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

U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: WAC-03-100-50469 Office: CALIFORNIA SERVICE CENTER Date: NOV 18 2004

IN RE: Petitioner:
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:

[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 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 hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary as a registered nurse under section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.20 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. Schedule A includes aliens who will be employed as professional nurses.

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 states that the evidence established the petitioner's ability to pay the proffered wage during the relevant period.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, and its qualification for a blanket labor certification on behalf of the beneficiary pursuant to Schedule A as of the priority date. In the instant case, the filing of the I-140 on February 7, 2003 established the priority date. *See* 8 C.F.R. § 204.5(d). The beneficiary's salary as stated on the labor certification is $15.00 per hour or $31,200.00 per year. For the reasons discussed below, the petitioner has failed to establish either its ability to pay the proffered wage or its qualification for the blanket labor certification.

On the Form ETA 750B, the block for the beneficiary's signature is left blank. The information in the experience blocks on the Form ETA 750B makes no claim that the beneficiary has worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of $43 million, and to currently have 403 full-time employees and 205 part-time employees.

In support of the petition, the petitioner submitted the following documents: a copy of the beneficiary's diploma for a Bachelor of Science in Nursing granted March 28, 1988 by Perpetual Help College of Rizal, Pamplona, Las Pinas, Metro Manila, Philippines, with attached course transcript; a copy of a letter dated in 2002, with an illegible month and day, from the Commission on Graduates of Foreign Nursing Schools (CGFNS) stating the beneficiary's passing results on the CGFNS Qualifying Examination; a copy of the beneficiary's score results on the Test of English as a Foreign Language (TOEFL), for the test date of January 23, 2002; a copy of the beneficiary's nursing license card dated July 10, 1989 issued by the Philippines Professional Regulation Commission; a copy of the beneficiary's license as a Registered Nurse dated July 10, 1989 issued by the Philippines Professional Regulation Commission; a record of the beneficiary's clinical experiences at the Perpetual Help College of Rizal, Philippines, for 1988; a copy of a letter dated June 9, 1989 from the Philippines Professional Regulation Commission stating the beneficiary's scores on the nurse licensing examination; a letter dated January 3, 2003 from the petitioner's president describing the petitioner and stating a job offer to the beneficiary; a certification of posting a job announcement for the offered position, signed by the petitioner's president, with the job announcement attached; copies of two apparent advertisements for the offered position, with no indication of where or when those advertisement appeared; a copy of the petitioner's license as an acute care hospital dated November 16, 2001 issued by the California Department of Health Services; a copy of an organizational chart for the petitioner dated November 7, 2002; a copy of a newspaper article about the petitioner dated January 28, 2002 in the Los Angeles Business Journal; a copy of an auditors' report on the petitioner dated June 12, 2002, including financial statements of the petitioner for the years 2000 and 2001; a copy of a certificate dated September 11, 2001 from the Baljurashi General Hospital, Ministry of Health, Kingdom of Saudi Arabia stating the beneficiary's employment as a staff nurse from February 23, 1992 until November 4, 2001; a copy of a certificate dated November 4, 2001 from the Ministry of Health, Kingdom of Saudi Arabia stating the beneficiary's employment as a nurse from February 23, 1992 to November 4, 2001; copies of three training certificates for courses taken by the beneficiary in Saudi Arabia; a copy of the beneficiary's birth certificate issued March 7, 1991; a copy of the beneficiary's professional resume; a copy of a certification by a former employer of the beneficiary in the Philippines stating her employment as a nurse from October 30, 1989 to December 27, 1991; and a copy of a marriage certificate of the beneficiary issued January 31, 1993.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director issued a request for evidence (RFE) dated June 4, 2003 requesting 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 that evidence for 2002 until the present.

In response to the RFE, the counsel submitted a letter dated June 10, 2003 and the following evidence: unaudited financial statements of the petitioner for 2002; an additional copy of an auditors' report on the petitioner dated June 12, 2002, including financial statements of the petitioner for the years 2000 and 2001; a copy of the petitioner's articles of incorporation dated February 23, 1996 under the name National Psychiatric Services, Inc.; a copy of a certificate of amendment dated February 25, 2002 to the petitioner's articles of incorporation changing the petitioner's name from National Psychiatric Services, Inc., to the petitioner's present name; a copy of an accreditation of the petitioner for the period 2000-2005 issued by the Joint Commission on Accreditation of Healthcare Organizations; and a copy of the petitioner's license as an acute care hospital dated July 7, 2002 issued by the California Department of Health Services.

The director issued a second RFE dated June 21, 2003 acknowledging the receipt of audited financial statements for 2000 and 2001 and unaudited financial statements for 2002, and requesting audited financial statements for the petitioner for the year 2002.

In response to the second RFE, the petitioner submitted a letter dated July 31, 2003 stating that audited financial statement for the petitioner were not yet available and would not be available until December 2003. With his letter counsel submitted unaudited financial statements for the petitioner for the year 2002 and a statement by the petitioner's chief financial officer dated July 29, 2002 attesting that the financial statements had been prepared in accordance with accounting principles generally accepted in the United States.

In a decision dated August 21, 2003, the director determined that the petitioner had failed to submit audited financial statements for the relevant period as requested. The director therefore determined that the evidence did not establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Newly submitted on appeal are unaudited financial statements of the petitioner for the six-month period ending June 30, 2003. The other evidence submitted on appeal consists of duplicate copies of documents submitted previously for the record, including a duplicate copy of the statement dated July 29, 2003 from the petitioner's chief financial officer.

Counsel states on appeal that the petitioner had submitted its most recent audited financial statements available, and that the unaudited financial statements for 2002 were prepared in accordance with accounting principles generally accepted in the United States. Counsel also states that ten other immigrant petitions were submitted by the petitioner in December 2002 and were approved, based on the audited financial statements for 2000 and 2001, and that the instant petition was submitted only two months later, in February 2003. Counsel states that the evidence shows that the petitioner has substantial net revenue sufficient to pay the proffered wage to the beneficiary.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to the director's decision. The evidence newly submitted on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS first examines whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, however, the petitioner did not establish that it had previously employed the beneficiary. CIS therefore will next examine the financial information about the petitioner in the record.

As noted above, the I-140 petition states in Part 5 that the petitioner has 403 full-time employees and 205 part-time employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted above, states that where a petitioner has 100 or more employees, 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 record in the instant petition includes a statement from the petitioner's chief financial officer dated July 29, 2003, along with an unaudited financial statement for 2002. The text of the chief financial officer's statement is as follows: "The Unaudited consolidated balance sheets and the related statements of consolidated earnings and cash flows have been prepared in accordance with accounting principles generally accepted in the United States. Where necessary, they reflect estimates based on management's judgment."

Although the regulation at 8 C.F.R. § 204.5(g)(2) allows CIS to accept a statement by a financial officer of a petitioner, the regulation requires that any such statement be one "which establishes the prospective employer's ability to pay the proffered wage." The sentence in the regulation which allows for the submission of a statement by a financial officer of a petitioner therefore does not imply that every such statement must be deemed sufficient to establish a petitioner's ability to pay the proffered wage. Rather, the effect of that sentence in the regulation is to allow an additional form of acceptable evidence for any petitioner which has at least 100 employees, in addition to tax returns, annual reports, or audited financial statements, which are acceptable forms of evidence for all petitioners.

In the instant case, the statement by the chief financial officer incorporates the unaudited financial statements of the petitioner for 2002. Therefore the information in those financial statements must be evaluated. Although the year of the priority date is 2003, the statements for 2002 are relevant because they were the most recent statements available as of the date when the record before the director closed on July 31, 2003, with counsel's submissions in response to the second RFE. Also, the end of 2002 was less than six weeks before the priority date, which is February 7, 2003.

The record in the instant case contains no tax returns of the petitioner, but the analytical approach taken by CIS in evaluating tax return information is relevant to an evaluation of the petitioner's financial statements for 2002.

When evaluating a petitioner's ability to pay the proffered wage based on tax return information, CIS examines the petitioner's net income figure 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In the instant petition, the petitioner's financial statements for 2002 show net revenue of $41,989,555.00 and total expenses, including depreciation expenses, of $42,400,108.00, for a net loss from continuing operations of -$410,553.00. Since that figure is negative, it fails to establish the petitioner's ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may also review the petitioner's net current assets. Net current assets are a petitioner'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 its tax returns on Form 1120, Schedule L, lines 1 through 6. Its current liabilities are shown on Schedule L, 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.

In the instant petition, the petitioner's balance sheets as of December 31, 2002 show current assets of $19,540,193.00 and current liabilities of $20,291,482.00, for net current assets of -$758,289.00. Since that figure is negative it also fails to establish the petitioner's ability to pay the proffered wage.

In his brief, counsel states that ten other immigrant petitions were submitted by the petitioner in December 2002 and were approved, based on the audited financial statements for 2000 and 2001, and that the instant petition was submitted only two months later, in February 2003. Counsel asserts that the evidence which supported the approvals of the ten earlier petitions also supports the approval of the instant petition.

Counsel's assertions concerning other petitions submitted by the petition are consistent with CIS records, which shown ten I-140 petitions submitted by the petitioner in December 2002, all of which have been approved. CIS records show that since April 2001 the petitioner has submitted thirty-seven immigrant petitions, including the instant petition. Fourteen have been approved, seven have been denied, and sixteen are pending. Of the seven petitions denied, three are now on appeal before the AAO, including the instant petition.

The record in the instant case lacks any information about the proffered wages for the other beneficiaries on whose behalf the petitioner has submitted immigrant petitions or about the present employment status of those other beneficiaries. Some or all of the beneficiaries of the other approved petitions may have declined the petitioner's offers of employment. On the other hand, all of those beneficiaries may now be employees of the petitioner. The record is silent on those matters. Even if CIS were to gather its files on each of those beneficiaries, the information in those files would not show whether the beneficiaries had accepted employment with the petitioner subsequent to the approval of the I-140 petitions on their behalf.

As shown above, the evidence in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition. But the petitioner has the burden to establish its ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of each of the approved and pending immigrant petitions submitted by the petitioner. If, on the other hand, the petitioner no longer anticipates hiring one or more of the other beneficiaries, evidence must be submitted to establish that fact. Since no information was submitted in the present petition about the beneficiaries of the other approved and pending petitions, the petition has failed to carry its burden of proof on this issue.

In his decision, the director failed to note that the record contains a statement from the petitioner's chief financial officer. As discussed above, that statement incorporates petitioner's financial statements for 2002. The director did not consider the unaudited financial statements for 2002 as acceptable evidence. The director erred in failing to consider the statement of the chief financial officer and the unaudited financial statements incorporated therein, since such a statement by a financial officer of the petitioner is explicitly allowed by 8 C.F.R. § 204.5(g)(2) for a petitioner which has 100 or more employees. The director also failed to note the existence of other approved and pending petitions submitted by the petitioner. Nonetheless, those errors of the director did not affect the director's decision to deny the petition, since, as shown above, the petitioner's financial statements for 2002 fail to establish the petitioner's ability to pay the proffered wage even to the single beneficiary of the instant petition. The director's decision to deny the petition was therefore correct, based on the evidence in the record before the director.

On appeal, counsel submits additional evidence consisting of unaudited financial statements of the petitioner for the six-month period ending June 30, 2003. Counsel also submits a duplicate copy of the statement from

the petitioner's chief financial officer dated July 29, 2003, along with duplicates of the petitioner's unaudited financial statements for 2002 and duplicates of the petitioner's audited financial statements for 2000 and 2001. Although the statement of the petitioner's chief financial officer is dated about one month after the closing date of the financial statements for the six-month period ending June 30, 2003, the six-month financial statements do not appear to have been incorporated into the chief financial officer's statement, because the financial statements for the six-month period ending June 30, 2003 were not submitted when the chief financial officer's statement was first submitted in evidence, as part of the petitioner's response to the second RFE transmitted with counsel's letter of July 31, 2003. The financial statements for the six-month period ending June 30, 2003 are therefore unaudited financial statements with no corroborating documentation.

Unaudited financial statements standing alone are not persuasive evidence. 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. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The six-month financial statements submitted on appeal covering for the period ending June 30, 2003 therefore are not acceptable evidence. Furthermore, the evidence submitted on appeal lacks any information about the beneficiaries of the other approved and pending immigrant petitions submitted by the petitioner. Therefore, for the reasons discussed above, the evidence submitted on appeal fails to overcome the decision of the director.

Beyond the decision of the director, the record in the instant petition fails to establish that the proffered wage as stated on the ETA 750 is at least the prevailing wage for registered nurses in the geographical region of the petitioner's location, which is Los Angeles County. *See* 20 C.F.R. §§ 656.20(c)(2), 656.40(a)(2)(i). According to the Internet web site of the Employment and Training Administration, U.S. Department of Labor, the prevailing wage for entry level registered nurses in Los Angeles County in 2003 was $21.53 per hour, which is equivalent to $44,782.40 per year. Employment and Training Administration, U.S. Department of Labor, *Online Wage Library*, http://www.flcdatacenter.com. (accessed November 2, 2004). As noted above, the proffered wage stated on the ETA 750 is $15.00 per hour, which is equivalent to $31,200.00 per year. The job announcement for the offered position in the record states the following: "Salary: $15.00 per hour (for CGFNS passers), $23.00 per hour (with California License for RN)." The letter in the record dated October 10, 2003 from the petitioner's president discusses the wage to be paid to the petitioner. In the letter, the petitioner's president states, "We wish to employ [the beneficiary] on a permanent full time basis and [she] will be compensated at the rate of $15.00 per hour, and as soon as she passes the licensure examination for Registered Nurse she will be compensated at an hourly rate of $23.00."

The ETA 750 states the following in block 15, for Other Special Requirements: "Must have passed the CGFNS Exam. Must be eligible to take the California State Board Nursing Exam or must have a California State Board Registered Nurse License." The ETA 750 therefore does not require the beneficiary to have received a California registered nurse license as a condition of employment in the offered position. The petitioner evidently intends to hire the beneficiary initially for a position of lesser responsibility pending her completion of all requirements for her California registered nursing license, and then to promote her to the position of registered nurse once the beneficiary receives her nursing license. Nonetheless, the ETA 750 states that the offered position is for a registered nurse, not for some other position with a lower level of responsibility. Nothing in the applicable regulations permits a two-stage employment process for the beneficiary to achieve the prevailing wage in the listed occupation. *See* 20 C.F.R. § 656.22. Therefore the evidence fails to establish that the petition complies with the prevailing wage requirements of the regulations.

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.