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

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PUBLIC COPY

[redacted]

FILE: WAC 02 197 53729 Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

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 completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on May 31, 2002. The proffered wage as stated on the Form ETA 750 is $16.30 per hour, which equals $33,904 per year.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 1,109 workers. The petition states that the petitioner's gross annual income is $19.5 million and that its net annual income is $2.8 million. On the Form ETA 750, Part B, signed by the beneficiary on May 2, 2002, the beneficiary did not claim to have worked for the petitioner.

The petition and the Form ETA 750 both contain spaces for the petitioner to indicate where it will employ the beneficiary. In that space on both forms the petitioner stated, "see Exhibit 2 (Petitioner's Notice of Available Positions." No Exhibit 2 or notice of available petitions was provided with the petition.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *see Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) a list of 137 hospitals to which the petitioner asserts it provides nurses, (3) contracts between the petitioner and ten of its clients, (4) a printout showing amounts the petitioner billed to its clients and some expenses associated with proving its services to those clients during calendar year 2001, (5) a check history printout showing paychecks the petitioner issued to its employees covering the year from August 2001 to July 2002, (6) an unaudited 2001 profit and loss statement, and (7) a letter dated December 19, 2002 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 tax return shows that the petitioner is a corporation, that it incorporated on January 30, 1996, and that it reports taxes pursuant to cash convention accounting and the calendar year.

Because the priority date of the instant petition is May 31, 2002 evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date, however, the petitioner's 2002 tax return was unavailable. Further, no evidence pertinent to the petitioner's finances during 2002 and later years was ever requested or provided. This office will consider the petitioner's 2001 tax return in the determination of its ability to pay the proffered wage.

The petitioner declared a loss of $354,938 as its ordinary income during 2001. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's accountant's December 19, 2002 letter states that the petitioner's sales greatly increased from 1998 to 2002. That letter also notes that the petitioner's loss for tax purposes on its 2001 return was reported pursuant to cash convention accounting. The accountant stated that if the petitioner had reported pursuant to accrual convention during that year it would have reported net income of approximately $178,000. The petitioner cited the unaudited 2001 profit and loss statement in support of that assertion.

The director denied the petition on December 2, 2002. On appeal, counsel reiterated the accountant's position that accrual convention accounting would paint a more accurate picture of the petitioner's finances and that

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

accrual accounting would show that the petitioner had a net profit of over $178,000 during 2001. Counsel cited the petitioner's unaudited profit and loss statement in making this assertion.

Counsel stated that the petitioner's 2002 net profit increased by nearly $5 million during 2002, citing the accountant's letter as support for that assertion. This office notes that the accountant's letter makes no such representation. Finally, counsel states that, because of the need for qualified nurses the petitioner's profit will continue to grow.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

This office notes that, given that the unaudited profit and loss statement will not be considered, the assertion of counsel and the accountant that the petitioner would have reported a greater profit during 2001 pursuant to accrual convention than it did pursuant to cash convention is not supported by any evidence in the record. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel and the accountant appear to assert that because the petitioner's tax returns are prepared on a cash basis rather than an accrual basis they are poor indices of the funds available to the petitioner with which to pay wages. Although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual.

In any event, counsel's assertion that the net income shown on the petitioner's tax return is a poor indicator of the petitioner's cash position is inapposite. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage. This office will not permit the petitioner, after it has elected to show its ability to pay the proffered wage with its tax returns, to amend those returns piecemeal as now suits its purpose. The petitioner is bound by the version of its tax returns that it submitted to IRS.

Counsel's assertion that the petitioner's profits will continue to grow is not supported by the record. The petitioner has not produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing revenue. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, whether this growth will render the petitioner profitable or merely increase its losses is unclear.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained

realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. (Reg. Comm.1967).

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 a given 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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[2] or otherwise increased its net income,[3] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income 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 that 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

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[2] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[3] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or 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 minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[4] shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $33,904 per year. The priority date is May 31, 2002.

Although the record contains no copies of annual reports, federal tax returns, or audited financial statements for 2002 or later years this office will, as was noted above, consider the petitioner's 2001 tax return in assessing its ability to pay the proffered wage.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. Counsel submitted no other reliable evidence that the petitioner has been able to pay the wage offered in this case at any time. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which basis the petitioner has not overcome on appeal.

Even if the petitioner had demonstrated the ability to pay the wage proffered to the instant beneficiary that would be insufficient to render the petition approvable. The AAO has ascertained that at least twelve petitions were approved in 2002 for the same petitioner.[5]

The regulations require the petitioner to show the ability to pay the proffered wage. Where the petitioner has other pending petitions, CIS must, in order to determine the petitioner's ability to pay the instant beneficiary's wages, take into account any additional wage obligations that have recently arisen or that could possibly result from the other pending petitions in order to determine whether the job offer is credible. As an example, a petitioner with $25,000 in net profits cannot show the ability to pay the wages of an infinite number of workers at $25,000 each per annum nor, in fact, more than one. Thus the regulations require CIS to take

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[4] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

[5] The receipt number for those petitions are as follows: WAC-02-120-53356, WAC-02-026-57796, WAC-02-034-52238, WAC-02-087-55665, WAC-01-294-58387, WAC-02-087-55643, WAC-02-076-52543, WAC-02-128-51597, WAC-02-092-50496, WAC-02-110-52853, WAC-02-110-52853, and WAC-02-178-52094.

notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage. The petitioner would be obliged to show the ability to pay the proffered wage of all recently hired employees and all employees for whom petitions are pending, in addition to the wage proffered to the instant beneficiary.

The record suggests additional issues that were not addressed in the decision of denial.

The job posting certification indicates that the position was posted at the petitioner's offices, rather than at the beneficiary's intended place of employment. The petitioner's September 19, 2002 letter repeats that it was posted at the petitioner's offices. The nature of the petitioner's business, however, makes obvious that its corporate offices are not the actual location at which the beneficiary would work. Rather, the beneficiary would work at a hospital or at a nursing facility.

The petitioner's May 10, 2002 letter states that the petitioner places its nurses in both California and Nevada. The petitioner's master hospitals list confirms that assertion. This raises the issue of whether the notice of the proffered position was posted at the location of the intended employment in accordance with the regulations.

20 C.F.R. § 656.20(g)(1) states, in pertinent part:

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 record contains no evidence that the petitioner's employees are represented by collective bargaining or, if they are, that the notice was provided to their bargaining representative. The evidence shows that the notice was posted at the petitioner's corporate offices, which is not the location of the proposed employment. That the posting does not comply with the regulations is another reason the petition cannot be approved.

The petitioner's failure to identify the location at which the beneficiary would work raises yet another issue, whether the proffered wage is equal to the prevailing wage for the position at the location of employment.

The regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.[6] Specific to the issue of offering

[6] Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. *See* 20 C.F.R. § 656.22(e).

wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

> Determination of prevailing wage for labor certification purposes.
>
> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b)(3), shall be determined as follows:
>
> . . . .
>
> (2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:
>
> (i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;
>
> . . . .
>
> b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment . . . ."

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. The city, state, and county of the intended employment location must be known in order to identify the prevailing wage rate.

Because the decision of denial did not discuss these issues and the petitioner has not been accorded the opportunity to address them, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address these issues.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.