



U.S. Citizenship
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Services

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FEB 28 2005



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 149 52466

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

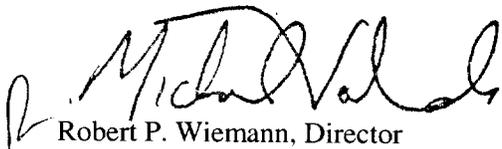
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to §
203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is an employment/staffing agency. 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. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.20 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Schedule A includes aliens who will be employed as professional nurses.

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, counsel submitted additional evidence and maintains that the petitioner's financial documentation demonstrates its continuing ability to pay the proffered salary.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 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 [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(d) further provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of

Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]."

Eligibility in this case rests, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is April 28, 2003. The beneficiary's salary as stated on the labor certification application is \$23.00 per hour or \$47,840 per annum. The visa petition states that the petitioner was established in 2001 and had, as of the date of filing, two employees.¹ It claims a gross annual income of \$250,000 and a net annual income of \$100,000. The ETA 750B, signed by the beneficiary on April 16, 2003, does not indicate that she has worked for the petitioner.

The petitioner initially submitted two copies of a business checking account statement dated December 20, 2002 and January 23, 2003, respectively, as well as three copies of a "business market rate" account for the three months between December 31, 2002 and March 31, 2003, as evidence in support of its ability to pay the annual proffered wage of \$47,840 per year. On June 13, 2003, the director requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director advised the petitioner that this evidence shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner was advised to provide this evidence from 2002 until the present.

Pursuant to 20 C.F.R. § 656.10(a)(2), the director also requested evidence from the petitioner that the alien beneficiary either possessed a full and unrestricted nursing license in her state of intended employment or who had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination.

In response to the director's request relating to the alien beneficiary's licensure credentials, the petitioner resubmitted a copy of a notification letter from the CGFNS, dated February 12, 2003, that had been initially provided with the petition. It merely acknowledges receipt of the alien's application for credentials verification has been received and that a permanent identification number has been assigned to her. It does not reflect that the alien has passed the CGFNS examination. Counsel's transmittal letter, dated September 4, 2003, also indicates that the beneficiary has neither taken the CGFNS examination or secured a license from the California Board of Registered Nursing.

The petitioner additionally provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2002. It shows that the petitioner reported total assets of \$151,131, no gross receipts or sales, \$325 in interest income, \$325 in total income, salaries and wages of \$15,125, \$369 in depreciation, \$7,594 in other deductions, and \$23,088 in total deductions. The petitioner reported -\$22,763 in net income. Schedule L, reflecting the petitioner's current assets and current liabilities is blank. The difference between current assets and current liabilities is the value of the petitioner's net current assets at the end of the year.² It is a measure

¹ The record indicates that [REDACTED] signed the visa petition on behalf of the petitioner. Counsel who is representing the petitioner is, himself, the 100% shareholder of the petitioner as identified on the tax return. It is unclear if these two individuals are also considered the two employees as of the date of filing.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts

of a corporate petitioner's liquidity during a given period, and, besides net income, is an alternative method of reviewing a petitioner's ability to pay the proffered wage. If a corporation's end-of-year 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 petitioner also provided a copy of the employer's federal quarterly tax return for the quarter ending June 30, 2003. It shows that the petitioner paid total wages of \$17,357 during that quarter. An Internal Revenue Service (IRS) change of address form, dated July 15, 2003, reflects that the petitioner's new mailing address and business location is the same as the petitioner's counsel.

The petitioner also included a document labeled as an annual report, which was accompanied by various unaudited profit and loss and balance sheets, as well as a salary schedule for 2002 and part of 2003. The petitioner further provided additional copies of its bank statements for both accounts. The business market rate account statements cover 2002 until July 31, 2003. The business checking account statements cover the period between February 2002 and August 21, 2003.

The director denied the petition on September 29, 2003, concluding that the petitioner's 2002 net income as reported on its federal tax return failed to demonstrate that either the -\$22,763 reported as the petitioner's net income, or its unreported net current assets were sufficient cover the beneficiary's proposed annual salary.

On appeal, counsel states that the page(s) 7 and 8 of the attachments were inadvertently omitted from the petitioner's 2002 federal tax return. Counsel states that these attachments, which constitute the previously submitted annual report, were not originally required to be submitted in accordance with the instructions on item 13, Schedule K, whereby a filer can omit Schedule L, M-1, and M-2 if its total receipts and total assets for the year were less than \$250,000. These attachments are labeled as other information relevant to Form 1120, Schedule K, line 13, and Form 1120, line 30. Counsel observes that they show that the ratio of current assets to current liabilities (excluding a long-term payable) results in \$91,864 available to pay the proffered wage in 2002. Counsel further provides copies of various unaudited financial statements previously submitted to the underlying record. He projects that the petitioner will place an additional five (5) nurses in the next twelve months, who, along with the beneficiary will generate additional income.

At the outset, it is noted that none of the financial statements offered to the director or submitted on appeal were audited. Unaudited financial statements are not persuasive evidence of a petitioner's ability to pay the certified wage. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be

payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

considered *prima facie* proof of the petitioner's ability to pay the proffered wage. There is no evidence of such employment contained in this record.

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 review 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). Showing that the petitioner's gross receipts or cumulative wages paid to other employees exceeded 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 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 that 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. (Original emphasis.) *Chi-Feng* at 537.

While the balances in the petitioner's bank statements may also be reviewed, it is noted that bank statements offer a partial profile of a petitioner's financial status as they do not reflect other encumbrances which may affect the petitioner's available resources and are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. It is further noted that to the extent that bank statements may represent a portion of a petitioner's cash assets during a given time period, these kinds of assets are generally included as part of a more complete profile of a corporate petitioner's current assets contained on Schedule L of the corresponding corporate tax return. In this case, it is noted that the petitioner's cash in the year 2002 is already included on page 7 of the tax return attachment submitted on appeal.

Although counsel states that the employment of the beneficiary will generate additional revenue, no detail or documentation has been provided to specifically establish how such employment will significantly increase the petitioner's profits. Further, the continuing ability to pay the proffered wage must be established as of the priority date, not at some later time under a new set of facts. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's hypothesis cannot be concluded to be considered to constitute evidence of the petitioner's continuing ability to pay the proffered wage. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the instant matter, as noted by the director, the petitioner's 2002 net income of -\$22,763 is insufficient to pay the proffered wage of \$47,840. That said, it is noted that, besides this petition, CIS electronic records indicate that this petitioner has filed at least six other immigrant worker petitions since 2003. Two were approved in 2003. It is the petitioner's burden to show that it has had sufficient income to continually pay an alien's salary as of the priority date(s) of each petition. If it files for multiple alien beneficiaries, it must demonstrate the ability to pay for additional alien workers. Although the petitioner has projected that it wants to hire more alien nurses, the AAO cannot identify from the electronic records available to it exactly what positions these beneficiaries have filled, or are to fill, and what the proffered wage is in each petition. Without more information, the AAO cannot specifically determine whether the petitioner's net current assets would be sufficient to cover the beneficiary's proffered wage in this case, as well as other pay the wages of other specific beneficiaries.

It is also noted that the petitioner is a staffing agency and not a direct provider of medical services. Part 6 of the visa petition and Part 7 of the labor certification application directs one to the "notice of available positions" to find out where the alien will work. This document, in turn, states that five vacancies are available as of February 5, 2003 for daily or weekly assignments at various hospitals or facilities in San Diego County. The record fails to contain any pre-existing contract for this specific alien's services between the petitioner and a named medical service provider corroborating that a realistic job offer of *permanent full-time* employment has existed as of the priority date. It is also observed that the posting notice contained in the record does not indicate whether the job opportunity notice was posted at the actual location of the alien's employment, rather than only at the petitioner's office.³ The purpose of requiring an employer to post notice of the vacant position is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. See 20 C.F.R. § 656.10.

A final issue which was not discussed in the director's decision to deny the petition, but which the petitioner was put on notice by the director's request for evidence, is the failure of the petitioner to demonstrate that the beneficiary possessed the requisite licensure credentials as of the time of filing the petition. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

³ The AAO understands the reference to "facility or location of employment" at 20 C.F.R. § 656.20(g)(1)(ii) to mean the actual location of employment; a distinction that becomes significant where the petitioner is not a direct medical care provider itself, but acts as a staffing firm for the third-party medical care providers.

It is further noted that 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*, 229 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 regulatory requirement for professional nurse U.S. licensure is found at 20 C.F.R. § 656.22(c)(2):

An employer seeking a Schedule A labor certification as a professional nurse (§656.10(a)(2) of this part) shall file, as part of the labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.⁴ Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

This record in this case does not contain evidence that the beneficiary has passed either the CGFNS or NCLEX-RN examination, or holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment. Therefore, the petitioner has not established that the alien beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. Such evidence was not submitted with the petition filed on April 10, 2003 and was not subsequently submitted in response to the director's request for such evidence. Rather, the evidence suggests only that the alien beneficiary had been in contact in the CGFNS. Moreover, it is also noted that the application for labor certification requires in Item 15 that the applicant must be licensed in California. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed*. (Emphasis supplied)

The petitioner's response to the director's request for evidence to show that the beneficiary possesses the requisite nursing licensure credentials was insufficient to demonstrate her fulfillment of this requirement as of the priority date of the preference petition. Although other problems of the petition are noted above and could

⁴ On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. *See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

possibly be addressed on remand, the deficiency in the licensure evidence was sufficiently brought to the petitioner's attention for it to be considered as a ground for denial. In view of the foregoing, the AAO concurs with the director's decision to deny the petition, but bases its conclusion on the petitioner's failure to establish that the beneficiary possessed the requisite credentials at the time of filing the visa petition. It cannot be concluded that the petitioner has established that the alien beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. Therefore the beneficiary does not qualify for the visa qualification sought.

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

ORDER: The appeal is dismissed.