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U.S. Citizenship
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Services

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MAR 08 2005



FILE: WAC-03-100-50335 Office: CALIFORNIA SERVICE CENTER Date:

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

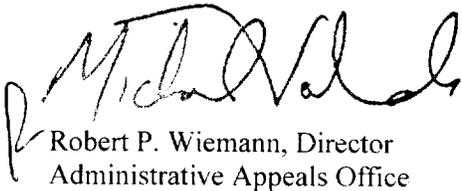
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The visa petition will be approved.

The petitioner is a hospital. The petitioner states that it currently employs 403 full-time and 205 part-time employees and states it has a gross annual income of \$43 million on its visa petition. It seeks to sponsor the beneficiary 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 director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date because it only submitted unaudited financial statements for 2002.

On appeal, counsel explains that financial audits are performed during the third and last quarter of each year and thus, audited financial statements were not available for 2002 at the time of responding to the director's request for additional evidence. Audited financial statements were provided to the director for 2000 and 2001 previously.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on February 7, 2003. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 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. Also, according to 20 C.F.R. § 656.10, 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 employment¹.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3)².

¹ Evidence in the record of proceeding contains proof that the beneficiary passed the Qualifying Examination portion of CFGNS prior to filing the petition.

² Evidence in the record of proceeding includes a posting notice that complies with the regulatory

The regulation at 8 C.F.R. § 204.5(g)(2) states the following in 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). The beneficiary's salary as stated on the labor certification is \$15.00 per hour, which equates to \$31,200 per annum.³ The pay rate of \$23.00 per hour upon obtaining a state license equates to \$47,840.

In support of the petition, the petitioner submitted a letter stating the following:

[The petitioner] is a 152-bed non-tertiary medical/surgical hospital and was formerly known as Echo Park Hospital. The hospital reopened in January 2000 as [the petitioner] and is owned by [REDACTED]. In line with top management's effort and commitment to provide high quality services to existing and prospective patients, the organization realigns its focus to provide all patients' [sic] the freedom to choose healthcare programs that fit their needs, the freedom to choose alternative or traditional medical programs and other positive choices. . . .

[The petitioner] has a total of 608 employees, with 403 employees working on a fulltime basis and 205 working part-time. For the year ending 2001, the hospital generated a gross income of \$430 [m]illion and for month ending June 2002, it has an estimated gross revenue of \$23 [m]illion.

The petitioner provided documents concerning its organization and a newspaper article from The Los Angeles Business Journal for the week of January 28, 2002, titled "Inner-City Hospital Succeeds Where Others Have Failed." That newspaper article states that the petitioner reopened a hospital that was abandoned by [REDACTED] which "got out of the hospital business" seven years prior to the new hospital's re-opening. Reporting that the petitioner got off to "a shaky start," the article reports that the petitioner "expects to report a pre-tax profit for 2001 of \$8 million, compared with a loss of \$1.1 million the year before." The article reports that the petitioner's patients qualify for Medicare or Medi-Cal, and has structured itself with a pediatric center after determining the neighborhood has a high percentage of young mothers and women of child-bearing age, free parking, no emergency room, and other features that limits its overhead. Its owners also infused \$11

requirements.

³ It is noted that the posting notice indicated that a wage rate of \$23.00 per hour would be paid when the beneficiary obtains a state license. Since the beneficiary may not work until she has her license, she would be paid the \$23.00 pay rate, which meets the prevailing wage rate as determined by the Department of Labor (DOL).

million in upgrading its facilities. The article states that the petitioner is structured like an urgent care clinic, "which gets heavy use because many . . . residents don't have primary care physicians or insurance."

The petitioner provided its audited balance sheets for 2000 and 2001, which are not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, which is 2003; however, presumably information on 2003 would not have been available at the time of filing. Those balance sheets reflect that the petitioner had total revenues of \$41,951,148 in 2001 and \$16,859,887 in 2000. Additionally, the petitioner paid \$17,028,046 in wages and salaries in 2001 and \$11,648,790 in wages and salaries in 2000. The petitioner reported a loss in 2000 but a net income of \$2,372,558 in 2001; it reported negative net current assets in both years.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 4, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The petitioner specifically sought evidence pertaining to 2002⁴.

In response, the petitioner submitted unaudited financial statements for 2002 and previously submitted evidence and other documents concerning its business organization.

The director again requested additional evidence on June 21, 2003, seeking the petitioner's audited financial statements for 2002. Counsel submitted a letter stating, "audited financial statement [sic] ending December 2002 of our client is not yet available until December of this year."

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 21, 2003, denied the petition.

On appeal in September 2003, counsel submits previously submitted evidence and explains that audited financial statements are still unavailable for 2002.

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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year.

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)

⁴ In an internal memorandum, the director noted that it sought additional evidence in his discretion since the petitioner was recently incorporated in 2000. Thus, the director did not accept a letter from the petitioner that the fact it employed over 100 employees was sufficient evidence of its continuing ability to pay the proffered wage beginning on the priority date.

(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 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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.⁵ 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 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 has not demonstrated that it paid any wages to the beneficiary. The petitioner had ample net income in 2001 to meet the proffered wage. It has a reasonable explanation for its failure to submit audited financial statements for 2002, but its unaudited financial statements are in keeping with its past information⁶. Its financial statements for 2000 and 2001, along with a business journal's review of its business reputation and financial situation, illustrate a hospital with very large revenues that meets substantial payroll obligations. It grossed approximately \$41 million in 2001 and \$17 million in 2000 and paid approximately \$17 million and \$12 million in wages and salaries in 2001 and 2000, respectively. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). This is not a small, fledgling business having difficulty making ends meet. It is in the lucrative health care service industry, a hospital in

⁵ 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.

⁶ Its management reports approximately \$40 million in total revenues and \$18 million in wages and salaries paid in 2002 and revenues of \$18 million for the first six months in 2003 as well as \$8 million in wages and salaries paid.

Los Angeles that has revamped its facility, service offerings and methodologies, considered its patient population, and is thriving. While the AAO considers that the director properly exercised discretion in seeking additional evidence, we will also consider that the director did not really need to request such evidence since the hospital was in operation prior to its reopening, showed strong financial figures in its audited financial statements with its initial submission, as well as evidence of a large cash infusion and positive growth. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage beginning on the priority date.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has sustained that burden.

ORDER: The appeal is sustained. The petition is approved.