

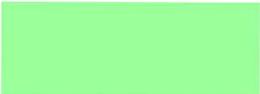
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U.S. Citizenship  
and Immigration  
Services



DATE: **AUG 02 2012** OFFICE: TEXAS SERVICE CENTER

FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as being in the skilled nursing, assisted living, and independent living facilities business.<sup>1</sup> It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The director's decision denying the petition concludes that the petitioner did not establish that it had the continuing ability to pay the proffered wage. On appeal, the AAO has identified another issue, whether or not the petitioner is the actual employer entitled to file the petition.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089 (labor certification). *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15. The petition was filed with a duplicate labor certification.

Both the labor certification and the petition were filed in the name of [REDACTED] a wholly owned subsidiary of [REDACTED]

<sup>1</sup> This information is found on the Form I-140 petition at Part 5, question 2.

<sup>2</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 8 C.F.R. § 103.2(a)(1).

**Ability to Pay the Proffered Wage**

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 either 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 ETA Form 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).

Here, the ETA Form 9089 was accepted on May 14, 2008. The proffered wage as stated on the ETA Form 9089 is \$27.30 per hour (\$56,784 per year). The ETA Form 9089 states that the position requires an associate's degree in nursing and one of the following: a valid [redacted] registered nurse license; a Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate; or passage of the National Council Licensure Examination for Registered Nurses (NCLEX) examination.

The evidence in the record of proceeding shows that the petitioner is a wholly-owned subsidiary of [redacted]. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of 326 million, and to currently employ 11,500 workers. On the ETA Form 9089, signed by the beneficiary on March 18, 2008, the beneficiary indicated that she was working for the petitioner, but she did not enter any employment dates.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the acceptance of the petition for Schedule A occupations establishes the priority date, 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'l Comm'r 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 (Reg'l Comm'r 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date or thereafter.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

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 net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup>

The record before the director contained a copy of the petitioner’s IRS Form 941, Employer’s Quarterly Tax Returns for the first, second, and third quarter of 2008, a letter dated July 23, 2008 from [REDACTED], the petitioner’s Vice President, Assistant Controller<sup>4</sup>, and an undated letter from [REDACTED] the petitioner’s Director of Nurse Recruiting.<sup>5</sup>

With regard to the petitioner’s IRS Forms 941, while additional evidence, such as quarterly tax returns, may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. The regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.)

Given the record as a whole, we find that USCIS need not exercise its discretion to accept either [REDACTED] letter. Regarding [REDACTED] letter, he states that the petitioner “is the payroll entity for facilities which are, like [the petitioner], wholly-owned by [REDACTED]”

<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.

<sup>4</sup>This letter is written on [REDACTED] letterhead, and although [REDACTED] identifies himself as the Vice President, Assistant Controller of the petitioner, there is no explanation for why the letter is not written on the petitioner’s own letterhead.

<sup>5</sup>This letter is written on [REDACTED] letterhead, and although [REDACTED] identifies herself as the Director of Nursing of the petitioner, there is no explanation for why the letter is not written on the petitioner’s own letterhead.

letter indicates that the petitioner does not appear to employ anyone directly, but rather is tasked with processing the payroll for other related entities. While Mr. letter states that the petitioner had annual gross revenue of approximately \$362 million in its most recent fiscal year, the record contains no regulatory-prescribed evidence of the petitioner's ability to pay, including federal tax returns, annual reports or audited financial statements, to support this assertion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regarding letter, she states "this letter confirms that has the ability to pay the proffered wage of \$27.30 per hour to [the beneficiary]." Although indicates that she is the petitioner's Director of Nursing, she does not indicate that she is also a financial officer of the petitioner. states that the petitioner's parent, has the ability to pay the proffered wage, but she does not state that the petitioner has the ability to pay the proffered wage. As 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'r 1980). In a similar case, 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The petitioner has not established that has any legal obligation to pay the beneficiary's wage on behalf of the petitioner. Thus, the petitioner cannot rely on its parent's financial resources to establish its ability to pay the proffered wage in the instant case.

Therefore, from the date the ETA Form 9089 was accepted for processing by USCIS, 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 its net current assets.

On appeal, counsel asserts that the director completely overlooked letter and that the petitioner established its ability to pay based on letter and its IRS Forms 941. For the reasons discussed above, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the record.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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, there is no evidence of the petitioner's historical growth, no evidence of the petitioner's reputation in its industry, and no evidence that the beneficiary will be replacing a former worker or outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

According to USCIS records, the petitioner has filed over thirty I-140 petitions on behalf of other beneficiaries. Therefore, 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'l Comm'r 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 ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record does not contain such evidence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary of the instant petition and the proffered wages to the beneficiaries of its other petitions.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

#### **Petitioner Not Actual Employer**

Beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such

indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

On April 27, 2012, the AAO notified the petitioner that it intended to dismiss the appeal as the petitioner had not established that it would be the beneficiary's employer. The notice referenced Mr. [REDACTED] letter that states that the petitioner "is the payroll entity only for facilities which are, like the petitioner, wholly-owned by [REDACTED]". The petitioner was also notified that the AAO's interpretation of [REDACTED] letter was that the petitioner was a payroll company and was not in the business of employing nurses. The petitioner was allowed 30 days in which to provide evidence that the petitioner was the actual employer entitled to file the petition.

The petitioner responded on May 25, 2012, submitting a letter from [REDACTED] states the AAO's statement in its Intent to Dismiss that the "petitioner describes itself as a skilled nursing, assisted living, and/or independent living facility" is completely unsupported by the record." However, [REDACTED] statement is inconsistent with the petition at Part 5, question 2, in which the petitioner described itself as being in the skilled nursing, assisted living, and independent living facilities business. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[REDACTED] continues by stating that "the AAO has seized upon a statement in the letter from [REDACTED] Vice President and Assistant Controller, that the petitioner 'is the payroll entity' for the 11,500 employees of the 200 nursing centers ultimately owned and operated by [REDACTED] and concluded that the petitioner is 'not in the business of employing nurses.'" Although [REDACTED] alleges that the AAO's conclusion that the petitioner is not in the business of employing nurses is wrong, [REDACTED] does not submit any evidence to support her allegation. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[REDACTED] concludes by stating "the original petition contains a letter from the Director of Nurse Recruiting for the petitioner, which clearly states that the petitioner owns and/or operates 200 skilled nursing facilities, and is a subsidiary of [REDACTED] and is offering the position of nurse to the

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[REDACTED] letter is on [REDACTED] letterhead. [REDACTED] identifies herself as the Senior Recruitment Manager & Head of Foreign Nurse Recruiting of [REDACTED]. There is no evidence in the record that [REDACTED] works for the petitioner or is authorized to represent the petitioner.

beneficiary.” The letter to which [REDACTED] refers is [REDACTED] undated letter. [REDACTED] identifies herself as the Director of Nurse Recruiting for the petitioner and states that she is submitting the letter “in support of the petition of [REDACTED] ..[and] the beneficiary has been offered the position of registered nurse at [a] [REDACTED] facility in [REDACTED]” Even if the petitioner were to establish that it owned and operated over 200 nursing facilities, [REDACTED] states that the beneficiary was offered a position at a [REDACTED] facility rather than being offered a position with the petitioner. See *Matter of Ho*, 19 I&N Dec. at 591-592.

The evidence in the record does not establish that the petitioner will be the beneficiary’s actual employer. The petitioner submitted a copy of the posting notice which identified the employer as [REDACTED]. The petitioner submitted a copy of the prevailing wage determination which identified the employer as [REDACTED]. The petitioner also submitted a copy of the intranet recruitment advertisement, which identified the employer as [REDACTED]. [REDACTED] undated letter indicates that the letter was in support of the petition of [REDACTED] the beneficiary was offered a position at a [REDACTED] facility, and that [REDACTED] had the ability to pay the beneficiary. Additionally, [REDACTED] states the petitioner is the payroll entity inferring that the petitioner is not an employer, but rather is the payroll agent. The AAO specifically referenced [REDACTED] letter in its Intent to Dismiss, and the petitioner did not submit any independent and objective evidence that [REDACTED] letter was incorrect. Therefore, based on this evidence and the total record, it appears that [REDACTED] rather than the petitioner, is the intended employer.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does 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 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.