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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: LIN-05-143-52577 Office: NEBRASKA SERVICE CENTER Date: MAR 29 2007

IN RE: Petitioner:
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:

[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 preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical staffing company. 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. § 656.5, Schedule A, Group I. The petitioner submitted a Form ETA 750 instead of a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the regulatory requirements and denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific 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.

As set forth in the director's August 5, 2005 denial, the first issue in this case is whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations.

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 (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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). Here, the priority date is April 11, 2005.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

> (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
>
> (b) *General documentation requirements.* A *Schedule A* application must include:
>
> > (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

(2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 656.15 (Schedule A), 656.16 (Sheepherders), 565.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(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 are of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(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 business days. The notice must be clearly visible and unobstructed while posted and must 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 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). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(3) The notice of the filing of an Application for Alien Employment Certification must:

(i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

(ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;

(iii) Provide the address of the appropriate Certifying Officer; and

(iv) Be provided between 30 and 180 days before filing the application.

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 relevant evidence in the record includes notice of filing and certification of posting from [redacted] dated April 7, 2005.

In his certification of posting [redacted]FO of the petitioner, attested that the notice was clearly visible and unobstructed, for at least ten (10) consecutive days, in conspicuous location(s) in the workplace, where employer's U.S. workers could readily read the posted notice from March 15, 2005 to March 31, 2005.

The director determined that the notice was not provided between 30 and 180 days before filing the application since the instant petition with the labor certification application was filed on April 11, 2005. The director also determined that it did not appear that the notice was posted at the actual location of employment as required. Therefore, the petition was not accompanied by a proper application for labor certification.

On appeal, the petitioner asserts that the posting notice was provided from March 15, to March 31, and gave 30 days notice before filing on April 17, 2005. However, the record clearly shows that CIS received and stamped the instant petition on April 11, 2005. As quoted above the plain meaning of the regulation language shows that the notification requirement must have already been "provided between 30 and 180 days" before filing the petition and Form 9089 with CIS. An employer must provide evidence that it posted a notice of filing for at least 10 business days with a labor certification application. Without finishing the 10 business days posting period, the employer cannot fulfill the obligation of notification. The regulation also requires the employer to submit evidence that it provided 10 business days posting between 30 days and 180 days before the filing of the labor certification application. Therefore, the petitioner's interpretation of the 30-180 day rule counting from the starting day of the posting is misplaced.

In addition, the petitioner also asserts that the petitioner is a staffing company, and does not have prearranged employment contracts for each beneficiary, and thus the notice was posted at the employer site, in this case Stat Resources LLC.

The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1)(ii). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. 656.20(d)(1)(ii) to mean the place of physical employment. In the instant case, the petitioner is a staffing company without any facilities. The Form I-140 indicates at Item 4. Address where the person will work if different from address in Part 1 under Part 6 "Various unanticipated worksites throughout the U.S." As the director correctly determined, the place of physical employment would be a client's facility where the beneficiary would perform services as a registered nurse instead of the petitioner's headquarters office. The petitioner must post the notice of filing at all possible facilities where the beneficiary would perform the duties as a registered nurse. The posting notice submitted indicates that the notice was posted in the petitioner's business office. On appeal the petitioner submits a letter from Fresenius Medical Care, one of the petitioner's alleged clients. [redacted] mentioned in the letter that "we post 'Posting Notices' at our job sites." However, the writer did not submit any evidence to support his/her assertions or demonstrate the relationship between Fresenius Medical Care

[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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

and the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the record does not contain any evidence showing that Fresenius Medical Care is the only place of employment for the beneficiary. Therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

Therefore, the petitioner's assertion on appeal cannot overcome the director's decision and evidence that the petitioner did not post the notice of filing in compliance with the requirements of the applicable regulations.

The second issue is whether or not the petitioner complied with the requirements under the regulation at 20 C.F.R. § 656.15. The regulation states that a Schedule A application must include an Application for Permanent Employment Certification form. The application for permanent employment certification form is the Form ETA 9089. The instant petition with Schedule A application was filed on April 11, 2005, after the PERM regulation's effective date of March 28, 2005. The petitioner failed to file the petition with the proper application for permanent employment certification form, Form ETA 9089, as required by the regulation. On appeal counsel does not submit the required Form ETA 9089 to resolve the deficiency.

The director found that the petitioner did not include documentary evidence concerning the posting of the notice in any in-house media as now required under 20 C.F.R. § 656.10(d)(1)(ii). On appeal the petitioner submits in-house media advertising to resolve the deficiency pointed out by the director in his decision. The print-outs from the petitioner's website concerning job opportunities for registered nurses at the petitioner's business submitted as in-house media advertising shows that a job opportunity was published on the petitioner's website. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) clearly requires an employer to publish **the notice** in any and all in-house media and provide copies of all the in-house media, whether electronic or print, that were used to distribute **notice of the application**. (Emphasis added). The submitted print-out of in-house media advertising is not the notice the employer should post and the regulation requires. Nor does it show that the in-house media was used to distribute the notice of the application. Therefore, the petitioner failed to provide evidence that the notice was published in any in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii).

As quoted previously, the regulation at 20 C.F.R. § 656.15 requires that for a Schedule A application the petitioner must submit an application for permanent employment certification form, which includes a prevailing wage determination (PWD) in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(c) states:

> *Validity period.* The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The PWD submitted was issued by Illinois Department of Employment Security (IDES) which is the state

workforce agency (SWA) in the instant case. The PWD was issued on May 16, 2005 and indicates that it is valid for the calendar year in which issued, i.e. until December 31, 2005. The record shows that the instant petition was filed on April 11, 2005. The PERM regulations expressly state that an employer must file their applications within the validity period specified by the SWA. The record does not contain any PWD valid on April 11, 2005. Thus, the petitioner did not file its schedule A application within the validity period specified by IDES. Therefore, the petitioner failed to comply with the PERM regulation pertinent to the PWD validity period at the priority date.

Beyond the decision of the director, the AAO notes that the record of proceeding does not reflect that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is in this case the date the complete, signed petition (including all initial evidence and the correct fee) is properly filed with CIS. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, 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. 612 (Reg. Comm. 1967).

Here, the petitioner claimed that it employs 142 workers on the Form I-140. Pursuant to the regulation quoted above the director may accept a statement from a financial officer of the petitioner establishing its ability to pay the proffered wage. However, the petitioner did not submit any letter from its financial officer pertinent to its ability to pay the proffered wage. In fact, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept a letter from its financial officer

because the petitioner has filed a number of Form I-140 petitions since October 1, 2004. Of these petitioners, it appears approximately 27 remain pending, or have been approved but the beneficiary has not yet adjusted status or obtained an immigrant visa. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of approximately $1,179,360. Given that the number of immigrant petitions reflects an increase of the petitioner's workforce, we cannot rely on a letter from a financial officer referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on a financial officer's letter, we will examine the other financial documentation submitted. 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 beneficiary did not claim to have worked for the petitioner, and the petitioner did not submit W-2 forms or any other compensation documents for the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 onwards.

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 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 2004. Although the petitioner's 2004 tax return is not necessarily dispositive because the priority date is June 11, 2005, the AAO will review the 2004 tax return as evidence to establish the petitioner's ability to pay the proffered wage since this is the most recent tax return available. The tax return demonstrates that the petitioner had net income[2] of $108,028. Therefore, for the year 2004, the petitioner had sufficient net income to pay the instant beneficiary the proffered wage of $43,680.

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.[3] 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 during 2004 were $562,593. Therefore, for the year 2004, as an alternative method the petitioner did have sufficient net current assets to pay the instant beneficiary the proffered wage.

However, CIS record shows that the petitioner has filed 62 Immigrant Petitions for Alien Worker (Form I-140) in recent three years. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date although the petitioner's net income or net current assets was sufficient to pay this beneficiary's proffered wage. The tax return indicates that the petitioner paid salaries and wages of $21,856 in 2004, which is even less than one employee's proffered wage although the petitioner claimed on the Form ETA 9089 submitted with the instant petition that it employed 151 workers. Assuming all these beneficiaries were offered the same

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[2] The petitioner is organized as a limited liability company (LLC). Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at http://www.irsgov/pub/irs-pdf/i1065.pdf.

[3] 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.

wage, the petitioner's net income is sufficient to pay two beneficiaries and the net current assets were sufficient to pay twelve beneficiaries in 2004. If all the petitions were filed at the same wage as this petition, the petitioner should have had $2,708,160 net income or net current assets for those 62 beneficiaries. The petitioner failed to establish its continuing ability to pay all the wages to each of the beneficiaries from their priority date until they obtain permanent residence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.