

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

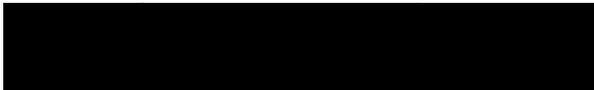
PUBLIC COPY



B6

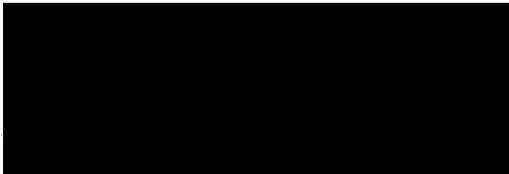
FILE: WAC 03 044 51760 Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2005

IN RE: Petitioner:
Beneficiary:



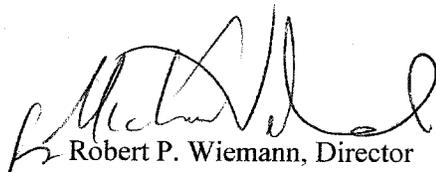
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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

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 granting 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 nature, for which qualified workers are not available in the United States.

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 the Service.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

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

- (1) 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that it complied with the other regulatory requirements. Here, the petition was filed with CIS on November 22, 2002. The proffered wage as stated on the Form ETA 750 is \$16.30 per hour, which equals \$33,904 annually.

On the petition, the petitioner stated that it was established during 1996 and that it employs 350 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated September 23, 2002, from its CEO. That letter states that the petitioner's gross receipts have grown to \$19.4 million annually. Another letter, dated November 13, 2002, from the petitioner's Controller, states "Based on the above information, we feel that we have the ability to pay the proffered wage for the nurses we have petitioned."

That letter also asserts that the petitioner has a \$2.5 million line of credit from Heritage Capital Group. In support of that assertion, the petitioner submitted a letter, dated August 7, 2002, from Heritage Capital Group. That letter confirms that the petitioner has a credit line, but states that it is a "low six figure" line. This office notes a considerable discrepancy between the assertion and the initial evidence.

The petitioner provided a copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner reports taxes based on the calendar year and declared a loss of \$354,938 as its ordinary income during 2001. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Finally, the petitioner provided a collated list of invoices of the hospitals with which it does business.

The petitioner submitted a Notice of Filing describing the proffered position. That notice states that the proffered position is \$16.30 per hour. A certification at the bottom of that notice states that it was posted for ten business days in a conspicuous location clearly visible to all U.S. workers. The address at which the notice was posted is unstated. Both the notice and the certification are undated.

On April 10, 2003, the California Service Center issued a Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

The Service Center requested evidence that the beneficiary will fill a specific vacancy. The Service Center requested a copy of the contract between the petitioner and the beneficiary and copies of the contracts between the petitioner and the facilities at which its nurses work. The Service Center stated that the latter contracts should specify the number of nurses to be employed and the term of their employment.

The Service Center requested evidence that the proffered wage is equal to the prevailing wage for the proffered position in the area of intended employment.

Finally, the Service Center requested that the petitioner provide evidence to demonstrate that, in accordance with 20 C.F.R. § 656.20(g), the petitioner either submitted the notice of filing of the proffered position to its nurses' bargaining representative or, if its nurses are not represented by collective bargaining, that it posted the notice at the intended place of employment.

In response, counsel submitted a letter, dated July 30, 2003. In that letter, counsel stated that, pertinent to the petitioner's ability to pay the proffered wage, he was enclosing a copy of the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. In fact, counsel did not enclose a 2002 tax return, but an additional copy of the petitioner's 2001 tax return.

Counsel did, however, provide an IRS printout of figures from the petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That printout states that, during 2002, the petitioner declared \$584,366 in ordinary income. That printout contains no figures from which the petitioner's 2002 end-of-year net current assets can be computed.

In the letter counsel emphasized the increases in the petitioner's gross receipts, the number of nurses it currently employs, and its 2002 ordinary income in arguing that the petitioner has the ability to pay the proffered wage.

Counsel noted that the petitioner's 2002 ordinary income was \$584,366, which is sufficient to pay the wages of 12 nurses with salaries of \$46,113.60 per year. Counsel stated that, therefore, the petitioner is entitled to have four more petitions approved. Counsel submitted a calculation to support that assertion. That calculation includes the number of nurses with approved Form I-140 petitions in 2002, its number of active and inactive nurses inside the United States with work permits, its number of nurses outside the United States with approved Form I-140 petitions, the number of nurses who left the petitioner's employ during 2002, and the number of nurses the petitioner can show the ability to pay with its 2002 ordinary income.

As additional evidence of the petitioner's ability to pay the proffered wage, counsel submitted (1) a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2003, (2) California EDD Magnetic Media Transmittal Sheets for the second, third, and fourth quarters of 2002 and the first quarter of 2003, (3) payroll summaries showing various statistics pertinent to the petitioner's payroll during 2002 and from January 1, 2003 to June 12, 2003, and (4) a loan agreement executed by the petitioner and Heritage Capital Group according the petitioner a \$3.5 million credit line.

The Form 941 shows that the petitioner paid more than \$5 million in wages during the first quarter of 2003. The petitioner's transmittal sheets showed subject wages reported of \$3,797,842.31, \$3,935,966.13,

\$4,422,393.43, and \$4,789,773.50 during the second, third, and fourth quarters of 2002 and the first quarter of 2003, respectively.

As to the Service Center's request for evidence of a specific vacancy that the beneficiary would fill, counsel stated that the beneficiary is to be employed by the petitioner and is guaranteed full-time employment so long as she performs satisfactorily. Counsel stated that the beneficiary would not learn the location of her work assignment until after completing training. Counsel notes that the petitioner places nurses at 137 different hospitals. Counsel provided a contract between the petitioner and the beneficiary. That contract does not appear to guarantee the beneficiary full-time employment.

As to the issue of the prevailing wage, counsel stated that the petitioner was raising the proffered wage to \$22.17 per hour, or \$886.80 per week. Counsel observed that this amended proffered wage exceeds the proffered wage for entry-level registered nurses in Orange, California, where the petitioner maintains its office, and that the previous proffered wage of \$16.30 per hour did not.

As to the issue of the posting of the notice of filing for the proffered position and its posting, counsel provided a copy of a posting. That posting states that the proffered wage is \$22.17 per hour and that the petitioner had 217 vacancies as of April 7, 2003. A certification attached to that notice states that it was posted at the petitioner's offices for ten days. That certification is dated April 28, 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 August 30, 2003, denied the petition. In that decision, the director relied upon figures from the petitioner's 2001 and 2002 income tax returns.¹

On appeal, the petitioner asserts that, because the priority date was during 2003, reliance on figures from the petitioner's 2001 tax return was improper. Counsel states, "I assume that the use of [figures from] the 2001 Federal Income Tax Return was inappropriate. I also assume that [use of figures from] the 2002 Federal Income Tax Return was appropriate because the priority date was so close to the tax year of 2002."

As was noted above, the priority date in the instant case is November 22, 2002. It is not, as counsel asserts on appeal, during 2003. To consider data from the petitioner's 2002 tax return, therefore, was proper. In the instant case, this office shall not consider data from the 2001 return.

The petitioner also noted that it employs 100 or more employees and, in accordance with 8 C.F.R. § 204.5(g)(2), submitted the statement of a financial officer attesting to its ability to pay the proffered wage. The petitioner cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) that a reasonable expectation of increasing profits can demonstrate a petitioner's ability to pay the proffered wage. The petitioner argues that its expectation of a vast increase in profits is reasonable.

¹ This office notes that the record of proceedings in this case did not then contain a copy of the petitioner's 2002 tax return. In order to compute the petitioner's 2002 end-of-year net current assets, the director must have referred to a copy of the 2002 return found in the record of one of the other petitions then before the Service Center. On appeal, however, the petitioner submits a copy of that return. A copy of that return is now in the record.

With the appeal, the petitioner submitted a copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return confirms that the petitioner declared ordinary income of \$584,366. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

As additional evidence the petitioner submits (1) a list of its client hospitals, (2) 21 pages of invoice data sorted by invoice date and grouped by client, (3) monthly bank statements from June 2002 to September 2003, (4) a printout of information pertinent to the petitions recently submitted and those approved, and (5) a copy of an IRS printout of data from its 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$354,938 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. As was noted above, however, information from that form, which is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, will not be considered.

The evidence demonstrates that the petitioner has experienced considerable growth in recent years. Clearly, this growth is fueled by the indisputable shortage of nurses in the United States. No reason exists to assume that the petitioner will cease to grow. The petitioner's assertion, however, is that it will enjoy vast growth and remain profitable. In view of the fact that the petitioner is seeking approval of a large number of petitions, the petitioner must demonstrate the truth of that assertion in order to prevail.

The petitioner's citation of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is unconvincing. The petitioner in *Sonogawa* sought approval of a single petition. In that case the Regional Commissioner found that the unusual circumstances were sufficient to show that the petitioner would become profitable enough to pay the wage proffered in that single petition. The petitioner in the instant case asserts and, in order to prevail, must demonstrate, that its profitability will *vastly* improve so as to cover the salaries of the beneficiaries of the approximately 93 Form I-140 petitions filed during 2002. Nothing in the record, however, supports that assertion. Assuming that the petitioner's business will flourish so markedly that it will be able to continue to add numerous employees to its payroll and remain profitable is speculation.

The petitioner argues that its credit line permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The petitioner notes that the banks willingness to extend it credit is based on its history of creditworthiness. That, too, is likely correct. The petitioner further argues, however, that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this final contention.

The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients. That does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage on a more permanent basis. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. Although the credit line permits the petitioner to withstand delays and interruptions, the petitioner must show the ability, over a longer period, be it 60 days or a year or longer, to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

That a commercial lender has accorded the petitioner a large credit line is an indication that the bank adjudges that the petitioner will probably remain solvent and able to repay its debt. That is not the same determination now before this office. As was noted above, this office must ask whether the petitioner can grow very rapidly and be profitable. The commercial lender made no decision on that issue and, if it had, this office would not be bound by the lender's assessment.

With the petition, the petitioner submitted the letters from its president/CEO and its CFO/controller stating that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that such a letter may suffice to demonstrate the petitioner's ability to pay the proffered wage. Although 8 C.F.R. § 204.5(g)(2) also states that CIS may require additional evidence in appropriate cases, the director did not explicitly state his reason for finding that the instant case was an appropriate instance to disregard the statements of the president/CEO and the controller/CFO and require additional evidence.

The director observed, however, that the petitioner has filed multiple alien worker petitions. In fact, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. The petitioner currently has more than fifty cases on appeal. This office finds that this unusually large number of petitions was sufficient reason to require additional evidence.

The petitioner also argues that the United States has an acute shortage of nurses and that humanitarian considerations require approval of the instant petition. That the United States has a shortage of nurses is confirmed by the DOL having placed registered nurses on the list of Schedule A occupations. That shortage does not, however, obviate the petitioner's obligation to demonstrate conformity with the statutes and regulations governing the instant visa category. Notwithstanding that the United States has a shortage of registered nurses, the petitioner must still demonstrate the continuing ability to pay the proffered wage beginning on the priority date and compliance with all other aspects of the regulations.

With its appeal brief, the petitioner submits a copy of a letter, dated October 29, 2003, from its accountant. That accountant states that the petitioner's tax returns are not a valid index of its financial condition because, in order to reduce tax liability, they were prepared on a cash basis, rather than on an accrual basis. The accountant states that, had the payables and receivables been included on the petitioner's 2001 tax return, it would have reflected a profit of \$178,000. The accountant notes that the petitioner's receipts and profits both rose during 2002, and asserts that this was a direct result of employing more nurses.

The accountant's assertion that the net income shown on the petitioner's tax return is a poor index of its cash position is inapposite. That assertion neither demonstrates the ability to pay the proffered wage nor releases the petitioner from the obligation of proving that ability. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely exclusively upon tax returns to demonstrate its ability to pay the proffered wage.

Having elected to demonstrate its ability to pay the proffered wage with its tax returns, however, the petitioner is bound by those returns. If the tax returns fail to show the ability to pay the proffered wage, then the petitioner has

failed to show its ability to pay the proffered wage unless it submits reliable evidence of additional funds available to the petitioner.

Counsel's reliance on the amount of the petitioner's gross receipts and the amount it pays in wages to its current employees is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income,³ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 has ever employed the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

² The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

³ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage. In this case, although counsel asserted that hiring the beneficiary would increase the petitioner's profits, he provided no calculations that demonstrate that assertion. Any such calculation would necessarily need to include not just the income to be derived from selling the beneficiary's services and the wages to be paid to the beneficiary, but also recurring costs of employing the beneficiary, such as increased administrative costs, and initial costs that would be incurred in hiring the beneficiary, such as transportation to the United States and expenses associated with training.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage, as amended, is \$46,113.60 per year. The priority date is November 22, 2002.

The petitioner declared ordinary income of \$584,366 during 2002. As counsel observed, that amount is sufficient to pay the proffered wage to approximately 12 beneficiaries with salaries similar to the proffered wage in the instant case. The petitioner, however, has recently filed petitions for 290 petitions. The petitioner's 2002 ordinary income, although substantial, is insufficient to show the ability to pay the proffered wages of such a large number of beneficiaries. The petitioner's 2002 ordinary income is insufficient to demonstrate the ability to pay the proffered wage. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage.

Finally, the petitioner asserts that, because its 2002 ordinary income was sufficient to pay the salaries of 12 new employees with salaries similar to the proffered wage in the instant case, at least 12 of its 2002 petitions should be approved.

CIS computer records, however, show that more than 12 of the petitioner's alien worker petitions were approved during 2002. In fact, the list of petitions, which counsel submitted on appeal, states that 110 petitions were approved during 2002. The evidence submitted does not indicate that the petitioner has the ability to pay any more beneficiaries than those already approved. The petitioner has not demonstrated the continuing ability to pay the proffered wage beginning on the priority date and the instant petition may not be approved.

Additional issues exist in this case, though, that were not addressed in the decision below.

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

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 no indication that the petitioner's nurses are represented by collective bargaining. In fact, the job posting appended to the petition states that they are not. In Part 6 of the Form I-140 petition, the petitioner states, as to the location where the beneficiary will work, "To be determined upon arrival." The Form ETA 750, Item 7, Address Where Alien Will Work, states: "To be arranged upon arrival. Neither the original posting submitted with the petition nor the amended posting submitted with the petitioner's response to the request for evidence states where the beneficiary would work. The certifications submitted with the first posting does not state where it was posted. The certification submitted with the second postings states that it was posted at the petitioner's offices, not at the location where the beneficiary would actually work.

The location at which the petitioner would employ the beneficiary is unknown. The record contains no evidence, then, that either job notice was posted at the prospective place of employment as required by 20 C.F.R. § 656.20(g)(1). The petition should have been denied for this additional reason.

The petitioner's failure to name the facility at which the beneficiary will be employed raises yet another issue. The petitioner is required, by 8 C.F.R. § 204.5(g)(2), to demonstrate that the proffered wage is at least as high as the predominant wage. The regulation at 20 C.F.R. 656.40(a)(2)(i) states that the predominant wage is the average wage paid to workers similarly employed in the area of intended employment. The list of the petitioner's client hospitals indicates that the petitioner employs its nurses at 137 facilities throughout California and in some locations in Nevada. Further, the petitioner has not indicated that, in the future, it will limit assignment of its nurses, or of the beneficiary in the instant case, to those locations. In the absence of any statement in the record of the actual location at which the beneficiary would work, this office is unable to determine whether the petitioner is offering the beneficiary the average wage for similarly employed workers in the area of intended employment.⁴

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. See 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulation at 20

⁴ This deficiency exists whether the petitioner relies on the original notice, with the proffered wage of \$16.30, or the amended notice, with the proffered wage of \$22.17 per hour.

C.F.R. § 656.20(c)(2) states that a labor certification application must clearly show that the wage offered meets the prevailing wage rate. A petition that fails to prove that its proffered wage is at least equal to the prevailing wage rate shall be denied. For this additional reason, the petition should have been denied.

Finally, even if the amended posting of the proffered position were in accord with the regulations in all other respects, this office notes that it was posted after the priority date.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. (Emphasis supplied).

The regulations require that the notice be posted for at least ten consecutive days and evidence of such posting be submitted with the Application for Alien Employment Certification. The amended job offer notice was posted subsequent to the filing of the Application for Alien Employment Certification and Form I-140 and is of no assistance in rendering the petition approvable, as it cannot retroactively render the petition approvable at the time it was submitted.

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).

The petitioner failed to demonstrate, in accordance with 8 C.F.R. § 204.5(g)(2), that the wage proffered is at least equal to the average wage for similarly employed workers in the area of intended employment. The petitioner failed to demonstrate that it is able to pay the wage proffered to the beneficiaries for whom it has petitioned. The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). For all of these reasons the petition may not be approved.

ORDER: The appeal is dismissed.