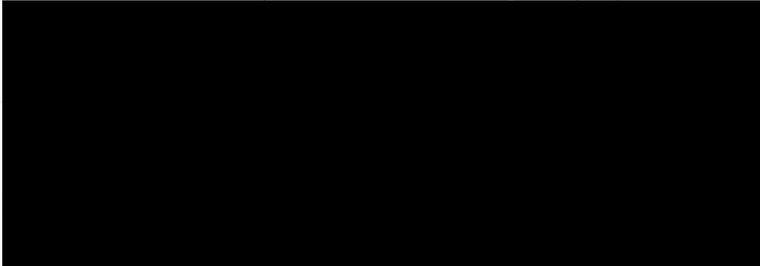




U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



Ble

FILE: WAC-02-216-50331 Office: CALIFORNIA SERVICE CENTER Date: **MAY 12 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 dismissed.

The petitioner is a nurse staffing agency that provides nurses for assignments with health care providers. It seeks to employ the beneficiary permanently in the United States as a registered nurse. In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary as a registered nurse under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). At the time the petition was filed the petitioner had 500 employees.

The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.20 for which the Director of the United States Employment Service 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. Schedule A includes aliens who will be employed as professional nurses.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 [Citizenship and Immigration Services (CIS)].

Eligibility turns on the petitioner's ability to pay the proffered wage and on its qualification for a blanket labor certification on behalf of the beneficiary pursuant to Schedule A, each as of the priority date of the filing of the petition. The filing of the I-140 on June 21, 2002 in this case established the priority date. 8 C.F.R. § 204.5(d). The beneficiary's salary as stated on the labor certification is \$16.85 per hour or \$35,048.00 per year. For reasons discussed below, the petitioner has failed to establish either its ability to pay the proffered wage or its qualification for the blanket labor certification.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 16, 2002 the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE also requested evidence to show that the petitioner will be employing the beneficiary to fill a specific vacancy and evidence of the contracts between the petitioner and the clients where the beneficiary will perform services. Finally, the RFE requested evidence to establish that notice of the filing was

provided to the bargaining representatives, if any, or that notice was posted for at least 10 days at the facility or location of intended employment.

Counsel responded to the RFE with a letter dated December 3, 2002 accompanied by additional evidence.

In a decision dated February 28, 2003 the director denied the petition, finding that the petitioner failed to establish that it had the ability to pay the beneficiary's wage.

On appeal, counsel for the petitioner submits a brief and additional evidence.

The AAO will first evaluate the decision of the director based on the evidence submitted prior to that decision. The evidence submitted for the first time on appeal will then be considered.

The petitioner's evidence included a financial statement for the petitioner compiled by a certified public account. The director correctly determined that the financial statement is not acceptable evidence, since it is not an audited statement. The regulation at 8 C.F.R. § 204.5(g)(2), quoted on page two above, neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. A compiled financial statement is of little evidentiary value because it is based solely on the representations of management.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp., supra*, at 1054.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

In support of the instant petition, the petitioner submitted a copy of its Internal Revenue Service (IRS) Form 1120 United States corporation tax return for the year 2001. That return shows taxable income before the net operating loss deduction and special deductions as \$29,288. The director found that the balance sheet information in the petitioner's tax return showed net current liabilities. The director found that the amounts on the tax return were insufficient to pay the proffered wage of \$35,048. The director's evaluation of the tax return was correct. The available income of \$29,288 is insufficient to pay the proffered wage. Calculations based on the net current assets and on the net current liabilities of the petitioner shown for the end of 2001 yield a negative figure for net current assets of -\$201,718 at the end of 2001. Since that figure is negative, it also fails to establish the ability of the petitioner to pay the proffered wage.

The evidence in the record before the director also included a copy of an agreement dated September 6, 2001 between the petitioner and a hospital in Los Angeles, California (hereinafter hospital #1) and a copy of an agreement dated November 4, 2002 between the petitioner and a hospital in Alhambra, California (hereinafter hospital #2). Neither agreement requires the contracting hospital to accept any specific number of nurses or other personnel from the petitioner. Rather, each agreement states that "upon request" by the hospital, the petitioner "shall use its best efforts to assign temporary, supplemental personnel" to the hospital. Since the agreements contain no commitment by either hospital to accept the beneficiary as a nurse provided by the petitioner, the agreements are insufficient to establish the ability of the petitioner to pay the proffered wage to the beneficiary.

Moreover, even if either of those agreements contained binding commitments to accept the beneficiary as a nurse at the signatory hospitals and to pay the petitioner at the hourly rates specified in those contracts, the evidence fails to establish that the agreements would generate sufficient funds for the petitioner to pay the proffered wage and also to pay additional costs associated with the employment of the beneficiary, including the employer's contribution to social security taxes, unemployment insurance, worker's compensation insurance, health insurance, professional liability insurance and the petitioner's own administrative costs. The agreements with hospital #1 and hospital #2 contain attached schedules of rates ranging from \$37.00 to \$47.75 per hour, depending on the shift and the unit to which the nurse would be assigned. Since the proffered wage is \$16.85 per hour, the petitioner's contracts with hospital #1 and hospital #2 would provide the petitioner with from \$20.15 to \$30.80 per hour in excess of the proffered wage. But no evidence indicates the projected hours to be worked by the beneficiary, nor the projected shifts and units, and no evidence indicates the non-salary costs of the petitioner expected to be incurred pursuant to the contracts. For these reasons, the agreements between the petitioner and two different hospitals fail to establish the petitioner's ability to pay the proffered wage.

Since the evidence in the record prior to the director's decision fails to establish the ability of the petitioner to pay the proffered wage of the single beneficiary in this case, the AAO does not reach the issue of whether the petitioner has established its ability to pay the proffered wage to any other beneficiaries for whom it may have submitted I-140 petitions.

On appeal the petitioner submits additional evidence. Some of the evidence consists of additional copies of documents previously submitted in evidence. The evidence submitted for the first time on appeal consists of copies of the following: an agreement dated January 10, 2003 with hospital #1 (an apparent renewal of the agreement dated September 6, 2001 which was previously submitted); an agreement dated January 12, 2002 with another hospital in California for which the address is not given (hereinafter hospital #3); an agreement dated March 19, 2003 between the petitioner and a nurse who is not the beneficiary; an agreement dated March 19, 2003 between the petitioner and the beneficiary; a letter with an illegible date and partially illegible text from the California State Compensation Insurance Fund; a certificate of insurance for the petitioner from an insurance company for the period January 5, 2003 to January 5, 2004; and several promotional flyers for the petitioner which were not previously submitted in evidence.

Documents which are dated in the year 2002 are found to be precluded from consideration on appeal by in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

The documents dated in 2003 are found not to be precluded from consideration on appeal by *Matter of Soriano, supra*, since the director's decision was issued in February 2003 on a record which had closed several months earlier. Nonetheless none of the documents submitted on appeal, whether dated in 2003 or earlier, affect the director's analysis of the petitioner's ability to pay. None of the agreements between the petitioner and hospitals require any hospital to accept a certain number of nurses from the petitioner. Nor does the other evidence submitted on appeal contain information which is significantly different from the information in the evidence which was in the record prior to the decision of the director. The evidence submitted on appeal therefore fails to overcome the decision of the director.

Beyond the decision of the director, the petition must be denied because the petitioner failed to comply with the regulatory requirements for a blanket labor certification for a Schedule A occupation.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

- (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
- (b) The Application . . . shall include:
 - (1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form. . . .
 - (2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
- (ii) If there is no such bargaining representative, *by posted notice to the employer's employees at the facility or location of the employment*. The notice shall be posted for at least 10 consecutive days.

(Emphasis added).

The petitioner has completed the job offer description portion of the ETA 750 form. By doing so the petitioner has provided sufficient evidence of prearranged employment for the beneficiary. 8 C.F.R. § 656.22(b)(1). See *IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY], Beneficiary: [IDENTIFYING INFORMATION REDACTED BY AGENCY]*, WAC 98 072 54049 (AAU 1999), available on Westlaw database at 1999 WL 33603420 (INS) (information on Forms I-140 and ETA 750 found to be sufficient evidence of prearranged, full-time employment); *IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY], Beneficiary: [IDENTIFYING INFORMATION REDACTED BY AGENCY]*, WAC 96 191 50812, (AAU, March 19, 1997), available on Westlaw database at 1997 WL 33170407 (INS) (nurse staffing agency found to be the employer of the beneficiary). Cf. *Matter of Smith*, 12 I&N Dec. 772 (D.D. 1968) (secretarial agency found to be offering permanent, full-time employment to its employees, who were placed on temporary assignments with contracting customers).

Although the ETA 750 establishes prearranged employment for the beneficiary, the petitioner has failed to provide an employment agreement with the beneficiary. Therefore the record lacks information concerning the scope of the proffered employment, such as a specific third-party worksite to which the beneficiary would be assigned.

The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representatives, as required by 20 C.F.R. § 656.22 (b)(2).

The petitioner's president attested that the job notice was posted for ten working days. Although the notice refers to the employment location as hospital #1, the petitioner failed to indicate where it posted the notice, stating only that the notice was posted "in two different locations on the job premises . . ." Also, nothing in the record states that the "job premises" is hospital #1.

If the petitioner merely posted the notice at its administrative offices, the petitioner has not complied with the requirement of 20 C.F.R. § 656.20(g)(1). The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers at the location of intended employment with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. See Immigration Act of 1990, Pub.L. No. 101-649, § 122(b)(1), 1990 Stat. 358 (1990). See also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

The record in the instant petition, including the documents submitted on appeal, contains a total of four contracts with three different hospitals. None of the contracts obligate the signatory hospitals to place the petitioner's nurses at their facilities. The petitioner therefore has failed to identify the actual "facility or location of the employment," and for this reason the evidence does not establish that the petitioner has complied with the provision of 20 C.F.R. § 656.20(g)(1) concerning the required location for the posting.

Another deficiency in the petitioner's evidence is that the notice of job opportunity lacks certain information required by the regulations.

The regulation at 20 C.F.R. § 656.20(g)(3) states:

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) State that applicants should report to the employer, not to the local Employment Service Office;

(ii) 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; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

The job opportunity notice in the record contains a description of the job and states that the employment location is at hospital #1, in Los Angeles, California and that the wage offered is \$16.85 per hour. The notice also states,

This posting is made in connection with the filing of a Schedule A permanent labor certification application. Any person may provide documentary evidence bearing on the application to the Immigration and Naturalization Service [REDACTED]

The petitioner's notice instructs any person with documentary evidence bearing on the application to provide that evidence to the office of the Immigration and Naturalization Service in Laguna Niguel, California. The notice therefore fails to conform with the requirement of 20 C.F.R. § 656.20(g)(3)(iii) that a job opportunity notice must state that "any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor."

Another issue requiring a denial of the petition is the failure of the petitioner to establish that the proffered wage is equal to or greater than prevailing wage rate.

The regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification. Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e). Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b)(3), shall be determined as follows:

....

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

....

b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment"

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. The city, state, and county of the employment location must be known in order to identify the prevailing wage rate. The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), an OWL Level I position are:

beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.

They may assist staff performing tasks requiring skills equivalent to a level II and may perform high-level work for training and development purposes.

These employees work under close supervision and receive specific instruction on tasks and results expected.

The level I job may require education and/or experience, but it does not require an advanced level of understanding to perform the job duties. Level I includes entry level jobs, but may also include some supervised activities, which exceed those normally considered as entry level.

See also "DOL Issues Guidance on Determining OES Wage Levels," Training and Employment Guidance Letter No. 5-02 (DOL August 2002).

According to GAL 2-98 (DOL), a Level II position is the following:

Level II employees are fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) further clarifies Level I and Level II designations in the alien employment certification program. TEGL No. 5-02 states the following:

Any job may be performed at either level of skill, depending on the level of supervision provided, the relative complexity of the job duties, the level of judgment required, and application of the other factors that distinguish between levels I and II.

....

The generic occupation descriptions found in the OES/SOC [Occupational Employment Service Standard Occupational Classification], DOT [Dictionary of Occupational Titles], and similar coding structures does not provide sufficient information to the State Workforce Agency (SWA) to determine whether the job is level I or level II. . . . The job description is the primary determinant for a level designation. Additional information regarding the job will not be given the same weight as the actual wording of the job description or the state job requirements (emphasis added).

....

Under GAL 2-98, if a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer that requires an advanced degree (Master's or Ph.D.) shall be at level II. There are instances when the employer can present sufficient evidence that the job does not require independent performance of all of the duties encompassed by the occupation and, therefore, is a level I in that particular instance.

Skill level determinations are based on the position requirements and general occupational standards delineated by the Department of Labor.

CIS often looks to the Department of Labor's *Occupational Outlook Handbook (Handbook)* to determine the appropriate minimum education and training requirements for entry into a particular position. In the 2002-2003 edition of the *Handbook* at page 269, the *Handbook* states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

....

[S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The proffered position resembles an entry-level nursing position as it does not specify an advanced level of training or experience or supervisory duties. The Form ETA 750A indicates that a director of nursing services would supervise the beneficiary. The proffered position sets forth basic responsibilities of a nurse under supervision and thus delineates the position as a Level I position.

The *Handbook* makes clear that nurses who had completed a baccalaureate degree may enter the nursing occupation through entry-level positions. Additionally, TEGl No. 5-02, published by the Department of Labor, who controls and publishes statistical information about prevailing wage rates for immigration

purposes, clearly establishes that the position, and not the beneficiary, is the focal point for analysis. Thus, when determining prevailing wage rates and skill level designations, CIS should review the proffered position's requirements, description of duties, and determination of subordination or supervision, as GAL 2-98 and TEGL No. 5-02 guides, and utilize the *Handbook* as appropriate to determine educational and training standards for various occupations.

In the instant petition, although the evidence is sufficient to establish that the position is a Level I position, the evidence fails to establish the geographical area of intended employment.

The petitioner's Form ETA 750, block 15, states that the job to be performed by the beneficiary requires a State of California registered nurse license, or eligibility to take the examination for that license. The petitioner's address is in Los Angeles, California. The ETA 750 gives no further information on the area of intended employment.

As discussed above, the contracts between the petitioner and three different hospitals fail to specify the intended job site of the beneficiary. Moreover, the ETA 750 indicates only that the beneficiary will require California licensing as a nurse, but it fails to specify in which area of California the beneficiary will work. The fact that the petitioner's business address is in Los Angeles does not establish that the area of intended employment will also be in Los Angeles. By failing to specify the area of intended employment the petitioner's evidence therefore fails to provide a sufficient basis for a determination of the prevailing wage.

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 not met that burden.

ORDER: The appeal is dismissed.