intended beneficiaries. Presuming that the proffered salaries for all intended beneficiaries are the same as the instant petition, the petitioner must demonstrate an ability to pay $535,392 in wages. The petitioner's net current assets of $770,639 cover that amount.

The director had good and sufficient cause to revoke the petition under the circumstances at the time of his adjudication; namely 74 pending petitions and only the petitioner's net income for 2001, which is irrelevant to its ability to pay the proffered wage in 2002, evidence of wages paid to other employees, and bank statements to prove the petitioner's ability to pay the proffered wage. The AAO would agree with the director's decision based upon the evidence the director had at the time of his adjudication. However, at the time of this appeal, new evidence (the audited balance sheet) and changed circumstances (changed number of pending petitions) rebut the director's findings, and the AAO finds in favor of the petitioner. The AAO also checked the prevailing wage rate, the petitioner's posting notice, and the beneficiary's qualifications, and finds all to be in order.

The petitioner has demonstrated ample net current assets from which to pay the proffered wage of this petition's intended beneficiary as well as for its other pending petitions. The petitioner thus submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

---

[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.

[5] CIS data did not indicate that the remaining denials are currently pending as appeals.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.