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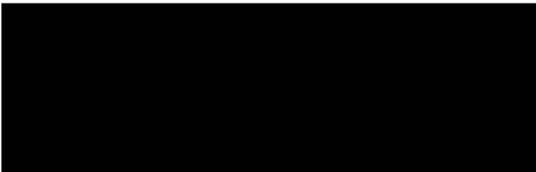


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2007
WAC 05 004 54338

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a health care registry. 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. § 656.22, Schedule A, Group I.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. 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 was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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) of the Act as a skilled worker or professional (registered nurse). Aliens who will be employed as registered 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.

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the Department of Labor regulations as in effect prior to the PERM amendments.

According to the regulation at 20 C.F.R. § 656.22, an employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750) with the appropriate Immigration and Naturalization Service office, now Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

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

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, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. See 8 CFR § 204.5(d). Here, the petition was filed with CIS on October 1, 2004. The proffered wage as stated on the Form ETA 750 is \$1,120 per week, which equals \$58,240 per year.

On the visa petition, the petitioner stated that it was established during 2000 and that it employs 50 workers. The petition states that the petitioner's gross annual income is \$2.79 million.² "Unavailable" was printed in the space provided on the visa petition for the petitioner to state its net annual income. Why the petitioner's net income should be unavailable is unknown to this office.

On the Form ETA 750, Part B, signed by the beneficiary on September 28, 2004, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Santa Clara, California.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

² None of the evidence subsequently submitted support that figure.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no

The record in the instant case contains (1) a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, (2) copies of the petitioner's 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation, and (3) a copy of the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation of [REDACTED]. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The 2001 tax return shows that the petitioner is a corporation and that it incorporated on December 4, 2001. That return covers the period from the petitioner's incorporation to June 30, 2002. The petitioner declared a loss of \$47,006 as its taxable income before net operating loss deductions and special deductions during that period. The corresponding Schedule L shows that at the end of that period the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002, 2003, and 2004 tax returns show that it elected subchapter S corporation status on July 1, 2002 and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The 2002 return, which covers the period from July 1, 2002 through the end of the calendar year, shows that the petitioner declared ordinary income of \$17,098 during that period. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 tax return shows that during that year the petitioner declared ordinary income of \$35,845 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$113,818 and current liabilities of \$91,983, which yields net current assets of \$21,835.

The petitioner's 2004 tax return shows that during that year the petitioner declared ordinary income of \$97,424 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$210,300 and current liabilities of \$89,222, which yields net current assets of \$121,078.

The proposition counsel intended to support by providing the tax return of Nexgen Infosys Incorporated is unclear to this office.

The director denied the petition on March 14, 2005. In addition to finding that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date, the director also noted that the petitioner's salary and wage expense and its gross receipts, as shown on its tax returns, are apparently inconsistent with the petitioner's claim of employing 50 people.

In the Statement of Facts in the appeal brief, counsel stated that the "... California Service Center denied the [instant visa] petition ... averring that the employer lacks the ability to pay the ... proffered wage." Counsel asserted, however, that the circumstances of the instant case, taken as a whole, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel cited *Matter of*

reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that this is sufficient to render the instant petition approvable.

Counsel also cited a nonprecedent decision of this office for the proposition that the amount of the proffered wage due should be prorated for the portion of the year that remained after the priority date.

Counsel's assertion that the California Service Center found that the petitioner is unable to pay the proffered wage is incorrect and inverts the burden of proof in this matter. The director found that the petitioner had failed to sustain its burden of affirmatively demonstrating that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The director did not assert that the petitioner was unable; merely that it had failed to demonstrate its ability as required by the regulations.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

In the instant case, however, the priority date occurred within the 2004 calendar year. Proration, if utilized, would apply only to that year. As will be further developed below, the petitioner does not need to rely on proration to show its ability to pay the proffered wage during 2004.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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. (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ 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.

The proffered wage is \$58,240 per year. The priority date is October 1, 2004.

Because the priority date fell within 2004 evidence pertinent to the petitioner's finances during previous years is not directly relevant to its continuing ability to pay the proffered wage beginning on the priority date. The

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

analysis in this decision, therefore, will rely heavily on the petitioner's 2004 return.⁵ This office notes, however, that the petitioner's tax returns show a steady increase in net income from a loss immediately after its incorporation to larger and larger gains during subsequent years.

During 2004 the petitioner declared ordinary income of \$97,424. That amount is sufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$121,078, which amount is also sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004 and is not required to demonstrate that ability during the years before the priority date.

The petition in this matter was submitted on October 1, 2004. On that date the petitioner's 2005 tax return was unavailable. The service center issued a notice of intent to deny on January 31, 2005 asking for additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 return remained unavailable. The petitioner is excused, therefore, from the obligation of demonstrating its ability to pay the proffered wage during 2005 and subsequent years.

The record suggests an additional issue that was not addressed in the decision of denial.

On the visa petition the petitioner stated that it employs 50 workers. The director noted that the amount of the petitioner's gross receipts and the amount it pays in salaries and wages is inconsistent with employing so many people.⁶ This might be taken as an indication that the petitioner misstated the number of people it employs. Such a misstatement might trigger additional scrutiny pursuant to the decision in *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The apparent discrepancy might also be taken as an indication that the petitioner's workers are underemployed, and that the petitioner is attempting to add to its registry of nurses, notwithstanding that it has insufficient clients to fully employ its current registered nurse employees.

The petitioner is not permitted, under the instant visa category, to maintain a pool of workers whose pay is conditional upon their placement with a health care provider. By filing a petition pursuant to the instant visa category the petitioner is stating that it will employ the beneficiary full-time, and the petitioner must guarantee the beneficiary full-time pay it even if full-time employment is unavailable.

This apparent discrepancy, however, although mentioned, was not relied upon in the decision of denial. Under these circumstances this office may not rely upon it in the instant decision. Further, the possibility exists that the petitioner incorrectly, but innocently, included in its employee count, employees of other businesses that share common ownership with the petitioner. This office will not, under these circumstances, remand for clarification, but will exercise its discretion to sustain the appeal. In any future filings, however,

⁵ The 2004 return was submitted on appeal and was not previously in the record. The director, therefore, did not err when he relied on tax returns from prior years in his analysis.

⁶ The 2004 return, the most recent in the record, shows that the petitioner paid \$155,097 in salaries and wages during that year. That amount, distributed between 50 people, would amount to an average of slightly over \$3,000 per person for a year.

the petitioner should resolve or explain the apparent discrepancy between the number of workers it claims to employ and the wages and salaries it claims to pay.

The petitioner demonstrated its ability to pay the proffered wage during 2004, the only year during which it was required to show that ability. The petitioner has overcome the sole basis for the decision of denial. The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

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