



U.S. Citizenship  
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**MAR 05 2009**

FILE: LIN 06 241 52219 Office: NEBRASKA SERVICE CENTER

Date:

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 employment-based preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. On October 6, 2008 the Administrative Appeals Office (AAO) requested evidence from the petitioner. On January 13, 2009 the petitioner responded to this request. The appeal will be dismissed.

The petitioner is a medical staffing company. 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. § 656.5, Schedule A, Group I. The director determined that the petitioner had failed to comply with the regulatory requirements and 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 December 6, 2006 decision, the issues in this case are whether the petitioner is the actual employer of the beneficiary and has offered employment to the beneficiary that is not of a temporary or seasonal nature, and whether the petitioner properly posted the notice of filing the application for permanent employment certification at the beneficiary's place of employment. The AAO also notes an additional issue of whether the petitioner has the ability to pay the beneficiary.

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.

On August 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).

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. Relevant evidence submitted on appeal includes a statement from [REDACTED] dated December 24, 2008; an Employment Agreement between the petitioner and the beneficiary; financial statements; and a Form 1065 U.S. Return of Partnership Income for 2007. The record does not contain any other documentation relevant to the issues of whether the petitioner is the actual employer of the beneficiary and offered employment to the beneficiary that is not of a temporary or seasonal nature, whether the petitioner properly posted the notice of filing the application for permanent employment certification at the beneficiary's place of employment, and whether the petitioner has the ability to pay the proffered wage.

The first issue in this case is whether the petitioner has offered employment to the beneficiary that is not of a temporary or seasonal nature.

The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The regulation at 20 C.F.R. § 656.3 further states, in part:

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an

audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

According to the Employment Agreement signed by the petitioner and the beneficiary on March 2, 2006, the petitioner agrees to pay the beneficiary a salary of not less than \$21.00 an hour. The Employment Agreement specifically states that the beneficiary shall not take any payment from any Client of the petitioner. The beneficiary shall look solely to the petitioner for her compensation for all professional service so rendered by the beneficiary. The beneficiary acknowledges that the petitioner will incur expenses on the beneficiary's behalf both before and after the beneficiary commences employment. Such expenses include some or all of the following: arranged study and review courses and otherwise assisted beneficiary in preparing for and taking the NCLEX-RN examination, including providing air transportation to and from the U.S.A. and accommodations at the examination site; arranged for and provided transportation from beneficiary's place of hire to the place of employment; sponsored, applied for, and otherwise assisted beneficiary in obtaining a work permit and visa for residency in the U.S.A.; provided orientation and indoctrination services; assisted in arranging for residential accommodations for beneficiary and placed beneficiary with one or more of its clients. As the petitioner is directly paying the beneficiary's salary along with other benefits according to the Employment Agreement, the AAO withdraws the portion of the director's decision finding the petitioner not to be the beneficiary's actual employer based on the Employment Agreement.

While the AAO acknowledges that the petitioner is directly paying the beneficiary's salary along with other benefits according to the Employment Agreement, it notes that in the request for evidence, the AAO stated that according to the Texas Comptroller of Public Accounts official site at <http://ecpa.cpa.state.tx.us/coa/Index.html> (accessed on September 24, 2008), the petitioner has not been registered and thus, is not in good standing in the State of Texas. The petitioner did not submit any additional documentation in response to the request for evidence on this issue. According to the Texas Comptroller of Public Accounts official site accessed on February 12, 2009, the petitioner still has not registered and thus, continues not to be in good standing in the State of Texas.

As such, the AAO finds that the petitioner, a staffing service, is not the beneficiary's actual employer and has therefore not offered employment to the beneficiary that is not of a temporary or seasonal nature.

The second issue in this case is whether the petitioner established that it properly posted notice of filing the application for permanent employment certification at the beneficiary's place of employment.

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:

- (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). 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.

The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(ii). USCIS interprets the “facility or location of the employment” referenced at 20 C.F.R. § 656.20(g)(1)(ii) to mean the place of physical employment. In this case, the ETA Form 9089 and the Form I-140 petition indicate that the beneficiary will work at [REDACTED]

[REDACTED] Therefore, as the director correctly determined, the place of physical employment would be [REDACTED] of Laredo. However, the attestation included on the copy of the notice indicates only that the notice was posted on the “bulletin board” but does not attest that the posting notice was posted at the place of physical employment. On appeal, counsel asserts that “the posting was placed on the [REDACTED] bulletin board.” However, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary 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)). In the request for evidence, the petitioner was asked to provide objective evidence to establish that the posting notice was placed at [REDACTED]. In response to the request for evidence, the petitioner submitted a cover letter dated December 24, 2008 stating that the attached notice of filing (which was also used in the original filing of this petition) was posted on the employee bulletin board at [REDACTED] signed by [REDACTED].

[REDACTED] As such, the AAO finds that the petitioner has shown that the notice was properly posted at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1)(ii).

As mentioned in the AAO’s request for evidence, it is noted that the posting notice contains inconsistencies. According to the notice, it was posted for more than 10 business days from May 11, 2006 to May 26, 2006 and the posting was attested by a person named [REDACTED] [REDACTED] on May 11, 2006. However, the ETA Form 9089, Form I-140, and the petitioner’s supporting letter dated August 11, 2006 indicate that the petitioner’s vice president of recruitment is [REDACTED] instead of [REDACTED]. It is not clear that the posting is attested to from the petitioner’s authorized legal representative. Further, the attestation was signed on May 11, 2006. Counsel for the petitioner did not explain how the signer could attest the posting for 15

days ending on May 26, 2006 when it was signed on May 11, 2006. Nor does the record contain any documentary evidence to establish the petitioner's more than 10-business-day posting. The inconsistencies raise a doubt on the reliability and authenticity of the posting and attestation. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." It also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Id.* The petitioner was requested to submit independent objective evidence to resolve these inconsistencies and to establish that the petitioner posted the notice in compliance with regulations prior to the filing of the petition. The petitioner did not submit any additional documentation to resolve these issues. As such, the AAO finds that the petitioner has not complied with 20 C.F.R. § 656.10(d)(1)(ii).

The third issue in this case is whether the petitioner has the continuing ability to pay the beneficiary the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner signed the Form ETA 9089 on August 14, 2006. The proffered wage as stated on the Form ETA 9089 is \$21.00 an hour for 40 hours a week, thus \$43,680.00 per year. The Form ETA 9089 states that a College Diploma/Associate's Degree is the minimum level of education required for the position and there is no experience in the job offered required for the job.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065 in 2007.<sup>1</sup> On the petition, the petitioner claimed to have been established in 2002 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on an unspecified date, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 petitioner's ability to pay the proffered wage. In the instant case, the beneficiary does not claim to have worked for the petitioner. The AAO thus finds that the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the given period.

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.

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<sup>1</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes in 2007.

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 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* at 537.

The record before the AAO closed on January 13, 2009 with the receipt by the AAO of the petitioner's response to the AAO's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2007 as shown in the table below.

In 2007, the petitioner's Form 1065 stated net income of \$53,522.00<sup>2</sup>

Therefore, for the year 2007, the petitioner did establish that it had sufficient net income to pay the proffered wage. The AAO notes that the petitioner has not submitted tax returns for 2006. In its request for evidence, the AAO acknowledged the audited financial statements submitted into the record, but noted that the petitioner's fiscal year ended on June 30, 2006 and the priority date in the

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<sup>2</sup> For a multi-member LLC treated as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedule K does not have relevant entries for additional deductions in 2007.

instant case is August 17, 2006. While the petitioner submitted a tax return for 2007 in response to the request for evidence, this return does not cover the period specified by the priority date. Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage in 2006.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 partnership's or 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 previously noted, the petitioner did not submit tax returns for 2006 and the record does not include documentation to show that the petitioner had the ability to pay the proffered wage as of the priority date. As such, for the year 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner 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, except for 2007.

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, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>3</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.