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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

File: [redacted] SRC-05-087-50493 Office: TEXAS SERVICE CENTER Date: OCT 20 2006

In re: [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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a pediatric clinic. The petitioner seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

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 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, not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner has applied for the beneficiary under a 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. § 656.10 with respect to 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). 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.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 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.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on February 3, 2005, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a registered nurse is an annual salary of $38,400 based on 40

hours per week, with a listed overtime rate of $30.00 per hour. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: July 2001; gross annual income: $2 Million; net annual income: "see attached"; and current number of employees: 15.

The Service Center issued a Request for Additional Evidence ("RFE") on February 16, 2005, requesting that the petitioner submit evidence of the petitioner's ability to pay, including the full 2003 Federal Tax Return if the petitioner's 2004 return was not yet available, along with the corresponding W-2 Forms, identifying the registered nurses employed.

In response to the RFE, the petitioner submitted a letter from the company's certified public accountant stating that the petitioner has "always been able to meet their payroll and filed all required returns in a timely manner, including Form 941. During the month of March 2005, they employed 27 people. I have no doubt that they will continue to be able to meet their payroll obligations in the future." The petitioner did not submit any further information, such as Federal Tax Returns, or W-2 statements as identified and requested in the RFE. On May 12, 2005, the Service Center denied the petition as the petitioner failed establish its ability to pay the beneficiary the proffered wage.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1].

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We shall first examine the petitioner's ability to pay based on prior wages paid, if any, then consider the petitioner's net income, and net current assets. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

The beneficiary identifies on Form ETA 750B, signed on January 21, 2005, that she has worked for the petitioner as a registered nurse since August 2002 on an "as needed" basis. The petitioner did not submit any evidence of payment to the beneficiary in the form of paystubs or W-2 statements. Therefore, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage based on any prior wage payment.

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. 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. 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.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

On appeal the petitioner submitted its 2004 Federal Tax Return. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $38,400 per year from the priority date. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

Tax year	**Net income or (loss)**
2004	$7,210

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets were as follows:

Tax Year	**Net Current Assets or (loss)**
2004	-$14,006

As demonstrated above, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage.

On appeal, counsel requests that the I-140 Petition be reconsidered based on the petitioner's submission of "the required tax return showing that he can pay the proffered wage." As noted above, the tax return does not demonstrate the petitioner's ability to pay the proffered wage based on net income or net current assets. However, looking at the totality of the circumstances, *see Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), and in consideration of the following: the pediatric clinic was established over five years ago; has minimal liabilities; the tax return reflects over $2 million in gross receipts, significant officer compensation, and documented payment of wages to other employees, we find that the petitioner can establish its ability to pay the proffered wage.

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[2]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.

As counsel notes "in as much as the petition for Schedule A for a nurse filed on form I-140 is prima facie approveable, except for the information that was lacking and herein furnished above. It would be in the interest of National Health to reopen and approve the petition, since there is a shortage of nurses." Based on the Schedule A designation, registered nurses are accorded favorable treatment in processing, however, this does not obviate the need of the petitioner to demonstrate its ability to pay the beneficiary the proffered wage in accordance with 8 CFR § 204.5(g)(2), which we find that the petitioner's tax return in view of its gross receipts, officer compensation, wages paid to employees, low level of liabilities, and the totality of the circumstances does demonstrate.

For the reasons discussed above, the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition will be approved.