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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 04 009 52075 Office: VERMONT SERVICE CENTER Date: APR 19 2005

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: SELF-REPRESENTED

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 Acting Center Director (Director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal is dismissed.

The petitioner is a healthcare staffing agency. 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. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

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, the petitioner submits additional evidence and maintains that the petitioner's documentation demonstrates its continuing ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's

Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is October 10, 2003. The beneficiary's salary as stated on the labor certification application is $23.00 per hour or $47,840 per year. On Item 7 of the labor certification application, it states that the beneficiary will be employed at the Select Specialty Hospital in Johnstown, Pennsylvania. Part 5 of the visa petition claims that the petitioner was established in 1999 and has over one hundred employees. It claims a gross annual income of approximately 5.1million dollars and a net annual income of $600,000.

The petitioner initially submitted unaudited financial statements representing its financial status in 2000 and 2001. On November 4, 2003, the director requested additional evidence pertinent to that ability. The director advised the petitioner that its evidence must demonstrate its ability to pay the proffered salary of $47,840 per year as of the October 10, 2003 filing date of the petition and continuing to the present. The director also informed the petitioner that as it had filed multiple petitions, it must also establish that it has the ability to pay the other beneficiaries' salaries for which it has petitioned.

In response, the petitioner, submitted copies of its unaudited financial statements for the period covering 2001 and 2002. The 2002 income statement shows that the petitioner claims net income of $207,781 in 2002 and its balance sheet reflects that its current liabilities exceeded its current assets in 2002. The petitioner also submitted copies of invoices that it has billed to Select Specialty of NW Indiana/Hammond and a flow-chart of its plan to provide foreign nurses. The petitioner's transmittal letter, dated December 3, 2003, signed by "Harvinder [redacted] as "President-CEO," describes the petitioner's business operation and billing procedure in which it is stated that the client would be billed about $84,000 per year and the foreign nurse would be paid about $49,920 annually.

The director denied the petition on March 5, 2004, determining that the petitioner's 2002 financial data as presented in its financial statement failed to reflect sufficient net income or net current assets to cover the proffered wage. The director further noted that the petitioner had filed roughly "70 I-140 petitions" that would require it "to substantiate your ability to pay based on your 2002 records." The director concluded that the petitioner had not shown that it has the ability to pay the proffered wage to these multiple beneficiaries.

On appeal [redacted] submits a letter, dated March 15, 2004. He states that the petitioning business has entered into contract with the Select Medical Corporation in which the petitioner will provide permanent placement for foreign nurses, who will be "absorbed by Select Specialty Hospitals" and who will be on their payroll rather than the petitioner's. [redacted] also explains that a similar arrangement has been negotiated with a Nevada healthcare management company. Copies of these two agreements have been submitted on appeal, as well as that individual financial data of these two companies [redacted] also asserts that the provision of these beneficiaries will alleviate the U.S. nurse shortage.

[redacted] contentions are not persuasive. Moreover, it is noted that the intent to place the beneficiary directly on the payroll of Select Specialty Hospitals, as indicated by the petitioner's letter and contract submitted on appeal, raises the issue as to whether the petitioner, who submitted the I-140, Immigrant Petition for Alien Worker and the labor certification application should be continue to be considered as the beneficiary's actual prospective U.S. employer. To be a valid job offer and establish the beneficiary's eligibility for a third preference classification, the job offer must be based on an offer of full-time permanent employment and the petitioner must qualify as the actual employer of the beneficiary.

The regulation at 20 C.F.R. § 656.3 provides a definition of an employer:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In *Matter of Smith*, 12 I&N Dec. 772, (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with fringe benefits. Client firms were billed by the petitioner for the services provided them. The petitioner was responsible for making contributions to the employee's social security, unemployment insurance programs, and worker's compensation, as well as for withholding state and federal income taxes. It was determined that the petitioner qualified as the actual employer of the beneficiary. *Id.* at 773.

In this case, in contrast to the copy of the contract between the petitioner and Select Medical Corporation, which was initially submitted to the record, the copy of the agreement submitted on appeal suggests that the petitioner is merely being paid a recruitment fee to supply foreign nurses to the hospital as the actual U.S. employer, rather than, itself, being the qualifying prospective U.S. employer pursuant to 8 C.F.R. § 204.5. Similarly, the copy of a contract with a Nevada healthcare management company does not establish that the petitioner will be the prospective U.S. employer who will be responsible for payment of wages and direction or control of the employee, but rather only acting as a recruitment agency. Further, as the petitioner, it must establish its own ability to pay the certified wage. As the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is further noted that none of the financial statements offered to the director or submitted on appeal were audited. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. 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. While this regulation allows additional material "in appropriate cases," the record in this case has not demonstrated why an annual report, *audited* financial statement, or the relevant federal tax return would be inapplicable or otherwise present an inaccurate financial picture of the petitioner during this particular period. The regulation neither states nor implies that such evidence may be considered in lieu of the regulatory requirements.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary

during that period. If the petitioner establishes by documentary evidence that it may have 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. There is no evidence of such employment contained in this record.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will review the net income figure reflected on the petitioner's federal income tax return, annual report or audited financial statements 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 has been well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

As an alternative method of reviewing a petitioner's continuing ability to pay a proposed wage offer, CIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets may be shown on Schedule L of its federal tax return. If a corporation's year-end 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.

As discussed by the director and according to CIS electronic records, the petitioner has filed multiple immigrant petitions. In 2003, it appears that the petitioner filed at least 74 petitions, out of which at least 39 were approved. It is unclear how much the cumulative certified wages amounted to in these cases, but even if the petitioner were recruiting beneficiaries at a minimum wage level, it would amount to $446,160 per year for the 39 petitions approved. It is the petitioner's burden to show that it has had sufficient income to continually pay all salaries as of the priority date(s) of each petition. Even if considering the evidence presented on the petitioner's unaudited financial statement for 2002, its claimed net income of $207,781 would have been insufficient to pay one-half of a total amount using a minimum wage calculation. Based on an annual wage offer of approximately $47,840, as set forth in this case, the net income figure represents enough funds to cover approximately four beneficiaries' wages. As the petitioner's current liabilities, according to its financial statement, exceeded its current assets in 2002, its net current assets need not be considered as a resource to pay a proffered wage here.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date. In this case, the petitioner failed to offer sufficiently probative evidence to establish its continuing ability to pay the certified wage.

It is finally observed that the posting notice contained in the record does not indicate whether the job opportunity notice was posted at the actual location of the alien's employment, rather than only at the petitioner's office.[2] The purpose of requiring an employer to post notice of the vacant position is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* 20 C.F.R. § 656.10.

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.

[2] The AAO understands the reference to "facility or location of employment" at 20 C.F.R. § 656.20(g)(1)(ii) to mean the actual location of employment; a distinction that becomes significant where the petitioner is not a direct medical care provider itself, but acts as a staffing firm for the third-party medical care providers.