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U.S. Citizenship
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Services

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FILE: [Redacted]
SRC-02-068-50645

Office: TEXAS SERVICE CENTER Date: FEB 02 2005

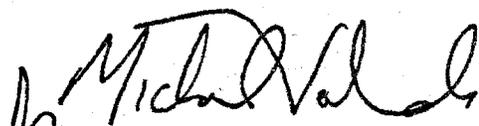
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[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 immigrant visa petition was denied by the director of the Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The immigrant visa petition is denied.

The petitioner is a staffing services corporation. The petitioner currently employs two employees and states it has a net annual income of \$85,000 on its visa petition. It seeks to sponsor the beneficiary for a third-party entity's permanent employment of the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a brief and copies of evidence formerly submitted into the record of proceeding as well as new evidence, namely, copies of documentation pertaining to the financial status of the petitioner's owners. Counsel states, in part, that the petitioner's third-party client, [REDACTED] will be the employer of the intending immigrant and has illustrated its continuing ability to pay the proffered wage. Counsel states that alternatively, the petitioner is structured as a sole proprietorship, and since it recently began operations and has no cash flow, it has not filed tax returns. Thus, counsel submits financial documentation pertaining to the financial status of the petitioner's owners. Counsel cites precedent from the Department of Labor's (DOL) Bureau of Alien Labor Certification Applications (BALCA) to support his appellate assertions.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on December 24, 2001. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification 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 20 C.F.R. § 656.20(g)(3).

I. **The petitioner failed to establish that it is the actual employer.**

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition.

In its initial petition, the petitioner submitted a contract between itself and [REDACTED] (Agreement) [REDACTED] and the beneficiary (Employee Contract), and a letter of support from [REDACTED] detailing its request for healthcare professionals from the petitioner (Support Letter). The Agreement illustrates that the petitioner recruits, screens, recommends, and assists with visa issuance to qualified healthcare professionals for permanent employment with [REDACTED]. The Agreement at section 5.2 indicates that [REDACTED] and the petitioner are independent business entities and have not formed a partnership or joint venture. The Employee Contract illustrates that [REDACTED] is offering the beneficiary a two-year employment contract for \$2,457.00 per month and benefits such as transportation, death benefits, medical, dental, life, and accident insurance, as well as outlining the use of future dispute resolution procedures. The Employee Contract indicates that [REDACTED] retains authority to hire, fire, and oversee all aspects of the beneficiary's employment. The Support Letter states [REDACTED] need for 12 intensive care unit registered nurses and 6 medical/surgical registered nurses.

Although the director issued a request for evidence and a decision that never addressed the issue of actual employment and a prearranged permanent offer of employment, 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*, 299 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

A. **Although the proffered employment may be pre-arranged, permanent and not temporary or seasonal, the petitioner is not the actual employer.**

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Additionally, 8 C.F.R. § 204.5(c) states the following: "*Filing petition*. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

In response to the director's request for evidence concerning the petitioner's continuing ability to pay the proffered wage, the petitioner's former counsel stated that "[t]he beneficiary is being employed by [REDACTED] in Lufkin, Texas, and [the petitioner] is the petitioner who has filed the current I-140 petition." Additionally, the petitioner's current counsel, substituted on appeal, states on the appellate form that the

petitioner "is contracted to recruit nurses for [REDACTED]" who "is fully financially responsible for the salaries of the nurses." The petitioner's current counsel states in his brief that [REDACTED] will be the beneficiary's "direct employer" and is the "enterprise wholly financially responsible."

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has not established that it is the beneficiary's actual employer. Although the petitioner completed and signed the relevant immigration forms, the Employment Contract between [REDACTED] and the beneficiary unequivocally states that [REDACTED] is the beneficiary's employer. Both former and current

counsel unequivocally represent that [REDACTED] will be the direct, financially responsible employer of the beneficiary. The petitioner will not maintain the beneficiary on its payroll or employment rolls, provide employment benefits, have the authority to hire and fire the beneficiary, or have any control over the beneficiary's employment. [REDACTED] will maintain the beneficiary on its payrolls, provide employment benefits, have the authority to hire and fire the beneficiary, and fully control the beneficiary's employment. [REDACTED] should have filed the instant visa petition since it is really the petitioning entity. [REDACTED] filed the petition, the position might have been construed as prearranged, full-time, permanent position for a registered nurse and that the beneficiary might have been employed 40 hours a week. However, neither current nor former counsel has cited legal authority for the proposition that a petitioning entity may sponsor an alien for permanent employment with an immigrant visa for a different and independent third-party entity. The petitioner has failed to establish that it is the actual employer and thus the petition may not be approved for this reason.

Although the petition cannot be approved because the petitioner has failed to establish that it is the actual employer, the remaining issues will be discussed in the event of additional proceedings in this matter.

II. **The petitioner failed to establish the ability to pay the proffered wages.**

The second issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is August 24, 2001. The beneficiary's salary as stated on the labor certification is \$15.00 per hour (\$22.00 per hour of overtime), which equates to \$31,200 per annum, based exclusively on the basic rate of pay¹.

In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date. The petitioner submitted evidence of its certificate of incorporation verifying its incorporation in 2001; its personnel employment service certificate of authority issued in 2001; and its application for employer identification number (EIN) indicating in part 8a that it is a corporation and not a sole proprietorship.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 3, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited

¹ It is noted that the Employment Contract specifies \$2,457 per month, which equates to \$29,484 per year.

financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In response, the petitioner submitted [REDACTED] unaudited monthly operating statements.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 3, 2002, denied the petition.

On appeal, counsel submits an affidavit from [REDACTED] (Mr. [REDACTED]) stating that the petitioner:

has not yet filed any tax returns as we have not earned any income because we have been a start-up company with no income and the nurses that we are petitioning from abroad have not arrived to the United States. Once they arrive in the U.S., we will have income and we will file tax returns.

Mr. [REDACTED] submits another letter "in support of the petitioner's financial ability to pay the proffered [sic] wage for the years 2001 to present for nurses who will be employed by [REDACTED] and attaches "financial records of our 3 shareholders." Mr. [REDACTED] submits a third letter stating that "[a]s shareholders totaling 50% of the company, my wife and I support [the petitioner] and have always been ready, willing and able to inject capital into the corporation as needed in order to ensure a profit." Corporate resolutions and stock certificates also submitted into the record of proceeding on appeal reflect that the [REDACTED] own 200 shares of the petitioner's stock and [REDACTED] (Ms. [REDACTED]) owns 200 shares of the petitioner's stock. The [REDACTED] present incomplete and excerpted copies of their individual income tax returns for 2001, 2002, and 2003, that does not reflect their source of income, other than gambling, accounting and "Unit.Asst." The [REDACTED] banking statements are also submitted. A copy of [REDACTED] individual income tax return for 2003 is also submitted into the record of proceeding.

At the outset, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The director requested the petitioner's tax returns, audited financial statement, or annual reports, banking statements, or quarterly reports. If the petitioner had wanted the submitted evidence on appeal to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Even if the AAO were to consider the evidence submitted on appeal, however, counsel's reliance on the assets of Woodland, and the Nairs and Ms. [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Woodland is an independent entity from the petitioner, and is neither a partner nor part of a joint venture. By failing to file this petition, it has no legal obligation to pay the wage.

Likewise, the personal assets of shareholders of a corporation cannot be considered. Citing to *Ohsawa America*,

1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the \$4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how DOL precedent is binding in these proceedings. Counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner does not show any earnings at all and concedes there is none. It does not present any evidence of any capital, savings, or any funds to facilitate its successful start-up. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition. Likewise, counsel cites to [REDACTED] 2002-INA-104 (2004 BALCA), for the premise that a sole proprietorship's overall fiscal circumstances should be considered "when assessing under section 656.20(c)(1) an employer's ability to pay the wages or salary of the alien." Counsel again does not state how DOL's BALCA precedent is binding on the AAO. [REDACTED] deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation². Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

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, CIS will next examine the net income figure 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. 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). Showing that the petitioner's gross receipts 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to

² In petitions involving the factual circumstances of sole proprietorships, the AAO does evaluate the overall fiscal situation of a petitioning entity's sole proprietors. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

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. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner has not demonstrated that it paid any wages to the beneficiary. It has not submitted any evidence of its financial worth, even to corroborate that its gross and net earnings are \$100,000 and \$85,000, respectively, as it represented on the petition. It has not provided any regulatory-prescribed evidence concerning its continuing ability to pay the proffered wage such as tax returns, annual reports, or audited financial statements. Therefore, CIS is unable to analyze the petitioner's ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. It has stated that it has not filed tax returns because it does not have any earnings or capital with which to file and pay taxes on. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 or 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

III. The petitioner failed to submit a posting notice that complies with regulatory requirements.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. Under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 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.

³ According 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.

- (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. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains a notice in compliance with the content requirements delineated in 20 C.F.R. § 656.20(g)(3), however, there is no documentation concerning where the notice was posted, which does not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. The petition and Employee Contract indicate that the beneficiary will work at [REDACTED] in Lufkin, Texas. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1)⁴. If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers 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.⁵ The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). The petitioner did not list the requirement of a license. The posting states that the pay rate is "\$15.00-\$22.00 P/HR.," but does not clarify that the high range is for overtime not regular pay. Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wages, these issues need not be discussed further, but are additional reasons why the petition may not be approved.

IV. The petitioner provided evidence that it is offering a wage that complies with the prevailing wage rate.

Beyond the decision of the director, 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. The director did not mention this issue in his decision so the AAO is not confident that it was analyzed. CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with DOL's prevailing wage rates. See 20 C.F.R. § 656.22(e). DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdatacenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.⁶ The prevailing wage rates are broken down into two skill levels. According to General Administration Letter

⁴ The posting notice states it was posted "in our premises," but does not indicate if that is at the petitioner's premises or [REDACTED] premises. Since it provides the contact information of the petitioner's representative, it seems likely, though not unequivocal, that it was posted on the petitioner's premises.

⁵ See the 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).

⁶ The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

(GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will report to a head nurse and does not require additional training or specializations other than nursing duties delineated by the DOL's *Occupational Outlook Handbook* at page 269. OWL reports that for 2001, the year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position in Angelina County, Texas, where Lufkin is located, was \$13.61 per hour or \$28,309 annually. The proffered wage for the position is \$15.00 per hour or \$31,200 annually on the petition, but \$2,457 per month or \$29,484 annually, according to the Employee Contract. Thus, either proffered wage from the petitioner or Woodland meets the prevailing wage rate, but any further proceedings in this matter would have to clarify which wage rate is the proffered wage.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.