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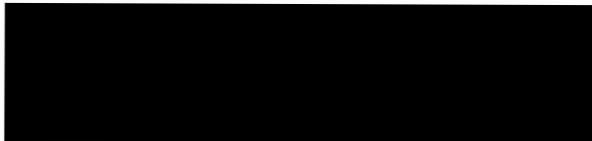


FILE: EAC-04-222-50747 Office: VERMONT SERVICE CENTER Date: **MAY 19 2006**

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a healthcare contractor firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 2, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the instant petition is July 23, 2004. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour, which amounts to \$43,680.00 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes the petitioner's payroll registers for July 29, 2004 and December 2, 2004. Other relevant evidence in the record includes copies of the petitioner's quarterly statements of deposits and filings dated January 19, 2002 and April 20, 2002, a copy of a document titled "Summary of W-2 Direct Reporting Information," and a copy of the petitioner's financial statements from January through July 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that the petitioner has the ability to pay the proffered wage and is financially viable.

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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, on the unsigned Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

The record includes two copies of a document titled "Summary of W-2 Direct Reporting Information" from Automatic Data Processing, Inc. dated February 7, 2002. The document lists the total amount the petitioner paid in wages and the total number of W-2 forms issued by the petitioner. It does not list the names of the employees or how much the petitioner paid each employee, and according to the Form ETA 750B, the petitioner did not employ the beneficiary in 2002. Payments made to other employees are irrelevant because they do not show whether the petitioner has additional funds to pay the beneficiary the proffered wage. In addition, the document is dated February 7, 2002 and appears to show the wages the petitioner paid in 2001. The priority date in this case is July 23, 2004.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 record contains no federal income tax returns for the petitioner.² Thus, CIS has no available information to calculate the petitioner’s net income.

As an alternative means of determining the petitioner’s ability to pay the proffered wage, 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 current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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.

The record contains no federal income tax returns for the petitioner. Thus, CIS has no available information to calculate the petitioner’s net current assets.

Counsel states on appeal that the petitioner “is well able to pay the proffered wage and has financial viability, as evidenced by Payroll Registers for the week ending 7/29/04 (covering date of filing) through the week of 12/2/04 (to the present), attached.” Counsel also states that the petitioner “employs over 175 RNs and CPNs with a weekly payroll in excess of \$200,000.00 and is therefore financially able as a petitioner.” The payroll registers list the petitioner’s employees and their wages for July 29, 2004 and December 2, 2004. However, the issue in this case is the petitioner’s ability to pay the beneficiary the proffered wage, and the fact that the petitioner paid its other employees is irrelevant to whether the petitioner has additional funds to pay the beneficiary.

The record contains a copy of the petitioner’s statement of deposits and filings dated April 20, 2002 and two copies of the petitioner’s statement of deposits and filings dated January 19, 2002. The statements list the total amount the petitioner paid in wages, its federal tax liabilities, and its deposits. However, it does not show the petitioner’s assets and liabilities and thus is not comparable to federal tax returns. Moreover, as stated above, the fact that the petitioner paid wages to its other employees is irrelevant to this case. The petitioner’s financial information in 2002 is likewise irrelevant because the priority date in this case is July 23, 2004.

The record also contains the petitioner’s financial statements from January through July 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant’s report that accompanied the petitioner’s financial statements makes clear that they were produced pursuant to a compilation rather than an

² The record before the director closed on October 22, 2004 with the receipt by the director of the petitioner’s submissions in response to the request for evidence (RFE). As of that date the petitioner’s federal tax return for 2004 was not yet due. Since the tax return for 2004, which covers the period of time from the priority date to the date the record closed before the director, was not available at the time the record closed before the director or at the time additional evidence was submitted on appeal, CIS will look at previous years’ tax returns to determine the petitioner’s ability to pay the proffered wage. The RFE issued by the director on September 24, 2004 specifically requested that the petitioner submit its federal tax return, annual report, or audited or reviewed financial statements for 2003. However, no tax returns appear in the record.

audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel, in stating that the petitioner "employs over 175 RNs and CPNs with a weekly payroll in excess of \$200,000.00 and is therefore financially able as a petitioner," seems to indicate that because the petitioner is a large entity, the ability to pay has been shown. The totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. The fact that the petitioner employed over 175 RNs and CPNs in 2004 is not in and of itself a unique factor that warrants a favorable exercise of discretion by the AAO. The fact that the petitioner had a weekly payroll in excess of \$200,000.00 in 2004 is likewise not a unique factor.

After a review of the evidence in the record of proceeding, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the issue of whether the proffered wage meets the prevailing wage rate warrants examination. 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 director's decision is silent on whether the proffered wage meets the prevailing wage rate even though the proffered wage as listed on the Form ETA 750 and the I-140 petition in the record does not comport with the regulations' requirement.

The regulation at 20 C.F.R. § 656.20(c), as in effect at the time of filing, requires the prospective employer in Schedule A labor certification cases to make certain certifications in the application of labor certification.

Specific to the issue of offering wages that meet the prevailing wage rate, 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 and references 20 C.F.R. § 656.40, which states that since prevailing wage surveys are inaccurate, the pay offered may be 95% of the prevailing wage. Thus, the proffered wage needs to be within 95% of the prevailing wage rate for the area of intended employment.

According to the Form 750 and the I-140 petition, the beneficiary's area of intended employment is Bronx, New York. According to the Department of Labor's Foreign Labor Certification Data Center, accessible at <http://www.flcdatacenter.com>, the prevailing wage for a registered nurse in Bronx, New York in 2004 is \$23.23 per hour, which amounts to \$48,318.00 annually. The annual proffered wage, \$43,680.00, is only 90.4% of the prevailing wage in 2004. Thus, it is less than 95% of the prevailing wage rate, and a petition that offers a salary that fails to meet the prevailing wage rate as determined by the Department of Labor will be denied.

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.