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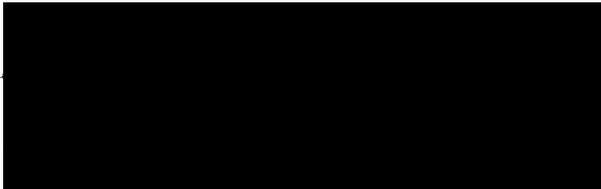
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FEB 14 2005

FILE: WAC-02-136-52224 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition will be remanded to the director for further action in accordance with the foregoing and entry of a new decision.

The petitioner contracts placement of registered nurses with hospitals. The petitioner states it was established in 1999, has 250 employees, and has a gross annual income of \$2,821,637 on its visa petition. It seeks to sponsor the beneficiary 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 director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a brief and a copy of an audited balance statement, for the year ended March 31, 2002, prepared by Ernst & Young, LLP, the petitioner's certified public accountants.

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 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 March 15, 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:

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)(3).

I. **The petitioner failed to establish the ability to pay the proffered wages.**

The first issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is March 15, 2002. The beneficiary's salary as stated on the labor certification is \$25.00 per hour, which equates to \$52,000 per annum.

In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 1999¹.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 2, 2002, the director requested 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.

In response, the petitioner resubmitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 1999 and a letter signed by [REDACTED] Chief Financial Officer of the petitioning entity, stating that the petitioner employs more than 100 persons, had revenues of \$31.6 million for the fiscal year ended March 31, 2002, and has the ability to pay the proffered wage.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 19, 2002, the director requested 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 specifically requested information for 2001 and the petitioner's quarterly wage reports for all four quarters of 2001.

In response, the petitioner submitted its 2000 corporate tax return for the period ended March 31, 2001², with counsel indicating that the petitioner's fiscal tax year ends on that date, and stated that its tax return covering the next fiscal period had not yet been filed. The petitioner also provided copies of its California state quarterly wage reports for all employees for all four quarters of 2001. The quarterly wage reports did not reflect actual employment of or wages paid to the beneficiary but did corroborate the number of the petitioner's employees.

¹ Financial information preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² See *supra*, note 1.

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 October 22, 2002, denied the petition, citing the petitioner's 2000 corporate tax return's taxable income of -\$3,302,131 and net current assets of -\$4,073,961.

On appeal, counsel submits a copy of an audited balance statement, for the fiscal year ended March 31, 2002, prepared by Ernst & Young, LLP, the petitioner's certified public accountants. With an accompanying cover letter, counsel explains that the petitioner's new name is Travel Nurse International.³ Counsel asserts that CIS approved three other nurse petitions "made on the same evidence submitted as was submitted to [CIS] in the instant [m]atter"; that there is a pending but not yet finalized acquisition of the petitioning entity; and that there is nursing shortage that encourages a public policy of mitigating "this health care crisis" by approving the petition. The audited balance sheet shows that the petitioner had net income of \$1,221,688 and negative net current assets for the fiscal year running from April 1, 2001 through March 31, 2002.

Regardless of counsel's perception of a "health care crisis," any petitioning entity seeking an immigrant benefit under Schedule A, Group I, must meet all statutory and regulatory requirements to receive such a benefit. Additionally, the petitioner noted that CIS approved other petitions that had been previously filed on behalf of other employees. The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported assertions that are contained in the current record prior to submission of evidence on appeal, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of the petitioner, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 the full proffered wage in 2002.

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 next examine the net income figure reflected on the petitioner's federal income tax return, 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

³ Employment identification numbers and addresses for Travel Nurse International and the petitioner remain the same making it likely that this was a non-substantive name change and does not require a successor-in-interest evaluation; however, any additional proceedings would need to confirm that point.

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). 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*, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner has not demonstrated that it paid any wages to the beneficiary. In 2002, the petitioner had a net income of \$1,221,688, which is sufficient to cover the proffered wage of \$52,000 if not too many other petitions were pending or approved in that year⁵.

The AAO has accessed a database that shows that the petitioner filed eight immigrant petitions and one non-immigrant petition in 2002. One immigrant petition was denied and six were approved. Out of those immigrant petitions approved in 2002, four were approved in 2002 and two were approved in 2003. Presuming each petition

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ Although the petitioner's fiscal year ends on March 31, 2002, the petitioner's tax return for that fiscal year covers its priority date on March 15, 2002. Additionally, since counsel's brief and additional evidence was filed in December 2002, it was impossible for the petitioner's tax return for the following fiscal year, which would end on March 31, 2003, to have been made available to CIS. Thus, the only figures available for analysis are the tax return for the petitioner's 2001 fiscal year.

contains a similar proffered wage of \$52,000, the petitioner has ample funds with its net income of \$1,221,688 to cover these additional wages.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date. Thus, this portion of the director's decision is withdrawn.

II. The petitioner failed to submit a posting notice that complies with regulatory requirements.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*, 345 F.3d 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9. Since the director overlooked this issue, the AAO has examined it on appeal and determined that the posting notice is deficient.

Under 20 C.F.R. § 656.20, the regulations require the following:

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 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains a deficient posting notice that was filed with the initial petition. There is no documentation concerning where the notice was posted, which does not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. The petitioner has indicated that the beneficiary will work at "various hospitals," without identifying an exact location or locations with greater specificity. The petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity 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 United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A

occupations.⁶ The petitioner further failed to indicate the dates the notice was posted. For this reason, the petition may not be approved.

III. **Because the petitioner failed to specify the intended geographic location of the proffered position's worksite, the petitioner failed to provide evidence that it is offering a wage that complies with the prevailing wage rate.**

Beyond the decision of the director, the regulation at 20 C.F.R. § 656.20(c) requires the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.⁷ The director did not mention this issue in his decision so the AAO is not confident that it was analyzed. CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with DOL's prevailing wage rates. See 20 C.F.R. § 656.22(e). DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdatacenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.⁸ The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will be under supervision and performing nursing duties delineated by the DOL's *Occupational Outlook Handbook* at page 269. OWL reports that for 2002, the year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position in San Francisco, Marin County, was \$24.25 per hour, which is lower than the proffered wage of \$25.00 per hour. Thus, the proffered wage from the petitioner meets the prevailing wage rate if the beneficiary were to work in Marin County. The petitioner did not identify a specific location for the proffered position, stating that it would be at "various hospitals," without elaboration. It is not clear that the proffered position's work site would be in Marin County. The petitioner must identify all worksites and counties included in the proffered position so CIS may analyze and make a determination as to whether or not it is offering the prevailing wage rate. For this additional reason, the petition may not be approved.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not clearly sustained that burden.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

⁶ See the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); see also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

⁷ See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9.

⁸ The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

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