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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 29 2009
SRC 06 253 52907

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded to the director for further action and consideration of the petitioner's ability to pay the proffered wage and the beneficiary's actual employer.

The petitioner is a staffing/recruiting office.[1] It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, the petitioner applied for the labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate U.S. Citizenship and Immigration Services (USCIS) office. The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of registered nurse, because the petitioner had not provided evidence that the beneficiary passed the National Council Licensure Examination (NCLEX). The director 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 January 9, 2007 denial, the primary issue in this case is whether or not the petitioner established that the beneficiary had passed the NCLEX examination, thereby making him eligible to work as a registered nurse throughout the United States.

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 [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is August 23, 2006.

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

[1] The I-140 petition indicates the petitioner was established in 1989, has a gross annual income of $1,000,000 and currently employs 20 workers.

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. Thus, the instant petition falls under the PERM regulations.

Further, the regulation at 20 C.F.R. § 656.10, in effect prior to November 28, 2005, states that 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 interoffice guidance memorandum from [redacted] titled "Adjudication of Form I-140 Petitions for Schedule A Nurses" etc. (2002 memorandum), dated December 20, 2002 considered the approval of I-140 petitions when the nurse could not obtain a social security number or a permanent nursing license of a state. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructed directors of service centers and AAO and other USCIS officials to consider successful NCLEX-RN results favorably. Since they satisfy § 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2), *a fortiori*, they fulfill terms of 20 C.F.R. § 656.22 (c)(2) for the alternative of approval of the I-140, based on successful examination results. This guidance memorandum did not add the NCLEX examination result to the adjudication process, but rather expanded the list of criteria available for proving eligibility at the I-140 stage.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

On appeal, the petitioner submits a copy of a document from the National Council of State Board of Nursing (NCSBN) National Council Licensure Examination for Registered Nurses (NCLEX) Examination. The document indicates that the beneficiary, an NCLEX examination applicant for the Vermont State Board of Nursing, passed the NCLEX examination on May 15, 2006, prior to the August 23, 2006 priority date. Thus, on appeal, the petitioner provides sufficient evidence to establish that the beneficiary is qualified to perform the duties of a registered nurse in the United States. The AAO will withdraw the director's decision with regard to the petitioner not establishing that the beneficiary had passed the NCLEX examination as of the priority date.

However, the AAO notes that the petitioner has not established its ability to pay the proffered wage. 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 AAO notes that the director in a Request for Evidence dated September 8, 2006 requested further evidence as to the petitioner's ability to pay the proffered wage of $35 per hour, or $72,800 per annum, and also requested a copy of any agreement between the petitioner and a healthcare facility that requires the petitioner to provide the beneficiary's services to that facility as a registered nurse. In response, the petitioner submitted a Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2005 filed by a California-based corporation with the same Federal Employer Identification Number (EIN) as the petitioner that indicates net income of $15,083 and net current assets of -$9,116.[2] The director did not comment on the petitioner's ability to pay the proffered wage in his decision.

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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *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 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As previously stated, 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 [USCIS]." 8 C.F.R. § 204.5(d). Here, the priority date is August 23, 2006. The Form ETA 9089 states that the position requires an associate's degree and twenty-four months of training in the proffered job.

Relevant evidence submitted on appeal includes counsel's brief. The record also contains the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2005, submitted in

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[2] This tax return indicates that the California company was incorporated on May 2, 2001. The tax return lists a California address. The I-140 petition lists a New York address, while the job offer is located in New Jersey.

response to the director's RFE dated September 8, 2006. The petitioner also submitted an IRS Form 7004, Application for Automatic 6-Month Period of Time to File Certain Business Income Tax, Information, and Other Returns, requesting an extension for tax year 2005. The petitioner's 2005 tax return indicates October 27, 2006 as the date of preparation.[3]

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of $1,000,000, and to currently employ twenty workers. On the Form ETA 9089, signed by the beneficiary on August 16, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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 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, USCIS 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. Neither the petitioner nor the beneficiary claimed that the petitioner had employed the beneficiary as of the 2006 priority date. Thus the petitioner cannot establish it had the ability to pay the proffered wage through the wages it paid to the beneficiary as of the 2006 priority date based on the beneficiary's wages. Thus, the petitioner has to establish its ability to pay the proffered wage of $72,800 from either its net income or net current assets.

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, USCIS 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*,

[3] The record closed as of the petitioner's response to the director's RFE dated December 1, 2006. The petitioner's 2006 tax return would have provided the most probative evidence of the petitioner's ability to pay the proffered wage in the 2006 priority year, but would not have been available when the petitioner responded to the director's RFE.

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 gross receipts and wage expense is misplaced. 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 USCIS, 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. 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. [USCIS] 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 Fang* 719 F. Supp. at 537

The petitioner's 2005 tax return[4] demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of $72,800 per year from the priority date:

- In 2005, the Form 1120S stated a net income[5] of $15,083.

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[4] The priority date in this matter is August 21, 2006. Therefore, the petitioner's 2005 tax return would not demonstrate the petitioner's ability to pay the proffered wage from the August 2006 priority date onward. However, in the absence of other information, the 2005 tax return will be considered generally.

[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage.

Additionally, USCIS records show that the petitioner has filed I-140 petitions for two other beneficiaries. The petitioner must demonstrate that it can pay the respective proffered wage for all sponsored workers.

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, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, USCIS 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.[6] 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.

In tax year 2005, the petitioner had net current assets of -$9,116. The petitioner did not provide any regulatory prescribed evidence for tax year 2006.

Therefore, from the date the Form ETA 9089 was filed with USCIS and the priority date was established, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The AAO notes that since the director did not address this issue in her decision, counsel has not presented any further evidence or commentary with regard to this issue.

Schedule K for tax year 2005, the petitioner's net income is found on Schedule K, line 17e for tax year 2005.

[6]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.

Further, the AAO would question whether the petitioner has sufficiently identified itself as the actual employer of the beneficiary. The director in her RFE requested evidence of the agreement between the petitioner and the healthcare facility where the beneficiary would be working. The record contains no employment agreement between the petitioner and the beneficiary that identifies benefits, length or terms of employment, indication of permanent full-time work and similar issues. The petitioner did submit a cover letter that stated the petitioner required the beneficiary's services to answer the nursing requirements of "our facility." In response to the RFE, the petitioner submitted a letter on its letterhead[7] dated November 30, 2006 that states the petitioner and [redacted] Flemington, New Jersey, will enter into a service agreement involving the beneficiary when his employment authorization is approved and he is issued a social security number. The letter further states that [redacted] will pay the petitioner for the beneficiary's services. This letter is signed by the petitioner's Vice President, and an unidentified person from [redacted] signed "noted" on the document. The Form ETA 9089 does identify the petitioner as the employer and identifies the primary worksite as [redacted]

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

> *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.

Additionally, 8 C.F.R. § 204.5(c) states the following: "*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part

[7] The letterhead identifies that the petitioner's "D/B/A" abbreviated name, [redacted], stands for "[redacted]

because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

The petitioner's letter submitted in response to the director's RFE is insufficient evidence to establish who will be the beneficiary's actual employer and evidence of the employer/employee relationship between the beneficiary and the petitioner.

Therefore, this matter will be remanded to the director for further consideration of the identity of the beneficiary's actual employer and the ability of the petitioner identified on the I-140 petition to pay the proffered wage. The director may request any additional pertinent evidence. The director must issue a new decision, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.