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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 137 51857 Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2005

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a medical staffing service. 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.

On appeal, the petitioner submits a brief and additional evidence.

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.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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. 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 Service.

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 March 27, 2003. The proffered wage as stated on the Form ETA 750 is \$22.17 per hour, which equals \$46,113.60 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 550 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, counsel submitted a letter, dated March 18, 2003, from the petitioner's president and CEO. That letter states that the petitioner has the ability to pay the proffered wage, citing the petitioner's 550 employees and its gross income. The president/CEO states that the petitioner's gross income is \$25

million. Counsel provided no additional evidence of the petitioner's ability to pay the proffered wage with the petition.

On May 7, 2003, the California Service Center requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. Specifically, the Service Center requested IRS printouts of the petitioner's tax returns for each year since 2002.

In response, Counsel submitted an IRS printout for 2002. The 2002 printout states that the petitioner declared ordinary income of \$584,366 during that year. The printout does not state the petitioner's 2002 end-of-year net current assets and does not give information from which it can be computed.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 30, 2003, denied the petition. In that decision, the director relied upon figures from the petitioner's 2001 and 2002 income tax returns.¹

On appeal, counsel reiterates the assertion that the petitioner is able to pay the proffered wage. Counsel cites the petitioner's gross income, the number of workers it employs, and its 2002 ordinary (net) income. Counsel also notes that 8 C.F.R. § 204.5(g)(2), as set out above, states that,

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.

Counsel notes that such a statement was submitted in the instant case. Counsel urges that the statement should be accepted as demonstrating the petitioner's ability to pay the proffered wage. In support of that position, counsel cites a non-precedent decision of this office.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect and will not be further addressed.

Counsel also reasserts the argument that, because the petitioner's net income exceeds the proffered wage, the petitioner has demonstrated the ability to pay the proffered wage.

Counsel further states that the beneficiary has worked for the petitioner since April of 2003. In support of that assertion counsel submits photocopies of 13 weekly pay stubs issued during 2003 showing payments to the beneficiary. The first of those pay stubs is dated April 25, 2003 and is for the week of April 14, 2003 to April 20, 2003. The last of those pay stubs is dated August 29, 2003 and is for the week of August 18, 2003 through August 24, 2003 and shows a year-to-day total paid of \$3,540.

¹ This office notes that the record of proceedings in this case did not then contain a copy of the petitioner's 2001 or 2002 tax returns. The director must have referred to copies of those returns found in the record of one of the other petitions then before the Service Center.

Simple division demonstrates that the beneficiary was paid between \$10 and \$13.04 per hour, exclusive of overtime pay. The pay stubs do not indicate who drew the corresponding checks. The petitioner's name does not appear on those pay stubs. The pay stubs appear to show that the beneficiary was not compensated for the weeks from May 19, 2003 through June 15, 2003, and from July 28, 2003 through August 10, 2003.

Counsel also submits calendars for April, May, and September 2003, showing the beneficiary's work assignments during those months. Those calendars appear to show that the beneficiary was in training during those months, rather than placed in a hospital or nursing facility.

Counsel also reasserts the argument that, because the petitioner's net income exceeds the proffered wage, the petitioner has demonstrated the ability to pay the proffered wage. This office notes that the petitioner filed approximately 140 petitions during 2003. In order to demonstrate the ability to pay the proffered wage, the petitioner must demonstrate the ability to pay the proffered wage of all of the aliens for whom it is petitioning.

Finally, counsel argues that the United States has an acute shortage of nurses, which consideration mitigates toward approval of the instant petition. That the United States has a shortage of nurses is confirmed by the DOL having placed registered nurses on the list of Schedule A occupations. That shortage does not, however, obviate the petitioner's obligation to demonstrate conformity with the statutes and regulations governing the instant visa category. Notwithstanding that the United States has a shortage of registered nurses, the petitioner must still demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

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 established that it employed the beneficiary intermittently from April to August of 2003 and paid her a total of \$4,781.54.

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, 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).

Counsel's reliance on the amount of the petitioner's gross receipts 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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, 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 the 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 business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be 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 net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$46,113.60 per year. The priority date is March 13, 2003. Evidence pertinent to the petitioner's finances prior to 2003 is not, therefore, directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

No copies of annual reports, federal tax returns, or audited financial statements were submitted pertinent to 2003. With the petition, however, the petitioner submitted the letters from its president/CEO and its CFO/controller stating that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that such a letter may suffice to demonstrate the petitioner's ability to pay the proffered wage. Although 8 C.F.R. § 204.5(g)(2) also states that CIS may require additional evidence in appropriate cases, the director did not explicitly state his reason for finding that the instant case was an appropriate instance to disregard the statements of the president/CEO and the controller/CFO and require additional evidence.

The director observed, however, that the petitioner has filed multiple alien worker petitions. In fact, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. The petitioner currently has more than fifty cases on appeal. This office finds that this large number of petitions was sufficient reason to require additional evidence.

The director based his decision on figures from the petitioner's 2001 and 2002 income tax returns. Because the priority date is during 2003, figures pertinent to the petitioner's financial performance during 2001 and 2002 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because those returns are the only reliable documentary evidence contained in the record pertinent to petitioner's ability to pay the proffered wage, however, they shall be accorded some evidentiary value.

During 2003 the petitioner paid the beneficiary \$4,781.54. The petitioner must demonstrate that it was able to pay the \$41,332.06 balance of the proffered wage.

During 2001 the petitioner declared a loss. If the petitioner had been obliged to pay the proffered wage during 2001 it would have been unable to pay any portion of it out of its income during that year. The

petitioner ended the year with negative net current assets. The petitioner would likewise have been unable to pay any portion of the proffered wage out of its net current assets during that year.

The petitioner declared ordinary income of \$584,366 during 2002. As the director observed, that amount is sufficient to pay the proffered wage to 13 beneficiaries with similar salaries. The petitioner, however, has recently filed petitions for 290 petitions. The petitioner's 2002 ordinary income, although substantial, is insufficient to show the ability to pay the proffered wages of such a large number of beneficiaries. Further, this office notes that more than 13 petitions were approved during 2003. The petitioner's 2002 ordinary income is insufficient to demonstrate the ability to pay the proffered wage. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Additional issues exist in this case, though, that were not addressed in the decision below.

Counsel states on appeal that "[the petitioner's] potential to earn more profit is propelled by the number of individuals it has in [its] pool [who] are ready for placement." The pay stubs submitted appear to indicate that the beneficiary has not been fully employed, contrary to the requirements of the pertinent immigration law governing the instant visa category. *See* 202(b)(3) of the Act. Aliens entering the United States pursuant to the instant visa category are not a pool of potential employees, to be employed and paid if and when the petitioner locates a suitable placement. Rather, the petitioner, by submitting the visa petition, is itself offering them full-time employment is to commence upon approval of the petition and entry into the United States, whether or not the petitioner is then able to place them at a client facility.

Further, the regulation at 20 C.F.R. § 656.20(g)(1) provides, 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 or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains no indication that the petitioner's nurses are represented by collective bargaining. The Form ETA 750 states, at Item 7, Address Where Alien Will Work, "see Exhibit 2 (Petitioner's Notice of

Available Positions).” Exhibit two is the posting of the proffered position. That posting states that the beneficiary will “report to client facilities as directed by Petitioner.” The certification attached to that posting states that it was posted at the petitioner’s offices for a period of ten consecutive days. The certification does not state the dates during which the notice was posted. The certification itself, however, is dated March 6, 2003.

The beneficiary will not be employed at the petitioner’s offices but at some other location. The posting was not, then, posted at the place of employment as required by 20 C.F.R. § 656.20(g)(1). The petition should have been denied for this additional reason.

The petitioner’s failure to name the facility at which the beneficiary will be employed raises yet another issue. The petitioner is required, by 8 C.F.R. § 204.5(g)(2), to demonstrate that the proffered wage is at least as high as the predominant wage. The regulation at 20 C.F.R. 656.40(a)(2)(i) states that the predominant wage is the average wage paid to workers similarly employed in the area of intended employment. In the absence of any statement in the record of the actual location at which the beneficiary would work, this office is unable to determine whether the petitioner is offering the beneficiary the average wage for similarly employed workers in the area of intended employment.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS’s jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner’s satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulation at 20 C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. For this additional reason, the petition should have been denied.

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 petitioner also failed to demonstrate, in accordance with 8 C.F.R. § 204.5(g)(2), that wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. The petitioner failed to demonstrate that it is able to pay the wage proffered to the beneficiaries for whom it has petitioned. The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). For all of these reasons the petition may not be approved.

ORDER: The appeal is dismissed.