

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: JAN 14 2009

LIN 06 184 50028

IN RE:

Petitioner:

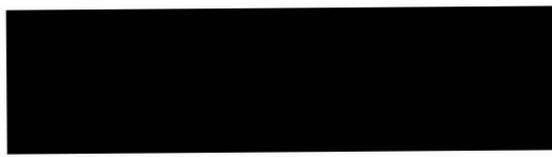


Beneficiary:



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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. 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 properly posted the notice of filing for the requisite ten consecutive business days. The director also concluded that the petitioner had not established its ability to pay the proffered wage because it had not submitted documentary evidence to establish its ability to pay the proffered wage as of the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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 January 25, 2007 denial, the two primary issues in this case are whether the petitioner established that it properly posted notice of filing the application for permanent employment certification, and whether the petitioner established its ability to pay the proffered wage as of the 2006 priority date. The AAO will consider each issue in turn and will also consider whether the petitioner satisfied the in-house media requirement.

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 May 17, 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 United States Citizenship and Immigration Services (USCIS) 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).

As a Schedule A filing, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The priority date for this petition is the date the ETA Form 9089 was properly filed with USCIS on May 17, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$27.04 an hour or \$56,243.20 annually.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence submitted into the record includes a posting notice signed by [REDACTED]. The notice was posted for ten (10) consecutive days from January 16, 2006 to January 29, 2006, on the petitioner's bulletin board. [REDACTED] indicated that no applicant had applied. The director determined that the petitioner failed to post the notice for the requisite ten consecutive business days, in accordance with 20 C.F.R. § 656.10 as January 16 was a federal holiday and January 21, 22, 28 and 29 were all weekend days.

On appeal, counsel states that the notice of job availability was posted at the petitioner's bulletin board from January 16, 2006 to January 29, 2006 and that January 16, was a federal holiday and January 21, 22, 28 and 29 fell on weekends. Counsel states that the petitioner's facilities were open on January 16, 2006 and business was conducted as usual. Counsel asserts that if January 16, 2006 were considered as a usual business day for the petitioner, and not as a federal holiday, then the petitioner complied with the required 10 "business day" posting of the notice of job availability.

The record does not contain any other documentation relevant to the issue of whether the petitioner posted notice of filing the application for permanent employment certification at its facility.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

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).

- (i) To the bargaining representative(s) (if any) of the employer's employees . . .
- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a).² In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

The notice of the filing of an Application for Permanent Employment Certification must:

- i. State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- ii. State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- iii. Provide the address of the appropriate Certifying Officer; and
- iv. Be provided between 30 and 180 days before filing the application.

² The regulation at 29 C.F.R. § 1903.2(a)(1) relates to Occupational Safety and Health Administration, U.S. Department of Labor, postings, but relevant to notice of filing provisions states: . . . “ Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.”

The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." Further, at the DOL website for information on the PERM process, (available at www.foreignlaborcert.doleta.gov as of December 20, 2008), the section on time frames, item number five, provides the following example of how the petitioner counts days for a posting notice: "If the Notice of Filing is posted on Thursday, June 28, 2007, the posting dates must be June 28 – July 12, and the earliest filing date permissible is Saturday, August 11, 2007, (the notice of filing must be posted for "ten consecutive *business* days and, therefore, neither weekends nor the Fourth of July are counted." (Emphasis in original.) Since January 16, a Federal holiday, and the weekend days of January 21, 22, 28, and 29 would not be considered business days, the petitioner in the instant petition posted the notice of filing for only nine consecutive business days, not the requisite ten consecutive business days. Thus, the AAO concurs with the director in his decision on this issue. The petitioner failed to properly post the notice, in accordance with 20 C.F.R. 656.10 (d).

With regard to the second issue raised by the director in his decision, namely, the petitioner had not established its ability to pay the proffered wage as of the 2005 priority date, 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. . . . 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 the (USCIS)].

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 USCIS on May 17, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$27.04 an hour or \$56,243.20 annually.

The evidence in the record of proceeding does not establish the petitioner's corporate structure. On the petition, the petitioner claimed to have been established in 1987, and to currently employ fourteen workers. The petitioner did not indicate its gross or net annual income on the I-140 petition. On the Form ETA 9089, signed by the beneficiary on April 11, 2006, the beneficiary did not claim to have worked for the petitioner.

With regard to the petitioner's ability to pay the proffered wage, with the initial I-140 petition, the petitioner submitted a letter dated February 17, 2006 written on the petitioner's letterhead by [REDACTED] Parsippany, New Jersey. In her letter Ms. [REDACTED] stated that after considering the petitioner's corporate balance sheets, related combined

statement of operations, changes of net assets and cash flow, she thought the petitioner had the financial position and ability to pay the proffered wages to the beneficiary. The director in his decision stated that when the petitioner employs less than 100 workers, the petitioner has to provide documentary evidence in accordance with 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage as of the priority date and to the present.

On appeal, counsel submits the petitioner's unaudited Financial Statement dated December 31, 2006 consisting of a statement of Assets, Liabilities and Stockholders' Equity, Comparative Statement of Revenues and Expenses for the Twelve Months Ended December 31, 2006 and December 31, 2005; and a Statement of Retained Earnings.

Counsel's reliance on unaudited financial records on appeal is misplaced. 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 these statements, 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. Thus the petitioner has submitted no relevant evidentiary documentation as to the petitioner's ability to pay the proffered wage to the record. The AAO notes that an audited financial statement or the petitioner's federal corporate tax return for tax year 2006 would have been the most relevant evidence as to the petitioner's ability to pay the proffered wage.³ Without such evidentiary documentation, the petitioner cannot establish its ability to pay the proffered wage. For illustrative purposes, the AAO will discuss further the analysis of a petitioner's ability to pay a proffered wage.

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, USCIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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

³ Based on the date of filing, the petitioner's 2006 tax return would likely not have been available, unless the petitioner files based on a tax year rather than a calendar year.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided no evidence that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2006 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax year 2006, based on either its net income or net current assets.⁴

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, USCIS 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 USCIS, 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. [USCIS] 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 Chang*, 719 F. Supp. at 537.

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, USCIS will review the petitioner's assets. The petitioner's total assets include

⁴ It is noted that the record of proceedings closed as of the director's denial of the petitioner dated January 27, 2007. At this time, the petitioner's 2006 income tax return may not have been available; however, the petitioner's 2005 tax return may have provided some evidentiary documentation as to the petitioner's ability to pay the proffered wage.

depreciable assets that the petitioner uses in its business. 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, USCIS 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.⁵ 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.

As noted previously, since the petitioner did not submit any federal corporate income tax records, the petitioner cannot establish its net income or net current assets for tax year 2006 or any other relevant tax year through its tax returns. The petitioner did not submit any regulatory prescribed evidence of its ability to pay the proffered wage. Thus, the petitioner cannot establish its ability to pay the proffered wage based on the beneficiary's wages, or its net income or net current assets. Further, since the financial reports submitted on appeal by the petitioner are not audited, they do not conform to the stipulations outlined at 8 C.F.R. § 204.5(g)(2). The AAO also concurs with the director's denial of the instant petition based on the petitioner's failure to demonstrate its ability to pay the proffered wage.

The AAO further raises the issue of whether the petitioner failed to demonstrate that it published notice of filing the application for permanent employment certification in any and all its in-house media. In-house postings are done in accordance with the normal procedures used for the recruitment of similar positions in an organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Counsel indicated in his filing letter that the petitioner was submitting a copy of its in-house media recruitment posting. The record contains a copy of a folded one-sheet brochure that indicates directions to the petitioner's location. On the inside fold the brochure indicates that a registered nurse is needed immediately, and that the petitioner offers competitive compensation and career advancement. The brochure also indicates that the salary is negotiable, and does not indicate any filing of a ETA Form 9089 for a registered nursing position.⁶ The "brochure" submitted is insufficient to meet the

⁵According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ The DOL website at www.foreignlaborcert.doleta.gov (as of December 20, 2008), at Section 10, also states, with regard to in-house recruitment postings, that, in every case, the notice of filing posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the certifying officer. The

requirements outlined at 20 C.F.R. § 656.10(d)(1)(ii) to satisfy the in-house posting requirement. The omission consists of an additional reason why the petition would be denied.

Where an application fails to comply with the technical requirements of the law, it may be denied by the AAO even if the Service Center or District Office did not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). 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).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.