U.S. Department of Homeland Security
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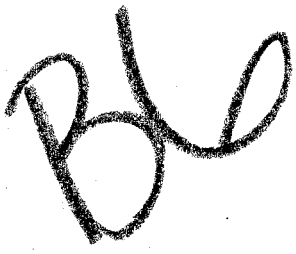
U.S. Citizenship and Immigration Services



[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 27 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
Administrative Appeals Office

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DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded to the director.

The petitioner is a healthcare staffing service. It seeks to employ the beneficiary permanently 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. 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.

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.

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 granting 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 September 16, 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 Citizenship and Immigration Services (CIS) office. The application for Alien Employment Certification shall include:

> Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
>
> 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 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, the day the petition in this matter was submitted. *See* 8 CFR § 204.5(d). Here, the petition was submitted on September 16, 2002. The proffered wage as stated on the Form ETA 750 is $880 per week, which equals $45,760 per year.

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 stated that it was established during 2002 and that it employs four workers.

In a letter submitted with the petition, the petitioner's vice president stated that the petitioner has a $1,000,000 line of credit and projects gross annual revenues of $2,542,000. As evidence of the line of credit, counsel submitted a letter, dated July 22, 2002, from a bank in Walnut Creek, California, confirming that credit line. That letter also states that the petitioner maintains a $100,000 bank balance with that institution.

With the petition, counsel submitted a brief in which he argued that the evidence submitted demonstrates the petitioner's ability to pay the proffered wage. Counsel states that the petitioner's founder previously founded a business that became very profitable. Counsel observed that the United States has a shortage of nurses and noted that the petitioner's business plan is to charge clients more for the nurses it places than it pays to those nurses, which counsel indicates guarantees the petitioner's profitability. Counsel states that the petitioner projects gross revenues of $2.5 million during 2003. Counsel indicates that those factors, in addition to the petitioner's credit line, demonstrate the petitioner's ability to pay the proffered wage.

In support of the proposition that the petitioner's credit line should be considered in determining the petitioner's ability to pay the proffered wage, counsel cites a non-precedent decision of this office, an article from Immigration Briefings, and the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). Counsel also cites the Immigration Briefings article and the minutes of a meeting between the Vermont Service Center and CIS for the proposition that a credit line demonstrates that substantial business has been firmed up, thereby evidencing Petitioner's financial viability.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that

an employer's reasonable expectation of an increase in profitability can demonstrate the ability to pay the proffered wage.

Finally, counsel noted that, because the petitioner is a start-up business, copies of annual reports, federal tax returns, and audited financial statements were not available. Counsel urged, citing an unpublished decision, *Anderson's Jewelry v. U.S.I.N.S.*, 83 F.3d 426 (9th Cir. 1996) that CIS should, in such a case, accept other evidence of the petitioner's ability to pay the proffered wage.[1] Counsel urges that the petitioner's cash on hand, its credit line, the income projected to be generated by hiring the beneficiary, and its reasonable expectation of increased profits, taken in the aggregate, demonstrate the petitioner's ability to pay the proffered wage.

On December 31, 2002, the Nebraska Service Center requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested other specific evidence pertinent to the petitioner's incorporation, business plan, and credit. The Service Center emphasized that the petitioner must necessarily provide copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of $1,675 as its ordinary income during that calendar year. The corresponding Schedule L shows that the petitioner had current assets of $92,666 and no current liabilities, which yields $92,666 in net current assets.

Counsel submitted bank statements from May through December, 2002, showing balances ranging from $10,388.31 to $185,475. Counsel submitted statements of another account, from August 2002, October 2002, and February 2003, showing balances of $550,000, $537,940.05, and $1,038,229.88, respectively.

Counsel submitted a second bank letter, dated March 21, 2003, confirming the petitioner's $1,000,000 credit line and stating that it expects to extend an additional credit line of $5,000,000 to the petitioner. The bank stated that the petitioner's business plan, its experienced management, and the banks previous financial relationship with the founders were factors in that decision. Counsel also submitted the other documents requested by the Service Center.

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 June 30, 2003, denied the petition. The director noted that the petitioner had filed 80 other petitions during the previous year and stated that the evidence did not show the ability to pay the proffered wage to the 80 beneficiaries of those petitions in addition to the wages of the instant beneficiary. The director rejected the petitioner's projections and its credit line as proof of its ability to pay the proffered wage.

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[1] Counsel mischaracterized the unpublished decision. The Ninth Circuit Court held that the INS, now CIS, did not abuse its discretion by requiring the submission of an annual report, tax return, or audited financial statement. *Anderson's Jewelry*, 83 F.3d at 426

On appeal, counsel submits a brief in which he argues that the petitioner's evidence conclusively demonstrates its continuing ability to pay the proffered wage beginning on the priority date.

This office does not agree that the petitioner's evidence is conclusive proof, but observes that the petitioner faces a somewhat less arduous burden of proof.

Counsel has cited non-precedent decisions of this office for various propositions. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of non-precedent decisions is of no effect.

Counsel also cites an article from Immigration Briefings for the proposition that the petitioner's line of credit should be considered. Counsel is welcome, if he finds the reasoning of an article persuasive, to urge the acceptance of that reasoning upon this office. Counsel did not state the reasoning upon which that article based its conclusion, but apparently urged that its conclusion, as such, should be accorded authority. This office is not bound by that article and does not accord its conclusion any authority, absent any reference to its reasoning.

Counsel further cites *Full Gospel*, 730 F. Supp. 441, for the same proposition. Counsel reasons that the funds pledged by a bank in this case should be even more persuasive evidence of the petitioner's ability to pay the proffered wage than the pledges of charitable donations in *Full Gospel*.

Initially, this office notes that *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. Here, counsel is asserting that CIS should treat its line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

Finally, counsel argued that *Masonry Masters,* 875 F.2d 898 requires this office to consider the ability of the beneficiary to generate additional income for the petitioner. Counsel submits projections that the petitioner will employ the beneficiary and others and bill clients at whose facilities the beneficiary's will work for more than the hourly wages of the beneficiaries. Counsel states that the petitioner, therefore, will certainly earn a profit. That certainty rests on various assumptions that must be considered.

That the petitioner's business will be successful depends upon the ability not only to bill clients for more than it pays its employees, but also to cover various overhead items with the difference. Some of those expenses, such as rent, are fixed. That is, the cost of the petitioner's rent payments for office space will not fluctuate based on the number of nurses it currently employs. If the petitioner is able to employ and place 100 nurses that fixed cost will be covered more easily than if the petitioner is able to employ and place only one nurse, for instance. The number of nurses the petitioner will be able to recruit is unclear; as is the number it will be able to place.

The petitioner's business will incur other expenses that will vary with the number of nurses it recruits. Those expenses include, for instance, airfare and expenses for health insurance. The petitioner's gross receipts must also be sufficient to cover those expenses. The projection that the petitioner will net $2.5 million per year certainly incorporates projections of the number of nurses the petitioner expects to place and of the various expenses the petitioner expects to incur. Neither the petitioner nor counsel made explicit the assumptions upon which that generous projection was based, nor provided evidence that the assumptions are reasonable.

Counsel's citation of *Masonry Masters* did not address these additional factors. Counsel indicated that the petitioner would charge more for its nurses' services than it would pay them, and argued that *Masonry Masters* mandates approval of the petition.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding here. *See Matter of K-S-*, 20 I&N Dec. 715.

If the petitioner were to hire the beneficiary, the petitioner's overhead would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages has not been mathematically demonstrated. As was noted above, however, mathematical certainty is not the standard of proof in this matter.

Ordinarily, in determining a petitioner's ability to pay the proffered wage during a given period, CIS will examine wages actually paid to the beneficiary during that period, the petitioner's net income during that period, and the petitioner's net current assets during that period. By those strict mathematical tests, the petitioner is unable to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

Citing *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), counsel asserts that an employer's reasonable expectation of increasing profits and business is sufficient evidence of the petitioner's ability to pay the proffered wage.

CIS may consider the totality of the petitioner's business activities and economic circumstances when evaluating the petitioner's ability to pay the proffered wage. The facts in this case, however, are distinguishable from those in *Sonegawa*.

The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons.

The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

In the instant case the petitioner is a start up company, established during the same year in which the petition was filed. The petitioner cannot, therefore, demonstrate previous profits or a sound business reputation. Further, the petitioner failed to demonstrate that it experienced unusual circumstances that would justify a significant reduction in income. The holding in *Sonegawa* is inapplicable to the instant case.

The petitioner has indicated that it has filed at least 81 petitions. The case will be remanded to the director to allow him to request additional evidence from the petitioner, specifically the total number of petitions pending, their receipt numbers, and the total of the proffered wages. The director should also request income tax returns for 2003.

The decision of the director will be withdrawn and the petition will be remanded for further action and consideration. The director must offer the petitioner a reasonable period of time during which to produce additional evidence. The director shall then render a new decision based on the evidence of record.

ORDER: The petition is remanded to the director for action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the AAO for review.