

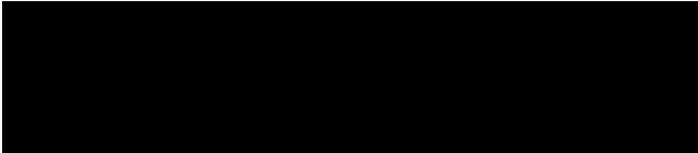
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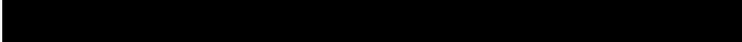
U.S. Citizenship
and Immigration
Services

Handwritten signature/initials



MAR 28 2005

FILE:  Office: CALIFORNIA SERVICE CENTER Date:
WAC-02-246-54000

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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.

Handwritten signature of Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. After discovering that the approval had been made prior to the receipt of the petitioner's response to an earlier request for evidence, the director served the petitioner with notice of intent to revoke the approval of the petition. In a Notice of Revocation, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a home health care firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for 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 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 states that the petitioner's evidence establishes its ability to pay the proffered wage, including the information on the petitioner's tax return for 2002, which was not yet available prior to the director's decision but a copy of which is submitted on appeal.

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 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) 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. The priority date for Schedule A occupations is established when the I-140 is properly filed

with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 8 C.F.R § 204.5(d). The priority date in the instant petition is July 31, 2002. The proffered wage as stated on the Form ETA 750 is \$24.42 per hour, which amounts to \$50,793.60 annually. On the Form ETA 750B, signed by the beneficiary on May 31, 2002, the beneficiary did not claim to have worked for the petitioner.

On the I-140 petition, the petitioner claimed to have been established in 1966, to have a gross annual income of \$2.1 million and to currently have 40 employees. The item on the petition for net annual income was left blank.

In support of the petition, the petitioner submitted a copy of a position opening notice with a posting certificate dated May 31, 2002; a letter dated May 31, 2002 from the petitioner's president; a copy of a letter dated December 31, 2001 to the beneficiary from a person in the Licensing Services office of the Physical Therapy Board of California, with attached score report for the California physical therapy examination; a copy of a letter dated August 13, 2001 to the beneficiary from an analyst with the Physical Therapy Board of California; a copy of a letter dated July 27, 2001 from the International Education Research Foundation, Inc., Credentials Evaluation Service; a copy of the beneficiary's transcript dated November 10, 1993 for his studies at Perpetual Help College, Manila, Philippines; a copy of a Certificate of Clinical Internship of the beneficiary dated February 28, 1997 issued by the University of the East, College of Physical Therapy, Quezon City, Philippines; a copy of the beneficiary's Bachelor of Science in Physical Therapy degree granted on April 15, 1997 by the University of the East, College of Physical Therapy; a copy of the beneficiary's license as a physical therapist issued on August 25, 1997 by the Philippines Professional Regulation Commission; a copy of the beneficiary's score report dated August 7, 1997 on the physical therapist licensure examination of the Board of Physical and Occupational Therapy, Philippines Professional Regulation Commission; a copy of a Certification dated April 10, 2001 of the beneficiary's apprenticeship as a physical therapist at the University of the East, Ramon Magsaysay Memorial Medical Hospital; and a copy of the beneficiary's physical therapy license card issued on August 25, 1997 by the Philippines Professional Regulation Commission.

In a request for evidence (RFE) dated October 29, 2002 the director requested additional evidence pertaining to the petitioner's ability to pay the proffered wage.

After the RFE was issued, the beneficiary filed a Form I-485 Application to Register Permanent Resident or Adjust Status. In support of that application, the beneficiary provided duplicate copies of many of his credentials documents which had been submitted with the I-140 petition. In addition, the beneficiary submitted two copies of his physical therapist license card issued by the Physical Therapy Board of California, with expiration date of January 31, 2004. The I-485 application was received by CIS on November 8, 2002.

In response to the RFE in the instant petition, counsel submitted a letter dated February 11, 2003 and the following evidence: a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001; a copy of the petitioner's Form 100S California S Corporation Franchise or Income Tax Return for 2001; a copy of a facsimile transmission dated December 30, 2002 to the petitioner's president from a certified public accountant; a copy of a letter dated December 27, 2002 from a certified public accountant; a copy of a Federal Register notice dated August 5, 1999 on home health association reimbursement rules; a copy of a document entitled CCH General Introduction discussing Medicare reimbursement accounting rules; and copies of the petitioner's Form DE 6 California Quarterly Wage and Withholding Reports for the first three quarters of 2002.

In a second RFE dated March 4, 2003 the director requested further evidence pertaining to the petitioner's ability to pay the proffered wage from July 31, 2002 to the present. The director specifically requested evidence in the form of annual reports, signed federal tax returns, or audited financial statements. The director also requested copies of the petitioner's California Quarterly Wage and Withholding Reports for the most recent two quarters.

Before the petitioner responded to the second RFE, the director approved the petition on March 20, 2003. A copy of the approval notice is no longer in the record, but attached to a file copy of the second RFE is a printout of a CIS electronic record which shows that the approval notice was sent to the petitioner on March 20, 2003.

In response to the second RFE, counsel submitted a letter dated May 27, 2003 inquiring whether the director wished the petitioner to submit evidence as requested by the RFE, since the requested information had already been submitted and since the petition had already been approved.

Following receipt of counsel's letter dated May 27, 2003, the director issue a Notice of Intent to Revoke (ITR) dated June 25, 2003. In the ITR, the director stated that "the I-140 petition was inadvertently approved on March 20, 2003 before the Petitioner's response to the Service Notice dated March 4, 2003 was received." The director afforded the petitioner thirty days to offer evidence in support of the petition and in opposition to the proposed revocation.

In response to the ITR, counsel submitted a letter dated July 1, 2003 stating that the petitioner's tax return for 2002 had not yet been prepared, and stating that the most recent Quarterly Wage and Withholding Reports had already been submitted. The petitioner's submissions in response to the ITR were received by CIS on July 18, 2003.

In a Notice of Revocation dated August 26, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and revoked the petition.

The petitioner's I-290B Notice of Appeal was received by CIS on September 17, 2003. On the Notice of Appeal, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. Counsel later submitted a brief and additional evidence consisting of a written declaration dated September 23, 2003 by the petitioner's president; and a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002.

Counsel states on appeal that the petitioner's evidence establishes its ability to pay the proffered wage. Counsel states that the most relevant tax return is the 2002 return, which was not yet available prior to the director's decision but a copy of which is submitted on appeal. Counsel further states that the evidence concerning the petitioner's gross receipts, its compensation of officers and other wage expenses, and its depreciation expenses is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 had previously employed the beneficiary. The beneficiary did not claim on the ETA 750B to have been previously employed by the petitioner, and the beneficiary's name does not appear on any of the Form DE 6 Quarterly Wage and Withholding Reports in the record for the first three quarters of 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The only federal tax return in the record before the director was the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001. The record before the director closed on July 18, 2003 with the receipt of the petitioner's submissions in response to the ITR. According to counsel's letter dated July 1, 2003, the petitioner had requested an automatic extension of time until September 2003 to file its tax return for 2002. Although no documentation of that request was submitted for the record, the petitioner had also requested an extension for its 2001 tax return until September of 2002, shown by a Form 7004 attached to the Form 1120S for 2001, therefore counsel's assertion has some support in the record. Therefore it appears that as of July 18, 2003, the petitioner's most recent tax return was that for 2001. Although 2001 is the year before the priority date, it is reasonable to consider the most recent evidence available in evaluating the petitioner's ability to pay the proffered wage.

The evidence indicates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the Form 1120S U.S. Income Tax Return for an S Corporation. The instructions on the Form 1120S state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Form 1120S Schedule K states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).*

In the instant petition, the petitioner's tax returns indicate income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions

which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income. The IRS instruction to line 23 states that a figure is required to be entered on that line only by S corporations which are required to complete Schedule M-1. For an S corporation which does not enter a figure on line 23 of its Schedule K for a given year, its net income would be the total of the figures shown on lines 1 through 6 of the Schedule K, minus the items listed in the instruction to line 23 of the Schedule K, namely the figures on lines 7 through 11a and on lines 15g and 16b of the Schedule K.

In the instant case, the petitioner's Form 1120S tax return for 2001 shows the amount of -\$80,836.00 on line 23, Schedule K, reflecting a net loss. Since that figure is negative it fails to establish the petitioner's ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L attached to the petitioner's Form 1120S tax return for 2001 yield the figure of -\$190,951.00 for net current assets for the end of 2001. Since that figure is negative, it also fails to establish the ability of the petitioner to pay the proffered wage.

The record also contains a copy of a letter dated December 27, 2002 from a certified public accountant explaining Medicare cost reimbursement policies as they apply to the petitioner. The letter states that from the petitioner's inception until October 1, 2000 the petitioner operated under a cost reimbursement system which permitted the agency to no more than break even. However, the letter fails to state the reimbursement system applicable to the petitioner after October 1, 2000. The record also contains a copy of a Federal Register notice dated August 5, 1999; and a copy of a document entitled CCH General Introduction discussing Medicare reimbursement accounting rules. The Federal Register notice discusses a technical change to home health association reimbursement rules, as in effect prior to October 1, 2000. The CCH General Introduction contains no indication of the time period applicable to the accounting rules it summarizes. The petitioner's evidence fails to explain the relevance of the foregoing information to the issue of the petitioner's ability to pay the proffered wage beginning on the priority date of July 31, 2002.

Attached to the accountant's letter is an analysis of the petitioner's finances for 2000 and 2001 showing separately the amounts of expenses for compensation of officers and for depreciation. The accountant's analysis of the petitioner's finances is not an audited financial statement, therefore it is not one of the types of acceptable evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2). Nonetheless, with regard to the year 2001, the figures in the accountant's analysis are the same as the corresponding categories on the petitioner's Form 1120S tax return for 2001. Therefore the accountant's analysis adds no information for 2001 beyond that contained in the petitioner's tax return for that year.

Where a petitioner's evidence does not establish sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the

circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant petition, counsel asserts that the petitioner has the ability to pay the proffered wage by reducing its wage costs to other persons, if necessary, including its compensation of officers. The petitioner's Form 1120S tax return for 2001 shows compensation of officers on line 7 in the amount of \$275,975.00. Supporting schedules show that the owner of 85% of the petitioner's shares is [REDACTED] and that Ms. [REDACTED] received \$258,040.00 in officer's compensation in 2001. The supporting schedules show that the owner of 15% of the petitioner's shares is [REDACTED] and that Ms. [REDACTED] received \$17,935.00 in officer's compensation in 2001.

Since [REDACTED] held a controlling interest in the petitioner, she had the authority to direct the allocation of the petitioner's expenses, subject to its available resources. Ms. [REDACTED] receipt of compensation of \$258,040.00 resulted in a net loss to the petitioner of -\$80,836.00. Deducting that loss from Ms. [REDACTED] compensation leaves \$177,204.00 in available income for 2001. That amount is greater than the proffered wage of \$50,793.60. If the instant petition were the only one filed since 2001, the petitioner's evidence might be sufficient to establish its ability to pay the proffered wage, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioner, however, has filed numerous other petitions since 2001.

Although the year of the priority date is 2002, the petitioner's most recent financial information in the record before the director pertained to the year 2001, therefore all petitions filed by the petitioner since 2001 must be considered relevant when evaluating the director's decision.

CIS electronic records show that the petitioner has filed eight I-140 petitions since January 2001, and that five of those petitions were approved and two were denied. The other I-140 petition is the instant petition, which was initially approved but for which the approval was later revoked. In addition to the instant appeal, one of the denied petitions is now pending before the AAO on appeal. CIS electronic also show that the petitioner has filed thirty two I-129 petitions since January 2001.

Even though the evidence in the instant case indicates financial resources of the petitioner sufficient to pay the beneficiary's proffered wage, it is necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. For I-129 petitions, which pertain to temporary workers, the regulations do not require evidence to establish a petitioner's ability to pay the proffered wages. Nonetheless, the added costs to a petitioner of hiring temporary workers authorized by I-129 petitions are relevant to any I-140 petitions for permanent workers filed by that same petitioner, since the regulations do require the petitioner to establish its ability to pay the proffered wages to the beneficiaries of any I-140 petitions.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-129 and I-140 petitions filed by the petitioner, nor about the priority dates of any of the I-140 petitions, nor about the present employment status of other potential beneficiaries. Lacking such evidence, the record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In his Notice of Revocation, the director analyzed the petitioner's net income for 2001 and correctly found that it indicated a loss. The director noted the absence of evidence pertaining directly to the period beginning on the priority date of July 31, 2002, and found that the petitioner's evidence failed to establish its ability to pay the proffered wage during the relevant period. The director failed to discuss the petitioner's net current assets, or to make any analysis of the petitioner's overall business circumstances under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612. Moreover, the director failed to note the existence of other petitions filed by the same petitioner since 2001. The director's analysis was therefore incomplete. Nonetheless, for the reasons discussed above, the director's finding that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period was correct, and the director's decision to revoke the petition was also correct, based on the evidence in the record before the director.

On appeal, counsel submits a written declaration dated September 23, 2003 by the petitioner's president, and a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002. Counsel asserts that the Form 1120S tax return for 2002 was not available prior to the director's Notice of Revocation. The written declaration by the petitioner's president discusses the filing date of the petitioner's 2002 taxes and provides a description of the petitioner's business operations similar to the description contained in the president's letter dated May 31, 2002 submitted previously for the record. Since both documents submitted on appeal contain information not available prior to the Notice of Revocation, neither document is precluded from consideration on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Although some of the information in the president's declaration was apparently available prior to the Notice of Revocation, the entire document will be considered by the AAO.

The declaration of the petitioner's president provides information on the cost reimbursement system under which the petitioner receives payments under the Medicare system. The information in that statement is sufficient to establish that when the beneficiary is working under the Medicare program his salary costs will be reimbursed to the petitioner. But the declaration by the petitioner's president provides an insufficient basis to establish that Medicare assignments for the beneficiary will be sufficient to occupy him on a full-time, permanent basis. The DE 6 Quarterly Wage and Withholding Reports in the record for the first three quarters of 2002 show that the number of employees on the petitioner's payroll varied significantly from month to month during those three quarters. The numbers of employees for each month are shown on the first page of each quarterly report. The numbers of employees for each month are as follows: 50 for January, 35 for February, 33 for March, 47 for April, 45 for May, 46 for June, 40 for July, 37 for August and 36 for September. Those variations in the number of employees indicate significant fluctuations in the petitioner's workload from month to month. Therefore the

petitioner's evidence fails to establish that Medicare assignments will be continuously available for the beneficiary on a full-time, permanent basis.

With regard to the petitioner's net income for 2002, the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 shows the figure of -\$13,005.00 on line 23, Schedule K, reflecting a net loss. That figure therefore fails to establish the petitioner's ability to pay the proffered wage during the relevant period. Calculations based on the Schedule L attached to the Form 1120S yield a figure of -\$223,374.00 for net current assets for the end of 2002. Since that figure is negative, it also fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

Other schedules attached to the petitioner's 2002 federal tax return show that [REDACTED] remained an 85% shareholder of the petitioner in 2002, and that Ms. [REDACTED] received compensation as an officer in the amount of \$127,500.00 that year. After deducting the petitioner's net loss of -\$13,005.00, the remaining available net income for 2002 was \$114,495.00. That amount is greater than the proffered wage of \$50,793.60. If the instant petition were the only one filed by the petitioner since 2002, the petitioner's overall financial information might be sufficient to establish its ability to pay the proffered wage, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612. However, as noted above, the petitioner has filed numerous I-129 and I-140 petitions since 2001. Of those petitions, five I-140 petitions, including the instant petition, and twenty-six I-129 petitions have been filed since January 2002, that is, since the beginning of the year of the priority date. As noted above, the record in the instant petition contains no information about the proffered wages in any of the other petitions filed by the petitioner, nor about the employment status of any of the beneficiaries of the other petitions filed by the petitioner. Although the petitioner's evidence submitted on appeal provides more recent financial information for the petitioner than was available prior to the director's Notice of Revocation, the record on appeal still fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition during the relevant period.

Beyond the decision of the director, the evidence in the record fails to establish that the petitioner has complied with the notice requirements in Department of Labor regulations.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

- (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
- (b) The Application . . . 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 § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 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.

(Emphasis added).

In the instant petition, the Form ETA 750A, block 7, states the address where the alien will work as "At various addresses in Los angeles [sic] County." In a letter dated May 31, 2002, the petitioner's president states:

[The petitioner] is a business that provides home health care to individuals in Los Angeles County. We provide skilled nursing cares as well as other health related services including Physical Therapy Services. The services are for individuals of its contracted health care facilities, such as hospitals, convalescent centers, nursing homes and other health care related facilities.

(Letter dated May 31, 2002 from the petitioner's president, page 1).

In his declaration submitted on appeal, the petitioner's president states:

[The petitioner] was established in 1996 as a home health agency. It provides skilled nursing care as well as other health related services including physical therapy services. The services are for individual patients of health care facilities, such as hospitals, convalescent centers, nursing homes and other health care facilities with whom it has a contract.

(Declaration dated September 23, 2003 by the petitioner's president, page 1).

The letter and the declaration of the petitioner's president are unclear concerning whether the services the petitioner provides are all rendered in the private homes of patients or whether some services are performed on the premises of its contracted health care facilities. If services are provided exclusively at private homes, posting the notice of job opportunity at the petitioner's administrative offices would appear to comply with the regulatory requirements quoted above. But if services are provided at least in part on the premises of the petitioner's contracted health care facilities, evidence of posting at the petitioner's administrative offices would not establish its compliance with those requirements. Since the petitioner's evidence fails to clarify where the beneficiary's work will be performed, the petitioner's evidence fails to establish its compliance with the posting requirements of the regulations.

In summary, the evidence in the record before the director failed to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of the petitioner's other pending and approved I-140 and I-129 petitions. The evidence submitted by the petitioner on appeal provides information which was not yet available at the time of the director's Notice of Revocation, but the evidence on appeal fails to provide information about the other pending and approved I-140 and I-129 petitions filed during the relevant time period. The evidence also fails to establish the petitioner's compliance with regulations on posting the notice of job availability.

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 met that burden.

ORDER: The appeal is dismissed.