U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 055 54342 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 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.

For Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical services company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary is eligible for Schedule A. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. 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 granting 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.

8 C.F.R. § 204.5(g)(2) states:

> *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. 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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on December 9, 2002. The proffered wage as stated on the Form ETA 750 is $20 per hour, which equals $41,600 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs 8 workers. In the space reserved for the petitioner to state the location where the beneficiary will work the petitioner entered, "To Be Determined." On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted a letter, October 10, 2002, ostensibly from the petitioner's Chief Financial Officer. That letter states that the petitioner has capitalization in excess of $2.6 million current

assets and is seeking an additional $2 million capitalization from a banking firm. Based on those assertions, the CFO states that the petitioner has the ability to pay the proffered wage.

In support of the assertion that the petitioner is seeking to borrow $2 million, counsel submitted a letter, dated November 22, 2001, from the petitioner's vice president and CFO to an institutional lender confirming that the petitioner has retained that institutional lender to seek up to $2 million in financing.

Counsel submitted another letter, dated November 22, 2002 from the petitioner's president. That letter observes that the United States suffers from a shortage of registered nurses and that the petitioner is in the business of supplying nurses to fill the vacancies.

Counsel submitted audited financial statements for the four months prior to April 30, 2002. Those financial statements include the petitioner's security deposit and its furniture and equipment, net of depreciation, in its current assets. Those current assets also include notes receivable of $2,547,200.

According to those financial statements, the petitioner's net income from January 1, 2002 through April 30, 2002 was $27,713.45. Those financial statements also show that the petitioner's current assets on April 30, 2002 equaled $2,609,363.72 and its current liabilities equaled $67,163.10, which yields net current assets of $2,542,200.62. This office notes that, because the priority date is December 9, 2002, evidence of the petitioner's financial performance prior to April 30, 2002 is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On March 7, 2003 the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested *inter alia* (1) original computer printouts from the IRS of the petitioner's tax returns since 2001, date-stamped by IRS, (2) evidence of contracts between the petitioner and the clients for whom the beneficiary would provide services, (3) a list of all Form I-140 petition filed by the petitioner during 2002 and 2003, (4) copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters including the names and social security numbers of the employees, (5) evidence that the petitioner is offering the beneficiary the predominant wage for the proffered position in the area in which the beneficiary will work, (6) a detailed list of the work sites at which the beneficiary will work, and (7) Form W-2 Wage and Tax Statements for each of the petitioner's employees for each year since 2001.

In response, counsel submitted a letter, dated May 28, 2003. In that letter, counsel stated that the petitioner is a new company with venture capital of over $2.7 million. Counsel observed that the petitioner has little revenue, as is typical of start-up companies. Counsel stated, however, that the petitioner will generate revenues of $45 per hour for each hour its registered nurse employees work.

As to the location where the beneficiary will work, counsel stated that "The beneficiary's worksite will vary according to patient needs, as stated in the ETA 750, Part A, Item 7. Counsel further stated that the petitioner, at item 22 of the Form ETA 750, Part A, has guaranteed that it will pay at least the prevailing wage at any location of employment.[1]

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[1] Counsel misstated slightly the contents of the Form ETA 750, Part A. Item 7, "Address Where Alien Will Work,"

Counsel stated that, of the petitioner's eight employees, three are in the United States and five are in the Philippines. Counsel further stated that the petitioner's three U.S. employees are "paid indirectly, through the law offices of James Wolf [petitioner's counsel], owned by one of the founders of the company.

Counsel submitted a printout of web content, dated May 2, 2003, of the Foreign Labor Certification Service of the U.S. Department of Labor, stating that the predominant wage for level one registered nurses in Contra Costa, Alameda County, California, is $21.18 per hour, or $44,058. Counsel also provided a letter, dated May 28, 2003, from the petitioner's president, requesting that the proffered wage be raised to that amount.

Counsel provided what purports to be a posting of the proffered position. That posting states the duties, requirements, and wages of the proffered position. That posting states that it was posted from March 28, 2003 to April 18, 2003, but does not state where it was posted.

In addition, counsel provided the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return and the petitioner's audited financial statements for the 2002 calendar year. The 2001 tax return shows that the petitioner declared a loss of $9,155 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of $21,101 and current liabilities of $800, which yields net current assets of $20,301.

The 2002 financial statements show that the petitioner suffered a net loss of $161,663.70 during that year. The petitioner's current assets on December 31, 2002 equaled $193,947, including $179,744 in accounts receivable. Those financial statements list current liabilities of $335,854.22. The petitioner's current liabilities, therefore, exceed its current assets by $141,907.22. Those financial statements list an additional $2,895,819.56 in notes receivable in the petitioner's non-current assets. Those financial statements also show that the petitioner's net income during 2002 was a loss of $160,405.18.

The petitioner submitted a copy of what purports to be an executed, but undated, contract between it and St. Anthony's Hospital, of St. Petersburg, Florida. That contract contains the terms pursuant to which the petitioner's employees will work at the hospital's site, but does not oblige the hospital to utilize any specific number of nurses. Counsel submitted a Work Order stating that St. Anthony's Hospital will employ the instant beneficiary when she becomes eligible to work in the United States, will pay the petitioner $45 per hour for her services, and that her services will end there "As agreed."

Counsel submitted the petitioner's 2001 Form W-2 Wage and Tax Statements showing that the petitioner paid wages to six employees during that year. The annual wages paid to those employees ranged from $213.75 to $10,416.71.

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does not state that "the beneficiary's worksite will vary according to patient needs," but merely "To Be Determined." Item 20 does not guarantee that the petitioner "will pay at least the prevailing wage at any location of employment," but that "The wage offered equals or exceeds the prevailing wage and I guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage with is applicable at the time the alien begins work."

Counsel submitted the petitioner's 2002 Form 940-EZ and the petitioner's Form 941 Employer's Quarterly Federal Tax Return for all four quarters of 2002 and the first quarter of 2003. The Form 941 for the first quarter of 2002 shows that the petitioner paid a total of $1,254.18 to all of its employees during that quarter. The remaining quarterly returns show that the petitioner paid no wages to any employees during any of the remaining quarters. The Form 940-EZ confirms that during 2002 the petitioner paid a total of $1,254.18 to its employees. Counsel submitted a 2002 Form W-2 wage and tax statement showing that the petitioner paid that amount to one employee.

Counsel also submitted his own California Form DE-6 Quarterly Wage and Withholding Reports for the last quarter of 2002 and the first quarter of 2003. All of the names and social security numbers on those reports are redacted, except the names and social security numbers of the three people ostensibly employed by the petitioner and paid by counsel. Counsel submitted the 2002 W-2 forms of the three people ostensibly employed by the petitioner but paid by counsel. The amounts counsel paid to those three people during that year were $4,200, $13,158.33, and $55,000.

Finally, counsel submitted a list of 48 beneficiaries, including the beneficiary of the instant petition, for whom the petitioner has petitioned.

The petitioner did not provide the requested date-stamped IRS printouts of its tax returns since 2001.

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 July 21, 2003, denied the petition. In that decision, the director noted that evidence of wages paid by counsel to the petitioner's employees does not show that the petitioner, itself, was able to pay wages. The director further noted that none of the few nurses employed by the petitioner appear to have full-time employment, and questioned whether the beneficiary would receive full-time employment.

Further, the director noted that, in order for the petitioner to show that it is able to pay the proffered wage, it must show that it is able to pay the wages of all of the beneficiaries for whom it has petitions pending. The director stated that CIS had received information that the California Secretary of State had suspended the petitioner's corporate status, making it an unauthorized corporation. Finally, the director noted that the petitioner's vice president and CFO, who wrote the November 22, 2001 letter, described above, is not listed as an employee of the petitioner on any of the W-2 forms or quarterly wage statements in the record.

On appeal, counsel submits a Certificate of Status, dated July 18, 2003, from the Secretary of State of California. That certificate states that the petitioner incorporated on June 23, 1998 and, on the date of the certificate, was in good legal standing. This office considers that the petitioner has demonstrated that it remains a valid corporation.

As to the director's observation that the petitioner's alleged CFO does not appear on the petitioner's payroll, this office concurs that it is a suspicious circumstance. A president, a vice-president, or a CFO would ordinarily be operational, and employees, whereas directors might be merely advisory, and not employees. Nothing prohibits the petitioner, however, from organizing itself otherwise. As such, this office finds this circumstance insufficient as a basis, in whole or in part, to deny the petition.

Counsel submits another letter, dated August 19, 2003, from a CPA who is also a professor at the Graduate School of Management of the University of California at Davis. In that letter, the CPA states that the petitioner's profits, current assets, and present number of employees are incomplete measures of a company's financial capacity, especially in the case of a start up.

The CPA notes that on December 31, 2002, for instance, the petitioner held $2,895,820 in notes receivable from its shareholders. The CPA further notes that, by the terms of those notes, they are payable within five days of the petitioner's demand. The CPA notes that the petitioner does not expect to call those notes, because it expects to operate on working capital finances and the revenue it receives from placing nurses. Although they are not carried as current assets, because the petitioner does not expect to need the money within the next year, they are, according to the CPA, currently available assets, should the petitioner need to draw upon them. Adding that amount to the petitioner's net current assets, the CPA reasons that the petitioner would be able to pay the proffered wage to up to 62 nurses for one year, even if unable to produce any revenues from their employment.

Whether the petitioner is able to rely upon those notes to pay the proffered wage depends upon whether the three stockholders are able to make good on notes of that size. The notes are for almost $1 million each. The record contains no evidence that the stockholders who drew those notes are able to contribute that sum from their personal income and assets. Whether such demand notes, though carried as non-current, should be counted as currently available in some other case is open to question. This office, however, need not reach that issue in the instant case. The record contains no evidence that the petitioner may, in fact, rely upon those notes to pay wages.

The October 10, 2002 letter, ostensibly from the petitioner's Chief Financial Officer, is ineffective to show the petitioner's ability to pay the proffered wage. Although 8 C.F.R. § 204.5(g)(2) states that the director may accept such a statement from a petitioner that employs 100 or more workers, the petitioner in the instant case employs considerably less than 100 workers, and the letter is of no effect.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). CIS may also rely upon audited financial statements, such as those submitted in this case, in assessing the petitioner's ability to pay the proffered wage.

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*, the court held that CIS, then the Immigration and Naturalization Service, 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage.[2] Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The petitioner amended the proffered wage to $21.18 per hour, which equals $44,054.40. The priority date is December 9, 2002. During 2002, the petitioner suffered a loss of $161,663.70. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income during that year. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated that any other funds were available during that year with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The director noted, correctly, that a petitioner that is petitioning for multiple beneficiaries must demonstrate the ability to pay the proffered wage of all of its beneficiaries. This office cannot easily determine how many petitions the petitioner still has pending. In view of the finding that the petitioner has not shown the ability to pay the proffered wage to even the instant beneficiary, however, this office need not pursue that issue.

Additional issues exist in this case beyond those cited by the director. As was noted above, the petitioner provided what purports to be a notice of the proffered position, which states that it was posted from March 28, 2003 to April 18, 2003, but does not state where it was posted.

20 C.F.R. § 656.20(g)(1) states, in pertinent part:

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[2] This office notes with interest that the petitioner carried its furniture and equipment as current assets on the April 30, 2002 financial statements. The notes to those financial statements contain no explanation of that practice, which would seem to imply that the petitioner intends either to convert those assets into cash within the coming year.

> In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> > (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
> >
> > (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least ten consecutive days.

The evidence does not indicate that the announcement was submitted to a bargaining representative, but rather that it was posted. To be effective, the notice must have been posted at the location of the intended employment. The petitioner has indicated, both on the Form I-140 petition, the labor certification, and, through counsel, in the letter of May 28, 2003, that it has not determined the location where the beneficiary will be employed. The petitioner cannot, therefore, have complied with 20 C.F.R. § 656.20(g)(1)(ii) by posting that notice at the facility or location of the intended employment. The petition should also have been denied for that reason.

That the petitioner is unable to specify the location of the intended employment[3] also raises the issue of the adequacy of the proffered wage. Counsel provided a printout of web content showing that the proffered wage is in line with the predominant wage for level one registered nurses in Contra Costa, Alameda County, California. The record contains no evidence, however, that the beneficiary will be employed in that county or even that state. The petition should also have been denied for failure to demonstrate that the petitioner is offering the predominant wage for the area of the intended employment.

The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. The director requested that the petitioner provide date-stamped IRS printouts of its tax returns since 2001. The petitioner did not comply with that request. Those IRS printouts would have confirmed that the petitioner actually filed tax returns and further confirmed that the information provided to CIS matched the information provided to IRS. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). The petition should also have been denied for this reason.

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).

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[3] The undated contract submitted in response to the Request for Evidence appears to indicate that the beneficiary would be employed in St. Petersburg, Florida. In the May 28, 2003 letter submitted contemporaneously, however, counsel stated that the beneficiary's work site would vary.

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

ORDER: The appeal is dismissed.