



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 25 2013 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant petition on November 14, 2006. The Administrative Appeals Office (AAO) summarily dismissed the appeal on April 15, 2008. On April 20, 2009, the petitioner filed a motion to reopen and reconsider. The director denied the motion for untimely filing. On July 30, 2012, the director also denied the petitioner's subsequent motion to reopen and to reconsider. Upon further review, the AAO concludes that the decision entered by the director on the petitioner's April 20, 2009 motions was procedurally erroneous. The motions should have been reviewed by the AAO, rather than the director, because the motions were filed after the denial by the AAO of the appeal. Therefore, the AAO is reopening this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of reviewing the motions and entering a new decision. The petition will remain denied.

The petitioner is a home health 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). On November 14, 2006, the director denied the petition because the petitioner failed to establish that as of the priority date, the beneficiary had received a certificate from the [REDACTED] that she held a permanent, full and unrestricted license to practice nursing in the state of intended employment, or that she had passed the [REDACTED]. Upon review on our own motion to reopen, we find that the petitioner has not established that the beneficiary met the minimum requirements for the job offered as of the priority date; that the petitioner met the requirements for the posting notice; and that it had the continuing ability to pay the proffered wage from the priority date onward.

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.¹

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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.*

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 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).

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 or Services). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. See 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i); see also 20 C.F.R. § 656.15. 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 [USCIS].” 8 C.F.R. § 204.5(d). A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date of the instant petition is June 26, 2006.

According to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must: (1) have received a certificate from the [REDACTED]; (2) hold a permanent, full and unrestricted license to practice nursing in the state of intended employment; or (3) have passed the [REDACTED]. See also 20 C.F.R. § 656.5(a)(2).

On April 30, 2013, the AAO notified the petitioner that it was reopening the case and requested evidence demonstrating that the beneficiary meets the requirements set forth in 20 C.F.R. § 656.15(c)(2). In response, the petitioner submitted a copy of an “Interim Permit” from the State of California, Board of Registered Nursing, valid from March 15, 2006 until September 15, 2006. The permit contains the following statement:

This permit allows the practice of professional nursing, under the direct supervision of a Registered Nurse, pending issuance of a license following examination. The interim permit expires on the above date or upon notice of failure of the examination, whichever occurs first.

The petitioner also submits a copy of the beneficiary’s registered nurse license issued by the State of California Board of Registered Nursing (Board of RN) on December 24, 2007. At the time of the filing of the petition, the beneficiary held an interim permit, which allowed her to practice nursing under the direct supervision of a registered nurse. According to the Board of RN, “an interim permit is not renewable and is in effect to the expiration date or until the results of the examination are mailed, at which time it becomes null and void.” See [REDACTED] (last accessed on June 18, 2013). Furthermore, “an interim permittee is not authorized to use any other title or designation than “I.P.” or “permittee” or “nurse permittee” or “nurse interim permittee.” *Id.*

Counsel asserts that although the beneficiary did not have a registered nurse license at the time of the filing of the petition, the interim permit authorized the beneficiary to practice nursing under a direct supervision. However, a temporary permit, which restricts the beneficiary to work only under a direct supervision of a registered nurse does not meet the requirements set forth in 20 C.F.R. § 656.15(c)(2). The beneficiary obtained her unrestricted registered nurse license on December 24, 2007, which is after the priority date of June 26, 2006. The record contains no evidence demonstrating that on the priority date, the beneficiary met the requirements

enumerated in the regulation. Therefore, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the minimum requirements as of the priority date.

Beyond the director's decision, the AAO concludes that the petitioner also has not met the notice requirements as set forth in regulations. Petitions for Schedule A occupations must contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. See 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posting notice to its employees at the location of the intended employment. See 20 C.F.R. § 656.10(d)(1). The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

- (i) State that 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.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. See 20 C.F.R. § 656.10(d)(6).

In cases where there is no bargaining representative, the Notice must be posted for at least 10 consecutive business days, and it must be clearly visible and unobstructed while posted. 20 C.F.R. § 656.10(d)(1)(ii). The Notice must be posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment. *Id.* In addition, the Notice must be published "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." *Id.*

The satisfaction of the Notice requirement may be documented by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the Notice. *Id.* Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing.

The record contains a copy of the notice the petitioner posted. The AAO notes that this notice, although it contains the job title "Registered Nurse," it does not describe the position as required

by the regulation. *See* 20 C.F.R. § 656.10(d)(6). Further, the notice indicates that it “has been posted since Feb 2006,” however the record does not indicate the exact date on which the notice was posted and taken down. Therefore, we cannot determine whether the notice was posted for at least 10 consecutive business days as required by 20 C.F.R. § 656.10(d)(1)(ii). Furthermore, the notice provides the address for the State of California, Employment Development Department as the contact information for the Regional Certifying Officer rather than the address for the DOL. *See* 20 C.F.R. § 656.10(d)(3). Thus, we find that the posting notice does not meet the requirements of 20 C.F.R. § 656.10(d).

Furthermore, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, June 26, 2006. The proffered wage as stated on the ETA Form 9089 filed with the Form I-140 is \$28.78 per hour (\$59,862.40 per year). 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).

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.

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’l Comm’r 1967). However, where a 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).

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. The record does not demonstrate that the beneficiary has ever been employed by the petitioner.

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); *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).

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to employ 40 workers. The petitioner's tax returns reveal the following information as shown in the table below:

Year	Net Income ²
2006	\$-26,093
2007	\$100,799
2008	\$114,431
2009	\$-14,992
2010	\$63,797
2011	\$83,393
2012	\$163,098

² 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 13, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

Thus, for the years 2006 and 2009, 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

Year	Year-end Current Assets	Year-end Current Liabilities	Net Current Assets
2006	\$326,566	\$270,685	\$55,881
2009	\$422,784	\$145,456	\$277,328

Thus, the petitioner did not have sufficient net current assets to pay the proffered wage of \$59,862.40 in 2006.

However, USCIS may also 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls

³According 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.

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.

Furthermore, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The evidence in the record does not demonstrate the petitioner's historical growth since its inception, nor does it demonstrate its reputation in the industry. Furthermore, the record is silent regarding the number of shareholders the petitioner has and whether the shareholders would forego their officer compensation in order to pay the proffered wage. Moreover, the record reflects that the petitioner filed Form I-140 immigrant petitions for multiple beneficiaries, as well as multiple nonimmigrant petitions.

In the 2013 Service Motion to Reopen, the AAO specifically advised the petitioner that USCIS electronic records show that it has filed seven other I-140 petitions and other nonimmigrant petitions. If the instant petition were the only petition filed by the petitioner, it 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 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* at 144-145. *See also* 8 C.F.R. § 204.5(g)(2).

Therefore, the AAO requested evidence showing that the petitioner has the continuing ability to pay each beneficiary the proffered wage from the priority date until each adjusts to permanent residence. Such evidence must include the name of each beneficiary, the receipt number for each petition, the proffered wages, and dates the individual became a permanent resident (or the petition denied or revoked as applicable). The petitioner provided none of the requested evidence regarding the other beneficiaries. Considering the totality of the circumstances and its multiple beneficiaries, the petitioner fails to demonstrate that it had the continuing ability to pay the beneficiary from the priority date onward.

In summary, the AAO concludes that the petitioner has not established that the beneficiary met the minimum requirements for the job offered as of the priority date; that the petitioner met the

requirements for the posting notice; and that it had the continuing ability to pay the proffered wage from the priority date onward.

The petition will remain 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 and the petition remains denied.