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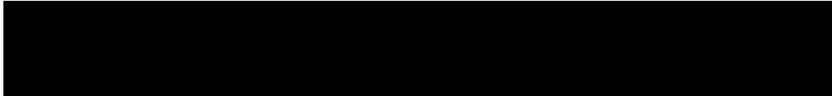
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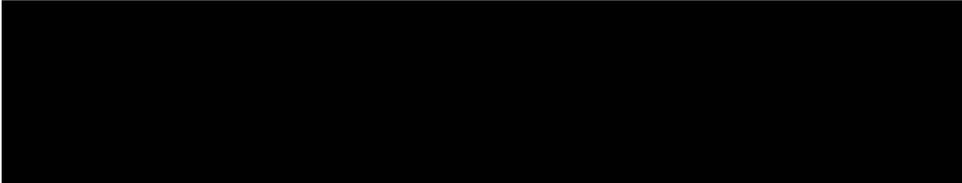
IN RE:

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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a long term care and rehabilitation hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary had obtained the requisite educational credentials as of the priority date. The director also determined that the petitioner had not demonstrated its financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly. The director also found that the position's requirements set forth on the labor certification do not require a skilled worker visa classification.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has had the continuing ability to pay the proffered wage and has established that the beneficiary possesses the requisite educational credentials as set forth on the ETA 750.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

At the outset and as referenced by the director, it is noted that this petition may not be approved because the petitioner requested a visa classification as a skilled worker, which, under section 203(b)(3)(A)(i) of the Act, requires a minimum of least two years training or experience. The alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. The minimum

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<sup>1</sup> 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).

educational, training, and experience requirements are set forth in Item 14. As the minimum employment experience is specified as three months in the job offered or three months in a related occupation, the terms of the labor certification are inconsistent with the visa classification selected on the petition. The only appropriate visa classification would be in the unskilled worker category under section 203(b)(3)(A)(iii) of the Act requiring less than two years of experience or training. There is, however, no provision in statute or regulation that compels CIS to re-adjudicate a petition under a different visa classification once a decision has been rendered. The appropriate remedy would be to file another petition with the proper fee and required documentation.

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 regulation at 8 C.F.R. § 204.5(l)(3) also provides in pertinent part:

(ii) *Other documentation—*

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.<sup>2</sup>
- (B) If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum

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<sup>2</sup> The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) also provides that if the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification. The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date.

requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The petitioner must also establish that the beneficiary obtained the required educational credentials as of the priority date, which is the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on April 17, 2001. The proffered wage is stated as \$8.23 per hour which amounts to \$17,118.40 per annum. The ETA 750B, signed by the beneficiary on April 9, 2001, indicates that she has worked for the petitioner since March 2001.

On part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on January 29, 2007, the petitioner claims that it was established in 1994, employs approximately 5,600 workers, claims a gross annual income of \$322,411,184 and a net annual income of \$7,433,840.

As referenced above, it is noted that item 14 of the ETA 750A states that the minimum education for the certified job offer of a nursing assistant is the completion of four years of high school education. Item 14 also specifies that the minimum employment experience required for the certified job is three months in the certified position as a nursing assistant or three months in a related occupation of caregiver.

It is noted that the petitioner is identified on the I-140 and on the ETA 750 as Covenant Care, Inc. dba Shoreline Care Center. The I-140 further specifies that the federal tax identification number of the petitioner is [REDACTED] and that the beneficiary will work at the facility in Oxnard, California. With the petition, the petitioner provided a copy of its Form 1120, U.S. Corporation Income Tax Return for 2005. The tax identification number is the same as that shown on the I-140, however the filing entity's name is indicated as Covenant Care California, Inc. & Subsidiaries, with a date of incorporation of 9/13/1994. The tax return also shows on Schedule K that the parent company is Covenant Care, LLC with a tax identification number of xx-[REDACTED]. The petitioner's return additionally contains the following information:

	2005
Net Income <sup>3</sup>	\$ 7,433,840
Current Assets (Sched. L)	\$68,884,923
Current Liabilities (Sched. L)	\$55,803,861
Net Current Assets	\$13,081,062

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current

<sup>3</sup> For the purpose of this review, taxable income before net operating loss deduction and special deductions found on line 28 of Form 1120 will be treated as net income.

assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of its corporate tax return. If the petitioner's end-of-year 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.

Although not noted in the director's denial, copies of the beneficiary's Earnings Statements from September, October and November 2006 were also submitted in support of the beneficiary's application for permanent residency concurrently filed with the I-140. They indicate that as of November 18, 2006, the petitioner had paid the beneficiary \$23,604.01 in wages. Copies of Wage and Tax Statements (W-2s) and gross earnings summaries for 2001, 2002, 2003, 2004, and 2005 were also submitted in support of an application to register permanent residence or adjust status.<sup>5</sup> These documents indicate that the petitioner paid the following gross wages to the beneficiary:

2001	\$12,633.24
2002	\$20,333.23
2003	\$21,361.51
2004	\$25,268.98
2005	\$26,344.93

The director denied the petition on August 7, 2007. The director noted that the petitioner did not establish that the position requires at least two years training or experience as indicated by its request for a third preference skilled worker visa classification on the I-140. The director also indicated that he denied the petition because of the lack of documentation showing that the beneficiary had obtained the requisite educational credentials. Additionally, although he concluded that the petitioner had demonstrated its ability to pay the proffered wage by either its 2005 net income or net current assets, it had not established its ability to pay the proffered wage of \$17,118.40 in 2001, 2002, 2003, 2004 and 2006.

It is noted that in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>5</sup> These documents refer to the beneficiary by her former married name of Strickland. In connection with two applications to register permanent residency or adjust status, the beneficiary also signed two biographic questionnaires (Form G-325). The earlier G-325, signed on August 2, 2001, states that her employment with the petitioner began in July 2001. The subsequent G-325 signed on December 13, 2006, claims that this employment began in March 2001.

proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. As set forth above, the petitioner has paid the beneficiary wages which have exceeded the proffered wage in 2002, 2003, 2004 and 2006 and has demonstrated its ability to pay the certified salary during those years. The only relevant year to be determined is 2001 where the petitioner paid the beneficiary \$12,633.24 or \$4,485.16 less than the proposed wage offer of \$17,118.40.

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, CIS will also 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); 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 taxable 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.

On appeal, the petitioner, through counsel has provided copies of corporate income tax returns for 2001, 2002, 2003, and 2004. For the purposes of determining the petitioner's continuing financial ability to pay the proffered wage, only the 2001 tax return is relevant, but it is noted that the 2001, 2002, and 2003 copies of the corporate income tax returns indicate that they were filed by Covenant Care, Inc. & Subsidiaries with a tax identification number of [REDACTED] and an incorporation date of 02/23/94. The 2004 tax return contains the same identification number and incorporation date as the I-140 petitioner. As the record stands, the corporate tax returns with the [REDACTED] do not match the petitioning corporation's information and the financial data with regard to net income or net assets will not be considered. It is noted that on Schedule K of the 2001 tax return, which references statement 27, it is indicated that the filing entity owned 100% of Covenant Care California, Inc. (listed with the I-140 tax identification number) as well as fifteen other corporations. However, the I-140 corporate petitioner is the prospective US employer and bears its own obligation to pay the proffered wage, absent a showing that another entity or parent is legally obliged to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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). 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."<sup>6</sup> Going on record without supporting documentary

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<sup>6</sup> In *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997), the court noted that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage.

evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus the petitioner failed to submit the relevant 2001 tax return or other documentation consistent with the requirements of 8 C.F.R. § 204.5(g)(2) and failed to demonstrate that its ability to pay the proffered wage was met in 2001.

With reference to the beneficiary's acquisition of three months of relevant work experience as specified on the ETA 750, in the certified job of nursing assistant or three months in the related occupation of caregiver as required by item 14 of Part A of the ETA 750, the petitioner established this on appeal through the submission of two letters, dated August 20, 2007, from [REDACTED] of Port Hueneme, California who attested that the beneficiary worked for him as a nursing assistant and caregiver for almost two years from April 6, 1999 to February 10, 2001, administering medication, accompanying him to medical appointments and maintaining his personal hygiene. Mr. [REDACTED], RN, as the owner and administrator of [REDACTED] in Port Hueneme, California also confirmed by letter, dated August 23, 2007, that he employed the beneficiary full-time as a direct care staff/caregiver from July 22, 1998 to April 15, 1999 and vouched for her dependability and caring attitude. Although [REDACTED]'s letter did not specifically state whether the beneficiary's employment for him as a caregiver was part-time or full-time and [REDACTED]'s letter was not as specific as [REDACTED]'s letter in describing the beneficiary's duties, it is reasonable to accept that the beneficiary accumulated at least the required three full-time months of work experience in the related occupation as a caregiver in the 31 months of employment for these employers. It may be concluded that the her work experience as described by these letters sufficiently meets the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) that specifies employment verification letters from identified trainers or employers describing the training received or the experience acquired by the beneficiary.

Similarly, relevant to the beneficiary's acquisition four years of high school, on appeal, the petitioner submitted a copy of a Filipino diploma from St. Paul College indicating that the beneficiary successfully completed an academic secondary course in 1976. The petitioner further provided a copy of the beneficiary's college grade transcript from the University of Santo Tomas indicating that she also obtained a Bachelor of Science degree in Medical Technology in 1980. This office has also reviewed credentials evaluations information available at the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the information found on the online registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is a "web-based resource for the evaluation of foreign educational credentials." EDGE indicates that in the Philippines, a high school diploma represents a level of education comparable to the completion of senior high school in the United States. Further, a bachelor of science degree represents a level of attainment

comparable to a bachelor's degree in the United States.<sup>7</sup> It may be concluded that the petitioner has established that the beneficiary obtained the equivalent of a four year high school education.

In summary, the petition is not eligible for approval because as noted in the director's denial, the preference classification described in Section 203(b)(3)(A)(i) of the Act requiring a minimum of two years of training or experience and as described on Part 2, paragraph (e) of the I-140 is not consistent with the terms of the labor certification and is not available in this case. Further, the petitioner failed to establish the ability to pay the proffered wage because it failed to establish this ability beginning as of the priority date in 2001 as required by the regulation at 8 C.F.R. § 204.5(g)(2).

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.

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<sup>7</sup> Copies of the EDGE printouts accompany this decision.