

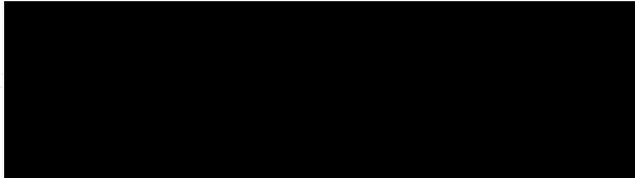


U.S. Citizenship  
and Immigration  
Services

ADMINISTRATIVE APPEALS OFFICE  
20 MASS, RM A3042  
WASHINGTON, DC 20529  
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FILE:



WAC-03-070-50461

Office: CALIFORNIA SERVICE CENTER

Date: FEB 04 2005

IN RE:

Petitioner:



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:



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 California 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 nurse registry. The petitioner states it has a gross annual income of \$88,861 on its visa petition. It seeks to sponsor 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 contracts with and documentation pertaining to the financial status of the petitioner's third-party clients.

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 26, 2002. 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 established that it is the actual employer and thus may not rely upon the financial status of its third-party clients.**

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. This issue arises on appeal since the petitioner suggests that the AAO consider the financial resources of third-party clients. 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."

On appeal, counsel submits contracts between itself and (1) Alvarado Medical Center/SDRI (Alvarado Contract), (2) Chino Valley Medical Center (Chino Contract), (3) Alta Health Care System LLC (Alta Contract), and (4) Helping Hands Sanctuary of Idaho, Inc. (Helping Hands Contract). The petitioner also submitted its contract with Alvarado Medical Center/SDRI (Alvarado) when it filed the initial petition since the Form ETA 750A indicates the beneficiary would work there, and submitted its contract with Chino Valley Medical Center (Chino) in response to the director's request for additional evidence stating that the beneficiary would work there. After a review of the record of proceeding in its entirety, it is unclear to which third-party client the petitioner would place the beneficiary. There is no employment contract between the petitioner and the beneficiary, its offer letter does not state a specific location, and the visa petition just states the beneficiary will work at its main location in Redondo Beach, California.

A review of the Alvarado Contract indicates at section 2, paragraph i, and section 4 that the petitioner will remain the employer for all nurses it temporarily places with Alvarado. The petitioner will also be responsible for payment of wages, taxes, and benefits. The Chino Contract also states that the petitioner will provide compensation, taxes, and benefits such as housing and liability insurance directly to its nurses that may be placed at Chino, and will not refer Chino employees as temporary nurses to its facility. See ¶¶ 4-9. A letter from [REDACTED] indicates that it seeks 20 registered nurses from the petitioner without further elaboration. The Helping Hands Contract indicates that the petitioner is a screening and recruiting entity for the Helping Hands Sanctuary of Idaho, Inc. (Helping Hands), which will employ qualified nurses referred to it. See ¶¶ 2-5.

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 been inconsistent about the placement of the beneficiary – it could be either Chino in Chino, California, or Alvarado in San Diego, California, or even itself, since on the petition it lists the beneficiary's work location as the same as its main address in Redondo Beach, California. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

However, evaluating either placement at Chino or Alvarado leads to the conclusion that the petitioner would be the beneficiary's actual employer if the beneficiary is placed at either third-party client's facility. Under

the contractual provisions with either Chino or Alvarado, the petitioner would maintain the beneficiary on its payroll, provide employment benefits, have the authority to hire and fire the beneficiary, and have control over the beneficiary's employment. There is insufficient information concerning Alta and the contract between the petitioner, and the Helping Hands Contract seems to indicate that Helping Hands becomes the employer for nurses it places with that third-party client. If the petitioner's intention was for [REDACTED] Alta, or Helping Hands to have the responsibility for paying the proffered wage and illustrating its continuing ability to pay the proffered wage beginning on the priority date, then one of those entities should have filed the instant visa petition and been the petitioning entity.

The petitioner filed the petition and states that the beneficiary will be placed at its Redondo Beach location, or with its third-party clients, [REDACTED] or [REDACTED]. The contracts with [REDACTED] or [REDACTED] indicate that the petitioner would retain the elements of permanent employment establishing that it will be the actual employer for any such placements. The petition indicates that it is permanent and full-time for a registered nurse and the beneficiary would have been employed 40 hours a week. It appears that the petitioner has some place for the beneficiary to perform her duties, whether it is with itself [REDACTED] or [REDACTED] and thus, prearranged employment is established.

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 December 26, 2002. The beneficiary's salary as stated on the labor certification is \$26.00 per hour time and a half for overtime), which equates to \$54,080 per annum, based exclusively on the basic rate of pay.

In support of the petition, the petitioner submitted the Alvarado Contract as discussed above and its Form 1120, U.S. Corporation Income Tax Return for 2001 reflecting net income of \$8,819<sup>1</sup> and net current assets of \$5,077<sup>2</sup>.

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 March 4, 2003, 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 financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority

<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.  
<sup>2</sup> \$30,190 current assets minus \$25,113 current liabilities as reported on Schedule L.

date. In response, the petitioner resubmitted its 2001 corporate tax return, the Chino Contract, and an unaudited financial statement for the three months ending in March 2003.

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 May 21, 2003, denied the petition.

On appeal, counsel submits the Alvarado Contract, Chino Contract, Alta Contract, and Helping Hands Contract, and asserts that these contracts are "like money in the bank," and the AAO has issued a past decision that using bank reserves may be sufficient to establish a petitioning entity's ability to pay the proffered wage beginning on the priority date.

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 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.<sup>3</sup> 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. In 2001, the petitioner had a net income of \$8,819 and net current assets of \$5,077, which are both lower than the proffered wage of \$54,080. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income or net current assets in 2001.

The petitioner did not present any evidence in 2002. In 2003, the petitioner submitted unaudited financial statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the petitioner's unaudited financial statements for the three months in 2003 will not be considered.

The petitioner states that it has "money in the bank" through its contracts with third-party clients<sup>4</sup>. The petitioner would pay the beneficiary \$26.00 per hour worked, and in turn the petitioner would receive from Alvarado and Chino between \$49.00 and \$56.00 per hour worked. In essence, the petitioner is claiming that each nurse it places, including the beneficiary, would generate approximately \$20.00-\$30.00 per hour worked. Yet the petitioner's contracts with Chino and Alvarado also reflect that the petitioner is responsible for the purchase of worker's compensation, professional liability, health insurance, and housing.<sup>5</sup> Unfortunately, only the Alvarado contract and the Helping Hands Contract were effective prior to the priority date and would be the only contracts that could be considered as competent and probative evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.<sup>6</sup> A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover each nurse's salary. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, however, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected nurse-generated income

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>4</sup> As noted above, the financial status of Alta will not be considered since it is not the petitioning entity.

<sup>5</sup> No other information has been provided about the benefits the petitioner will provide to the nurses, such as transportation, legal fees, education/licensure fees, etc.

<sup>6</sup> The Chino Contract is dated March 15, 2003 and the Alta letter is dated May 8, 2003.

would be sufficient to cover the salary of the nurse and all concomitant expenses of the business. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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 or 2003. 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. See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*, 345 F.3d 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9.

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.
- (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 response to the director's request for evidence, 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 petitioner has indicated there are three possible locations where the beneficiary will work – its location at Redondo Beach, California; Alvarado in San Diego, California; or Chino in Chino, California. The petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be. 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). 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.<sup>7</sup> The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s) and the dates the notice was posted. 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.<sup>8</sup> 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](http://www.ows.doleta.gov) which provides access to an Online Wage Library (OWL), [www.flcdatabcenter.com](http://www.flcdatabcenter.com). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.<sup>9</sup> The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (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 be under supervision 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 2002, the year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position in San Diego County, San Bernardino County, and Los Angeles County, all counties for the three possible work locations of the beneficiary, ranged between \$19.72-\$21.13, which are all lower than the proffered wage of \$21.00 per hour. Thus, the proffered wage from the petitioner meets the prevailing wage rate regardless of the beneficiary's actual work location.

**V. The petitioner has not established that the beneficiary is qualified for the proffered position or to be categorized under Schedule A, Group I for a registered nurse position.**

Also beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered position or to be categorized under Schedule A, Group I for a registered nurse position.<sup>10</sup> As stated above, 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. With the petition, the petitioner provided a copy of the beneficiary's license to practice professional nursing in Oregon. The petitioner never indicated the beneficiary would work in Oregon. In response to the director's request for evidence, the petitioner provided a copy of the beneficiary's license to practice professional nursing in California, however, the copy is too illegible to determine its issuance and expiration date. Thus, it is unclear whether or not the beneficiary holds a current unrestricted license to practice professional nursing in the state

<sup>7</sup> 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).

<sup>8</sup> See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; see also *Dor v. INS*, 891 F.2d at 1002 n. 9.

<sup>9</sup> The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

<sup>10</sup> See footnote 7, *supra*.

of California, the state of the beneficiary's intended employment, in compliance with 20 C.F.R. § 656.10, and that the license was issued prior to the filing of the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. at 49. For this additional reason, the petition may not be approved.

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.