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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 07 160 53182 Office: NEBRASKA SERVICE CENTER Date: NOV 2 4 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner operates a healthcare staffing company, and seeks to employ the beneficiary permanently in the United States as a registered nurse, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that it has made a permanent, full time job offer to the beneficiary. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes an 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 March 3, 2008 denial, the primary issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the petitioner has made a permanent, full time job offer to the beneficiary.

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140), together with ETA Form 9089, Application for Permanent Employment Certification, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on May 14, 2007.[1] Aliens who will be permanently employed as registered nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 for which the Secretary of the U.S. Department of Labor (DOL) has determined that there are not sufficient United States 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 United States workers similarly employed. Also, according to 20 C.F.R. § 656.5, aliens who will be permanently employed as professional nurses must: (1) have received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); (2) hold a

[1] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

permanent, full and unrestricted license to practice nursing in the state of intended employment; or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).[2]

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.[3] Relevant evidence in the record includes a brief submitted on appeal; an accountant's report dated March 25, 2008, from [redacted]; a spreadsheet detailing the petitioner's estimated expenses and income in connection with the employment of registered nurses; the petitioner's reviewed financial statements for the years ending December 31, 2004 and December 31, 2005;[4] a list of the Form I-140 petitions filed by the petitioner; and the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2003, 2004, 2005 and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ 70 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 26, 2007, the beneficiary did not

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[2] The beneficiary has passed the NCLEX-RN and is licensed as a registered nurse in the State of Vermont.

[3] 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).

[4] 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

claim to have worked for the petitioner. Here, the priority date is May 14, 2007. The proffered wage as stated on the ETA Form 9089 is $25.00 per hour ($52,000.00 per year).

On appeal, counsel asserts that the petitioner had sufficient net current assets to pay the proffered wage in 2006. Counsel states that the petitioner has filed 66 Form I-140 petitions, and that 41 of those petitions have been approved. He further states that ten beneficiaries have filed to adjust their status, and that seven of those cases have been approved. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petitioner's sound business reputation and the expected increase in profits as a result of the beneficiary's employment must be considered when assessing the beneficiary's ability to pay the proffered wage. Counsel further cites *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986), for the proposition that financial statements are the starting point in the analysis of the petitioner's ability to pay, not the ending point. Counsel also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the proposition that USCIS must review whether petitioner's income will increase as a result of the beneficiary's proposed employment.[5]

Counsel states that the petitioner established "its stellar reputation in the healthcare community, its record of financial success, and objective credible facts that evince a marginal increase in income attributable to the Beneficiary's future employment." Counsel notes that from 2003 to 2006, the petitioner paid $2,600,000 in salaries and made over $5,800,000 in gross profits. Counsel asserts that based on the spreadsheet submitted on appeal, the petitioner's net income increases substantially as the number of nurses on its payroll increases. He notes that the petitioner's estimated expenses and income in connection with the employment of registered nurses presented on the spreadsheet have been evaluated by the petitioner's independent accounting firm.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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 Sonegawa*, 12 I&N Dec. 612.

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[5] The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.

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 petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. at 1054 (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term

tangible asset is a "real" expense.

River Street Donuts at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on October 26, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's 2006 Form 1120S stated net income[6] of $7,783.00. Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] 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. The petitioner's 2006 Form 1120S stated net current assets of $497,542.00. Therefore, for the year 2006, the petitioner had sufficient net current assets to pay the proffered wage.

However, USCIS electronic records show that the petitioner filed numerous other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a

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[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 18 of Schedule K for 2006. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed October 7, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, loss and deductions shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return.

[7] According 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.

petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains specific information about the filing dates of Form I-140 petitions filed by the petitioner from December 30, 2004 through August 2, 2007, and about the names and proffered wages for the beneficiaries of those petitions, the current employment status of those beneficiaries, and the current status of those petitions with USCIS.

As noted by counsel on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was incorporated on May 22, 1997. The petitioner claimed to currently employ 70 workers on the Form I-140 petition, and it paid salaries and wages of $752,787.00, $634,979.00, $630,100.00 and $560,551.00 in 2003, 2004, 2005 and 2006, respectively. The petitioner had substantial gross receipts in 2003, 2004, 2005 and 2006.[8] The petitioner submitted testimonials of its clients and employees to evidence its reputation within its industry.[9] Further, the petitioner has established that full-time employment of the beneficiary will

[8] The petitioner's gross receipts were $6,581,370.00.00, $6,622,870.00, $6,510,187.00 and $6,617,392.00 in 2003, 2004, 2005 and 2006, respectively.

[9] On September 23, 2006, the petitioner received a Certificate of Distinction from the Joint

increase its net income, as evaluated by the petitioner's independent accounting firm. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wages of its multiple sponsored beneficiaries, including the instant beneficiary. The petitioner has overcome this basis for denial.

The director also determined that the petitioner had not established that it has made a permanent, full time job offer to the beneficiary. Relevant evidence in the record includes written testimonials from the petitioner's clients and employees; the petitioner's healthcare personnel service contracts with GBMC Healthcare, Inc., St. Vincent's Medical Center, Henry Mayo Newhall Memorial Hospital, Maine General Medical Center, The Hospital of Central Connecticut at New Britain General, and Milford Hospital; and an employment agreement between Nursing USA and the beneficiary.

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

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Commission on Accreditation of Healthcare Organizations based on a review of its compliance with national standards.

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.*

In his decision, the director noted certain deficiencies in the agreement between the beneficiary and Nursing USA. Specifically, the director noted that it is unclear from the agreement whether the petitioner is the actual intending employer and whether there is a permanent offer of employment from the petitioner. Instead, the director noted that it appeared that the beneficiary had been offered a job by Nursing USA.

On appeal, counsel asserts that Nursing USA and the petitioner have the same owner; that Nursing USA is the "brand" for international recruitment while the petitioner is the actual employer; that the agreement between Nursing USA and the beneficiary allows Nursing USA the right to assign its rights and interests in the agreement; and that Nursing USA has assigned all rights and interest in the agreement to the petitioner. The written testimonials from the petitioner's clients and employees, and the petitioner's healthcare personnel service contracts with GBMC Healthcare, Inc., St. Vincent's Medical Center, Henry Mayo Newhall Memorial Hospital, Maine General Medical Center, The Hospital of Central Connecticut at New Britain General, and Milford Hospital, support counsel's assertions. Further, the employment agreement between Nursing USA and the beneficiary clearly allows for its assignment by Nursing USA.[10] Thus, the evidence establishes that the petitioner has made a permanent, full-time job offer to the beneficiary, and that the petitioner is the intending employer. The petitioner has overcome this basis for denial.

Finally, counsel requests oral argument on appeal. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel

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[10] The agreement states that "Nursing USA or any successor or assignee of Nursing USA has the Right to assign any and all rights and interests in this Agreement. Any assignment hereof shall not relieve the RN of his or her obligations herein."

identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter, and the appeal has been sustained. Consequently, the request for oral argument is denied.

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 met that burden.

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