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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 30 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a health care staffing provider. It seeks to employ the beneficiary permanently in the United States as a traveling 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 demonstrated that it had the continuing ability to pay the proffered wage beginning on the priority date. The director also found that the petitioner had not demonstrated that it gave notice of the filing of the Application for Alien Employment Certification in accordance with the requirements of 20 C.F.R. § 656.20(g).

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section 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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

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 office. 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).

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

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[1] The petitioner also filed a previous petition for the same beneficiary, which petition was denied on December 3, 2002.

(1) 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 of location of the employment.

The regulation at 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 [CIS].

In this case, Form I-140 was filed on January 29, 2003. The Form ETA 750 states that the proffered wage is $17 per hour, which equals $35,360 per year.

With the petition, counsel submitted a letter, dated May 6, 2002, from the petitioner's president. That letter states that the petitioner's projected gross annual income is $329,970, that its projected net annual income is $155,030, and that it has a credit line of $250,000. The president further attested that the petitioner has the ability to pay the proffered wage. A copy of an undated information sheet, signed by the petitioner's vice-president, states that the petitioner expected to place its first nurses during March of 2002, and that the petitioner has contracts for ten "additional"[2] nurses during the first six months of 2002. Counsel also provided a copy of the petitioner's projected 2002 budget and a letter from a bank confirming the line of credit.

On February 6, 2003, the director requested that the petitioner submit evidence that notice of the position had been posted in accordance with 20 C.F.R. § 656.20(g). The director also requested additional evidence of the petitioner's continuing ability to pay the proffered wage.

In response, the petitioner submitted (1) a letter of support, dated April 23, 2003, from a congressman, (2) a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, (3) a copy of the petitioner's Quarterly Earnings Report for the first quarter of 2003, (4) copies of the statements of two of the petitioner's February 2003

[2] Why the petitioner's vice-president used the word "additional" in this context is unclear, as the petitioner, at the time that information sheet was written, apparently had placed no nurses.

bank statements, (5) a copy of the petitioner's unaudited balance sheets as of December 31, 2002, January 31, 2003, and February 28, 2003, (6) the petitioner's Missouri Certificate of Incorporation, (7) a copy of what purports to be the petitioner's Form 941 Employer's Quarterly Federal Tax Return for some unstated quarter, (8) the petitioner's Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return, (9) the petitioner's Missouri Division of Employment Security Quarterly Contribution and Wage Report, (10) a copy of the petitioner's payroll roster for the last quarter of 2002, (11) a copy of the petitioner's Form W-10 Employer's Quarterly Earnings Tax Return for the last quarter of 2002, (12) statements of the petitioner's owners' accounts with investment brokers, (13) a monthly statement of a $250,000 line of credit with a balance of $118,195.46 as of March 6, 2003, (14) stock certificates vesting 100 shares in the petitioner's owners, (15) a letter from the IRS assigning an employer identification number to the petitioner, (16) a copy of the petitioner's 2002 Form 1120S U.S. Income Tax Return for an S Corporation, (17) the petitioner's owners' 2001 and 2002 Form 1040 joint income tax return, (18) an unaudited list of the assets and monthly expenses of the petitioner's owners, (19) statements of bank accounts of the petitioner's owners as, (20) a statement of that owner's 401K plan, (21) the statement of that owner's life insurance policy for the first quarter of 2003, (22) copies of 2001 and 2002 Form W-2 Wage and Tax Statements showing amounts paid to one of the petitioner's owners by his employers, (23) letters thanking the petitioner's owners for charitable donations, and (24) a notice of the proffered position purporting to show that it was posted from March 10, 2003 through March 21, 2003.

The petitioner's 2001 tax return shows that the petitioner declared a loss of $960 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 $6,240 in current assets and no current liabilities, which yields $6,240 in net current assets.

The petitioner's 2002 tax return shows that the petitioner declared a loss of $124,395 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Although the record is not entirely clear on this point, it appears to indicate that on May 6, 2003, the Director, Nebraska Service Center, issued a decision denying the petition to the congressman who provided the letter described above. The record appears to indicate that the director issued another, slightly different, version of that denial to the petitioner. On June 10, 2003, the petitioner filed an appeal.

On June 12, 2003, the director issued yet another decision in this matter. Although that decision does not expressly so state, it appears to have withdrawn the previous decisions before again denying the petition. On July 15, 2003, the petitioner appealed that decision.

The issuance of more than one decision of denial in this case is a procedural anomaly. Any error which may have been occasioned by that anomaly, however, is best addressed and corrected by this office issuing a *de novo* decision in this matter on the merits, which, in any event, it will.

On appeal, counsel notes that 8 C.F.R. § 204.5(g)(2) states evidence of the petitioner's ability to pay the proffered wage must be in the form of annual reports, federal tax returns, or audited financial statements, but notes that in appropriate cases, additional evidence may be considered. Counsel did not state why this is an appropriate case to disregard, or to accord less weight to, the required evidence.

Counsel states that at the time the appeal was filed the petitioner had over $200,000 in receivables, all of which would be paid during the following year. As evidence of that statement, counsel submitted an unaudited statement of the petitioner's Aged Receivables. Ordinarily, this office would only consider the petitioner's receivables in the context of considering its net current assets, its current assets less its current liabilities. Further, unaudited financial statements are representations of management, and generally not convincing evidence.

Counsel notes, on appeal, that the petitioner submitted audited financial statements with its initial filing. The audited financial statements are for the six months ended June 30 2001 and the six months ended June 30, 2002. Because the priority date is January 29, 2003, those financial statements are not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

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).

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. 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 proffered wage is $35,360 per year. The priority date is January 29, 2003. The appeal in this matter was filed on June 10, 2003. Obviously, the petitioner's 2003 tax return was not available on that date, less than halfway through the year.

If the preferred evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986).

Counsel's reliance on the petitioner line of credit is misplaced. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that, where a company shows no net profit, a record of having paid its employees wages in the past and of doing business as an ongoing enterprise may suffice to show the ability to pay the proffered wage. Counsel submits a feasibility study commissioned by the petitioner as evidence that a demand exists for nurses in the petitioner's market area.

Sonegawa relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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.

Counsels is correct that, if losses or very low profits are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the petitioner is a relatively new business. The record contains no evidence that it has ever posted a profit. Without the accompanying feasibility study, assuming that the petitioner's business would flourish, with or without hiring the beneficiary, would be speculative.

The feasibility study changes that calculus somewhat. The feasibility study notes that vacant nursing positions exist in the United States generally, and in the petitioner's market area in particular. Although some of the

statistics cited seem improbable[3] and are not credited, the finding that nursing positions exist to be filled is credible. The study further notes that the petitioner's three owners have, between them; considerable training and experience in health care provision, business administration, and law. Although the petitioner can show no previous profits, it has a feasible business plan, a ready market, and ostensibly competent management. Pursuant to the principle enunciated in *Matter of Sonegawa, supra*, the petitioner may have shown that it is able to pay the proffered wage of the beneficiary of the instant petition. Because the appeal will be dismissed on other grounds, however, this office need not reach that issue.[4]

In response to the request for evidence, counsel submitted a copy of the job offer notice. However, the notice was not posted until March 10, 2003, more than three months after the petition was filed in this matter.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed.* (Emphasis supplied).

Furthermore, a petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

The regulations require that the notice be posted for at least ten consecutive days and evidence of such posting be submitted with the Application for Alien Employment Certification. As the job offer notice was posted subsequent to the filing of the Application for Alien Employment Certification and Form I-140, the petitioner has not complied with the instructions stipulated in the regulations. Consequently, the petition may not be approved.

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. This decision is without prejudice toward the petitioner's ability to file future petitions. The petitioner is obliged, however, to follow the requirements of the regulations, including providing evidence of its continuing ability to pay the proffered wage beginning on the priority date, in accordance with 8 C.F.R. § 204.5(g)(2), and evidence that it posted a notice of the proffered position at the appropriate time and place in accordance with 20 C.F.R. § 656.20(g).

ORDER: The appeal is dismissed.

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[3] The feasibility study states, for instance, that nursing positions increased 36% during 2000. Such a leap during a single year is manifestly unlikely. Although the study states that this is a Department of Labor Statistic, it cites no particular page, nor even a particular publication, of that department. The study further states that during 1999 the St. Louis University School of Nursing saw a 50% decrease in first year enrollment. Unless the university planned that decrease in class size, such a drop in a single year is improbable. Again, the study cites no publication at which that unlikely statistic might be confirmed.

[4] Even if this office were to find that the petitioner has shown the ability to pay the proffered wage in the instant case, that finding would not be a "blank check" for future filings. In future findings, the petitioner must demonstrate, with then current evidence, including copies of annual reports, federal tax returns, or audited financial statements, that it has the continuing ability to pay the proffered wage beginning on the priority date.