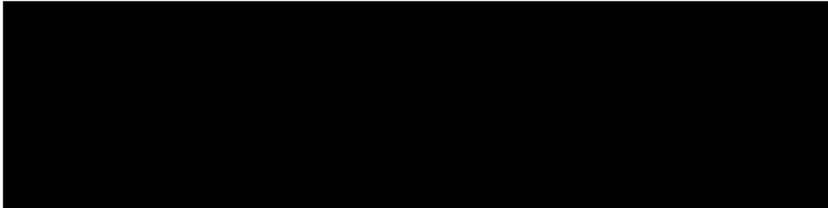


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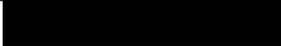
**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



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FILE:



Office: TEXAS SERVICE CENTER

Date: **JUL 13 2007**

SRC 06 080 51524

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.

Keren S. Forlos for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an ambulatory surgery center. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 5, 2006 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 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.

On January 13, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has been determined that there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS on January 13, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$67,000 annually. The AAO notes that the petitioner submitted a prevailing wage determination for registered nurses in Bexar County that indicates the Texas prevailing wage for a registered nurse, level II, in Bexar County is \$48,402.20, while the petitioner on Form 9089 stated the proffered wage is \$67,000. The AAO further notes that the prevailing

wage determination is dated March 24, 2006, which is after the petition was filed. The prevailing wage determination must be greater than 90 days old and less than one year old at the time of filing I-140 and ETA 9089.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹ Relevant evidence submitted on appeal includes counsel's brief, a copy of a CIS interoffice memorandum written by William R. Yates, former CIS Associate Director for Operations;² minutes of a liaison meeting between California Service Center (CSC) and the American Immigration Lawyers Association (AILA) held on February 22, 2006 which references approaches to establishing the petitioner's ability to pay the proffered wage as stated in a CIS standard operation procedures document; four of the beneficiary's biweekly pay statements issued by [REDACTED] Oklahoma City, Oklahoma³, dating from February 13, 2006 to April 9, 2006 that indicate a biweekly salary of \$2,576.92; and a one page document entitled Detail Payroll Register Foundation Management Affiliates MST that indicates the beneficiary received wages of \$833.98 on January 20, 2006 from [REDACTED] of San Antonio while in "PTO" work status.

With regard to the identification of the petitioner, counsel submits a copy of a certificate of filing for an assumed name certificate. This document indicates that the [REDACTED] is conducting business under the assumed name of [REDACTED] as of April 5, 2004. The document further notes that the entity is a registered limited liability partnership, with the registered office at 3120 S.W. Freeway, Suite 590, Houston, Texas, and the principal office is identified as the petitioner's address of [REDACTED]

Counsel also submits a fax communication from [REDACTED] Foundation Surgery Affiliates, Inc., Oklahoma City, Oklahoma, to the beneficiary in care of the San Antonio office. Ms. [REDACTED] is identified as senior accountant of "ACS's, Foundation Surgery Affiliates." The FAX transmission indicates the corporate office of Foundation Surgery Affiliates, Inc. is located at 13900 N. Portland, Suite 200, Oklahoma City, Oklahoma, while a Foundation Surgery Affiliates Southwest regional office is located at 3120 S.W. Freeway, Suite 590, Houston, TX 77098. She submits the 2004 audited report for Foundation Surgery Affiliates, Inc., prepared by the accounting firm, Ernst and Young, Oklahoma City, Oklahoma. This audited report states the following:

Foundation Surgery Affiliates, Inc., and its wholly owned subsidiaries, consisting of management holding companies and Foundation Surgery Affiliate Aviation Ltd. Co, (collectively, the Company) were formed in 1996 as an Oklahoma corporation to manage outpatient surgical centers, imaging centers, short-stay hospitals and real estate companies in Texas, Pennsylvania, and New Jersey. As of December 31, 2004, 16 facilities were operating and eight facilities were under construction.

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).

² Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

³ These four documents also contain the name "[REDACTED]"

The document also refers to investment in limited liability partnerships and limited liability companies (affiliates) and further states that as of December 31, 2004, the Company's investment in affiliates includes a fourteen percent interest in Foundation Surgery Affiliates of San Antonio, L.P. It also states that the Company has contracted with affiliates to manage the construction and operation of the treatment facilities, and under the contracts, the Company receives fees of a percentage of construction/leasehold improvement and equipment purchases during the construction phase, plus certain commitment and development. The document finally states that in 2004 and 2003 the revenues from Foundation Surgery Affiliates of San Antonio, L.P. were twelve percent in 2004 and sixteen percent in 2003.

The record also contains two unaudited financial reports for Physicians Ambulatory Surgery Center, L.L.P. ostensibly prepared by Foundation Surgery Affiliates for the months ending in January 2006 and February 2006. These reports appear to be prepared for presentation at partnership meetings and also examine medical services provided by some 29 medical specialists.⁴

The evidence in the record of proceeding does not show the petitioner's corporate or partnership structure. On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of \$1.2 million, to have a net annual income of \$700,000, and to currently employ 15 workers. On the Form 9089, signed by the beneficiary on December 22, 2005, the beneficiary claimed that she had worked for the petitioner since April 2005.

On appeal, counsel asserts that the director in his request for evidence dated March 7, 2006, requested evidence that the petitioner had the ability to pay the beneficiary's wages as of January 13, 2006, a date less than two months earlier than the director's request, and that the petitioner was informed that the evidence to be provided must be in the form of copies of annual reports, prepared federal tax returns, and/or audited financial statements. Counsel states that the petitioner was unable to produce any of these documents, as most companies prepare these documents on a yearly basis. Counsel states that based on the Yates memo, evidence that the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in the year of filing may also be used to establish the petitioner's ability to pay the proffered wage. Counsel states that payroll stubs are obviously one form of evidence that could be used to provide proof of the petitioner's ability to pay the proffered wage as of the filing date; however the service center did not provide the petitioner the opportunity to provide such evidence. Counsel also refers to the documents submitted on appeal with regard to the petitioner's assumed business name, and the audited financial statements from [REDACTED], as well as the Foundation Surgery Affiliates balance sheet as of December 31, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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

⁴ The AAO notes that the petitioner's corporate name appears to be [REDACTED], with an assumed name of [REDACTED]. Therefore the financial reports for a separate entity, [REDACTED], are not relevant to these proceedings.

business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 has submitted the beneficiary's pay statements for work performed from two weeks prior to the January 20 pay slip and up to April 2006. While the initial pay slip does not indicate a fulltime two weeks pay check, the remainder of the wages indicates a biweekly salary of \$2,576.92 which is commensurate with an annual wage of \$66,999.92. Since the proffered wage is \$67,000, the beneficiary appears to be receiving the proffered wage as of the January 13, 2006 priority date and to the present time. Thus, the record establishes that the beneficiary is receiving the proffered wage.

However, the record is not clear as to what entity is the beneficiary's employer and the actual petitioner of the instant petition, and who is paying the beneficiary's salary. Pursuant to the assumed name certificate, the petitioner's corporate name is [REDACTED]. This entity's name is not listed in the audited financial statements prepared by [REDACTED] Inc. The record also indicates that the Oklahoma-based Physicians Ambulatory Surgery Center I is paying the beneficiary's wages with an apparent employer noted as [REDACTED]. This name is not reflected anywhere else in the record as another assumed name of the petitioner. Thus, the relationship between the Foundation Surgery Center of San Antonio, L.L.P., or its assumed name Physicians [REDACTED], and the Oklahoma-based corporation, [REDACTED] that submitted an audited 2003 and 2004 reports is not established.

The petitioner listed on the I-140 petition has submitted no federal income tax returns to the record to establish a separate corporate identity from [REDACTED], or to clarify its relationship to [REDACTED]. The audited report submitted to the record also does not identify the petitioner as a wholly owned corporation of Foundation Surgery Affiliates, Inc. Further the wage statements submitted by the petitioner do not establish that the petitioner is the beneficiary's employer. The employer's address listed on the statements is located in Oklahoma, not Texas, and the petitioner's name is not listed on the statements. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006 or subsequently.

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) (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).

Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Since the petitioner has not submitted any federal tax returns to the record or other regulatory-prescribed evidence, the AAO cannot examine the petitioner's ability to pay the proffered wage based on its net income. It is noted that the petitioner would not have had its tax return for tax year 2006 available at the time the record was closed when the petitioner responded to the director's request for further evidence. However, even the submission of the petitioner's earlier 2005 tax return would have provided some information as to the petitioner's specific financial viability. The AAO notes that the record contains a consolidated balance sheet dated August 31, 2005 from the petitioner, [REDACTED]. However, 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. As there is no accountant's report accompanying this consolidated balance sheet statement, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The record also contains unaudited financials for an entity called [REDACTED] for January and February 2006. However, as previously stated, the record contains no evidence that this entity is the petitioner, and as also previously stated, the AAO does not accept unaudited financial statements.

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, including real property that counsel asserts should be considered. 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.⁶ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Again, the petitioner did not submit any federal income tax returns or other regulatory-prescribed evidence to the record, and the relationship between the petitioner under the corporate name of [REDACTED], or its assumed name [REDACTED], and the Oklahoma-based corporation's Foundation Surgery Affiliates, Inc. that submitted an audited 2003 and 2004 report is not established. Therefore the AAO cannot examine the petitioner's net current assets as a method of determining the petitioner's ability to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was filed with CIS, the petitioner identified on the instant I-140 petition had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner is required to submit a posting notice that meets the requirements of 20 C.F.R. § 656.15, and to provide evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees via in-house media as prescribed in § 656.10(d). The record does not contain any other documentation relevant to the issue of whether the petitioner provided notice of filing the application for permanent employment certification to its bargaining representative or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of positions similar to the position that is the subject of the application. If the petitioner pursues this petition any further, such evidence should be provided to the record.

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.

⁶According 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.