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U.S. Citizenship and Immigration Services

[redacted]

FEB 26 2004

FILE: WAC 02 266 50546 Office: CALIFORNIA SERVICE CENTER Date:

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: SELF-REPRESENTED

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional.[1] The petitioner operates nursing homes and other long-term health care facilities. It seeks to employ the beneficiary permanently in the United States as a registered nurse/charge nurse. The petitioner states that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner asserts that it has had the continuing financial ability to pay the beneficiary's proffered wage and requests reversal of the director's decision.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

> (2) *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. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The regulation at 8 C.F.R. § 204.5 additionally provides that the "priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service."

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date,

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[1] Registered nurses are considered members of the professions [*Matter of Gutierrez,* 12 I&N Dec. 418 (D.D. 1967]. However, a registered nurse who has a bachelor's degree would not normally qualify for E32 classification because entry into the occupation does not require a minimum of a baccalaureate degree. [8 C.F.R. § 204.5(l)(ii)(C)]

which is the date the completed, signed petition was properly filed with CIS. Here, the petition's priority date is August 26, 2002. The beneficiary's salary as stated on the labor certification is $20.00 per hour or $41,600 per annum, based on a 40-hour week. The visa petition states that the petitioner was established in 1994. The labor certification application reveals that the beneficiary will be assigned to work at the Westminster Extended Care & Living Center in Westminster, California.

Along with the beneficiary's licensing and educational credentials, the petitioner initially submitted a letter dated August 20, 2002, from its financial controller, [redacted] Mr [redacted] confirms the petitioner's job offer and states:

> The Petitioner, Northwest Bec Corp. is financially able to pay the offered salary to the Beneficiary. It has been operating and managing various health facilities in the United States since 1994, including the Westminster Extended Care and Living Center, located in Westminster, California. At present, [the petitioner] employs over 1,350 employees and has a gross annual income in excess of $62 million.

The director requested additional evidence from the petitioner related to its ability to pay the proffered wage as well as further evidence of the business relationship between the petitioner and the skilled care facility where the beneficiary will be employed. The petitioner response included a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It reflected a gross income of over 22 million dollars, salaries and wages paid of over 13 million, and a taxable income declared loss of approximately $1,400,000.

The petitioner also provided a summary of its operations and personnel. It revealed that the petitioner is a privately held company that was originally formed in October 1993. Its operations in three states include the management of twelve skilled nursing facilities, seven residential care facilities, an institutional pharmacy, two geriatric psychiatric hospitals, two home health agencies, and three behavioral health units. The report also noted that the petitioner's growth rate has been over 25% for the past eight years.

The director concluded that petitioner's declared tax loss in 2001 failed to cover the beneficiary's proposed wage offer of $41,600 and denied the petition.

On appeal, the petitioner asserts that the most recent fiscal year of 2002 has produced an increase in revenue of over 60 million dollars. The petitioner states that the company has shown losses because of its difficulty recruiting nurses and its lack of success in petitioning for alien nurses under a Schedule A, Group I blanket certification.

The petitioner's point is well taken. As noted above, the regulation at 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer relevant to the U.S. employer's ability to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way to allow large, established employers to utilize a more simplified route through adjudication. *See* Employment-Based Immigrants, 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proposed wage offer.

In this case, although the petitioner's federal tax return showed a net loss for 2001, the balance of the evidence indicates that the petitioner has been in business for ten years, grossed over 22 million in 2001, paid over 13 million dollars in salaries and wages, operates multiple medical facilities, and is producing increasing revenues. Here, the totality of the circumstances reflecting the magnitude of the petitioner's operations in conjunction with the favorable regulatory language relating to large employers at 8 C.F.R. 204.5(g)(2), weighs in the petitioner's favor.

Based on the evidence contained in the record, it can be concluded that the petitioner has demonstrated the continuing ability to pay the proffered wage as of the priority date of the petition.

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.