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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 10 2004

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.

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 is a supplemental medical staffing firm. It seeks to employ the beneficiary permanently in the United States as a staff (registered) 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, counsel submits additional evidence and asserts that the petitioner 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)(2) provides 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. 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 June 26, 2002. The beneficiary's salary as stated on the labor certification is $17.00 per hour or $35,360 per annum, based on a 40-hour week. The visa petition states that the petitioner was established in 1999 and is organized as a corporation. The record reveals that the beneficiary will be assigned to work at the Greater El Monte Community Hospital.

In support of its ability to pay the beneficiary's proffered salary, the petitioner, through counsel, included various copies of its quarterly federal tax return (Form 941) from 2000 and 2001 and a copy of the petitioner's W-3, Transmittal of Wage and Tax Statement for the year 2000. They reflect that the petitioner grew from 53 employees in July 2000 to over 100 by the end of October 2000. It paid slightly more than $2,000,000 in wages in 2000. By the time the visa petition was filed in June 2002, the petitioner claimed a payroll of 300 people. The petitioner also submitted a letter dated September 25, 2002, confirming that the beneficiary had a definite job offer as a staff nurse at a salary of $680 per week.

As part of her response to the director's September 2002 request for evidence, counsel submitted a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001. It reflected a gross income of over $5,550,000, labor costs of over $4,000,000 and a declared taxable income before the net operating loss (NOL) deduction and special deductions of approximately $70,670. The petitioner also provided a copy of its contract with Greater El Monte Community Hospital to supply nursing staff.

The director concluded that petitioner's declared taxable income, as set forth on its 2001 federal income tax return, failed to cover the beneficiary's proposed wage offer of $35,360 and denied the petition. The director noted that two other visa petitions had already been approved for this petitioner and concluded that the petitioner's remaining net income would not cover the beneficiary in this case.

On appeal, counsel asserts that the petitioner has been paying 300 employees and has contracts with 28 health care facilities to help fill the shortage of trained nurses. She maintains that these nursing vacancies will directly translate to more income. Counsel submits a list of the health care facilities on the petitioner's letterhead as well as a few sample copies of the contracts the petitioner maintains. Counsel also submits a copy of a compiled balance sheet and income statement purporting to reflect the petitioner's financial status as of the end of September 2002. It states that the petitioner's net income is approximately $173,000.[2] Copies of the petitioner's 2002 state wage reports showing its employees' payroll records, copies of the petitioner's quarterly federal tax return for the quarter ending December 31, 2002, and a copy of a state annual reconciliation form reflecting that the petitioner paid $4,374,580 in wages as of December 31, 2002, are also submitted on appeal. Counsel additionally offers a letter from the petitioner's chief financial officer, dated February 4, 2003, which states that the petitioner has 300 workers on its payroll and that the petitioner has the ability to pay the beneficiary's proffered wage.

In this case, the AAO concludes that the growth and magnitude of the petitioner's business supports the petitioner's ability to pay the beneficiary's proffered salary of $35,360. The regulation at 8 C.F.R. § 204.5(g)(2) permits 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

[2] The regulation at 8 C.F.R. § 204.5(g)(2) requires audited financial statements, annual reports, or federal tax returns. A compilation is based only on the representations of management and offers little evidentiary weight.

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 may have suggested an inability to pay the beneficiary's wage offer, the balance of the evidence indicates that the petitioner has experienced significant growth and is producing increasing revenues. Here, the totality of the circumstances reflecting the size 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, the AAO concludes 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.