

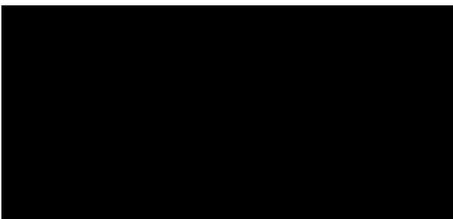
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U.S. Citizenship  
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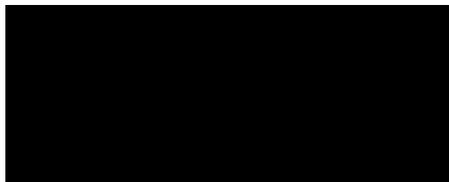
FILE: EAC 02 247 53166 Office: VERMONT SERVICE CENTER Date: **JUL 22 2005**

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse at a yearly salary of \$53,092.00. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. 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.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Furthermore, 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 20 C.F.R. § 656.10(a)(2) states that, professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its 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.

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 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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 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). Here, the petition was filed on July 22, 2002.

With the petition, the counsel submitted documents pertaining to the beneficiary's qualifications, a support letter from petitioner confirming the employment position, a copy of the annual review for petitioner and other information concerning the business.

The Service requested consistent with regulation 8 C.F.R. § 204.5(g)(2) copies of the 2001 Form W-2 Wage and Tax Statement issued to the beneficiary to show the total salary paid by petitioner, a copy of the 2001 federal corporate tax return with schedules and attachments, and, a copy of the latest annual report.

In response, counsel submitted a letter from a certified public accountant and the 2002 annual review of GF/Pennsylvania Properties Inc.<sup>1</sup>

The director determined that evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date denied the petition on August 28, 2003.

The director stated:

Evidence submitted does not show that you have the ability to pay the offered wage. You have submitted an internally generated [financial] statement that was neither audited nor verified in any way. Though requested, you have failed to submit a copy of the 2001 (or latest) Form W-2 Wage and Tax Statements issued to the beneficiary, a copy of 2001 (or latest) U.S. federal corporate income tax returns or a copy of the latest annual [report] that is accompanied by audited financial statements.

owns three facilities, one of which is the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the three years prior to filing the petition. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Counsel has not explained why tax returns were not submitted.

On appeal, counsel asserts that:

[The petitioner] asserts that when the alien is making \$68,564.08 a year currently working for the ... [petitioner] and [she] has a W-2 working part [time] for \$39,170.50 for 2002, along with an audited financial statement for a company over \$10,000,000.00 worth of gross revenue, supported by a letter from a certified public accountant, that there is sufficient evidence to show to some degree of certainty that the business is financially viable and can pay the alien's wage....

Along with Form I-290B counsel submitted a short statement of the petitioner's contentions to counter the Service Center's finding that it did not have the ability to pay the proffered wage. Counsel submitted the beneficiary's most recent pay statement demonstrating that the beneficiary had been paid for approximately the last 8 months prior to September 18, 2003 at a wage rate indicating a yearly wage of \$68,564.08, and also submitted beneficiary's W-2 Wage and Tax Statement for 2002 wherein she worked part time for petitioner and earned \$38,630.50 in wages.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Petitioner has offered evidence that it paid the beneficiary a wage for 8 months of employment in 2003 at a rate that is more than the proffered wage. In 2003, the petitioner paid the beneficiary the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now 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 v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Counsel submitted a financial review of [REDACTED] based upon audited financials by an accounting firm stating for year 2001 a net income of \$303,610.00 in 2001, and in 2002, a net income of \$129,438.00 for the petitioner nursing home business.<sup>2</sup> Therefore for the two years for which data has been provided, the petitioner had the ability to pay the proffered wage of \$53,092.00

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 met that burden.

**ORDER:** The appeal is sustained.

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<sup>2</sup> In its cover letter dated February 4, 2003, addressed by The [REDACTED] to the bondholders of [REDACTED] trustee and [REDACTED] it declares in pertinent part: "... The financial statements and management information, as of June 30, 2002, were neither audited by us nor independently verified by us in any way and, accordingly, we do not express an opinion on them ...." The petitioner has submitted the "... periodic review of the operating results of [REDACTED]" based upon data from [REDACTED] a management company, and an auditing company which is [REDACTED] Counsel states that the above referenced annual review include audited data prepared by an audit firm. Therefore, although The Guardian Foundation review is not audited, the data within it pertinent to each of three nursing home facilities that includes petitioner is audited.