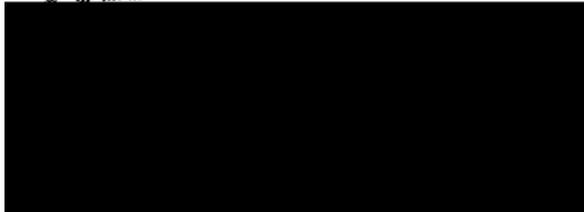


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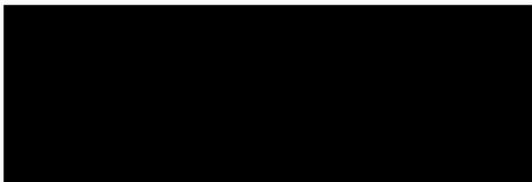
IN RE:

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, Chief
Administrative Appeals Office

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

The petitioner is a health care services. 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 director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was posted according to the regulation at 20 C.F.R. § 656.20(g)(1),¹ and, 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. The director denied the petition accordingly.

According to the petitioner, it has been in operations since 1997, and it employs 42 personnel

On appeal, counsel submits a brief and additional evidence.

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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.10(a)(2) specifies 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.²

The regulation at 20 C.F.R. § 656.22 (Applications for labor certification for Schedule A occupations.) (b)(2) states that [the Application for Alien Employment Certification form shall include:] 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.

¹ According to a statement of posting included with the petition as an exhibit, notice of filing the Application for Alien Certification was posted in the office reception area and employees' lounge area at the petitioner's offices at Daly City, California.

² Regarding the beneficiary's receipt of a CGFN certificate, counsel stated in a letter dated October 15, 2004, that the beneficiary was to take the examination for the certificate on October 16, 2004.

The regulation at 20 C.F.R. § 656.20(g)(3) states that:

Any notice of the filing of an Application for Alien Employment Certification shall

- (i) State that applicants should report to the employer, not to the local Employment Service office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

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.

In a memo dated December 20, 2002, the Office of Adjudications of the CIS issued a memo instructing Service Center to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

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 U.S. Citizenship and Immigration Services 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).

In this case, Form I-140 was filed on July 23, 2003. With the petition, counsel submitted the following documents: a list of exhibits; a U.S. Department of Labor (USDOL) ETA 750 A/B; Articles of Incorporation; two licenses; an advertising brochure; a "Declaration Regarding Financial Capacity;" a letter from petitioner stating that its 2002 corporate tax return was unavailable; a balance sheet as of December 31, 2002;³ three IRS Form 941 "Employer's Quarterly Federal Tax Return statements for March 31, 2002, September 30, 2002 and March 31,

³ Unaudited financial statements are not probative of the ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2).

2003; a statement of posting at the petitioner's offices in Daly City, California; a "Job Announcement" dated June 16, 2003, as well as documents concerning the beneficiary's qualifications and personal information.

On July 28, 2004, the director transmitted to the petitioner two requests for evidence concerning the ability to pay the proffered wage, notice of filing according to 20 C.F.R. § 656.10(a)(2), CGFN certificate, employment letter, and, evidence, among other things, that the beneficiary will be employed to fill a specific vacancy.

In response to the director's request, the petitioner submitted a U.S. corporate tax return for 2003, four IRS Form 941 "Employer's Quarterly Federal Tax Return statements; and, the beneficiary's 2003 personal income tax return.

Further in the response, counsel stated in the letter dated October 15, 2004 that under the "portability"⁴ provisions of the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313) the beneficiary has left the petitioner, and, she is now employed by the University Convalescent Hospital. Additionally, counsel provided financial information relating to the University Convalescent Hospital, and he provided the beneficiary's pay stubs from University Convalescent Hospital.

Under these circumstances, as in every petition reviewed, the subject petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer.⁵

As additional evidence submitted in response to the director's request dated July 28, 2004, counsel provided the beneficiary's State of California, licensing as a registered nurse.

Further relative to the posting, counsel stated that the petitioner had no bargaining representative. Counsel provided a notice of the proof of filing the Application for Alien Employment Certification that evidenced posting at the petitioner's offices at Daly City, California.

Relative to the director's request to show a specific job vacancy, counsel provided staffing agreements between the petitioner and various hospitals.

Counsel submitted an employment letter from the University Convalescent Hospital dated August 12, 2004, that the beneficiary was employed as a full time charge nurse by that employer.

On December 16, 2004, the Director, California Service Center, issued a decision in this matter. The director stated that evidence was not submitted to demonstrate that notice was posted in accordance with the regulation at 20 C.F.R. § 656.20(g)(1) and (g)(8). According to the director, that posting was to be made according to the regulation at the facility referenced by the regulation at 20 C.F.R. § 656.20(g)(ii), and, *not* as found in this case, at the administrative offices of the petitioner. The director citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971), and *Matter of Izumii*, 22 I. & N. Dec. 169 (Assoc. Comm'r, Examinations 1998) stated that

⁴ Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

⁵ A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3.

the petitioner may not make material changes to the petition (with its exhibits that include the notice of posting) to make an apparent deficient petition conform to CIS requirements.

The regulation at 20 C.F.R. 656.22(e) states in part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A . . .

(2) The Schedule A determination of INS [CIS] shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

Further the director found in his decision that the petitioner has not established its ability to pay the proffered wage of \$52,00.00 for the beneficiary in addition to the two already approved employees from the income stated on the petitioner's tax return submitted for 2003.

On appeal, counsel asserts that the job posting conformed to regulation and the labor certification. Further, counsel contends that the petitioner has the ability to pay the proffered wage for the beneficiary and two other aliens for which petitions were filed.

Counsel specifically states there is no statutory or regulatory basis for the CIS' interpretation of the regulation to mean that posting was to be made according to the regulation at the facility referenced by the regulation at 20 C.F.R. § 656.20(g)(ii).⁶ The regulation at 20 CFR 656.20(g)(1)(i) and (ii) states in pertinent part that

The regulation at 20 CFR 656.20(g)(1)(i) and (ii) states in pertinent part:

(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. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, *where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment* [emphasis added]. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

Since there is no evidence submitted the petitioner employed the beneficiary at the Daly City, California, administrative office as a nurse, the act of posting notices off the nursing work site does not conformed to the letter or the legislative intent expressed in the above regulation. The Beneficiary will not be employed at the petitioner's offices but at some other location. The posting was not, then, posted at the place of employment as required by 20 C.F.R. § 656.20(g)(1). The petitioner has indicated that the beneficiary will work at "various hospitals and facilities," without identifying an exact location or locations with greater specificity. The petitioner needs to show it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the

⁶ The petitioner posted the notice at the administrative offices of the petitioner.

job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.⁷ In the instant petition, it is noted those "similarly employed" would be nurses in the client hospitals. By the petitioner's actions, it denied proper notice to U.S. workers of this employment opportunity.

The second issue concerns the director's finding that the petitioner has not established its ability to pay the proffered wage of \$52,000.00 for the beneficiary in addition to the two already approved employees from the income stated on the petitioner's tax return submitted for 2003.

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 at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The proffered wage as stated on the Form ETA 750 is \$25.00 per hour (\$52,000.00 per year).

The petitioner submitted a U.S. income tax return, Form 1120, that stated taxable income⁸ for 2003 as \$28,873.00. Net current assets are calculated from Schedule L of the return as \$7,361.00.⁹ Since the

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⁸ IRS Form 1120, Line 28.

⁹ The petitioner also submitted a balance sheet as of December 31, 2002; three IRS Form 941 "Employer's Quarterly Federal Tax Return statements for March 31, 2002, September 30, 2002 and March 31, 2003, but it has not stated in the record of proceeding or on appeal any contention relative to these submittals. 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 CIS, should have considered income before expenses were paid rather than net income. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability to pay the proffered wage. Further, the petitioner's has submitted the beneficiary's 2003 personal tax

proffered wage is \$52,000.00, the proffered wage is more than the petitioner's taxable income or net current assets.

CIS records show that the petitioner filed I-140 petitions on behalf of two other beneficiaries at about the same time as the instant petition was filed. Although the evidence in the instant case did not indicate financial resources of the petitioner that are greater than the beneficiary's proffered wage, it would be 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. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was posted according to the regulation at 20 C.F.R. § 656.20(g)(1).

Counsel's contentions cannot be concluded to outweigh the evidence presented in the corporate tax return as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

return, pay statements and other evidence of wage payments by another corporation to the beneficiary. There is no evidence submitted that this second corporation is the successor-in-interest to the petitioner. Contrary to counsel's primary assertion, Citizenship and Immigration Services (CIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."