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U.S. Citizenship
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Services

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FILE: WAC-03-016-54535 Office: CALIFORNIA SERVICE CENTER Date: JAN 05 2005

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

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 preference visa petition was initially approved by the Director, California Service Center. The Director later revoked the approval. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care services firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, as well as to pay the beneficiaries of other approved I-140 petitions filed by the petitioner, and revoked the petition accordingly.

On appeal, the petitioner states that the additional evidence submitted on appeal establishes the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is October 22, 2002.

The proffered wage as stated on the Form ETA 750 is \$25.00 per hour, which amounts to \$52,000.00 annually. On the Form ETA 750B, signed by the beneficiary on September 30, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$2.5 million, to have net annual income of \$300,000, and to currently have 124 employees.

In support of the petition, the petitioner submitted the following: a letter dated October 8, 2002 from the petitioner's managing director; a job announcement for the offered position dated August 19, 2002 with an accompanying undated certificate of posting signed by the petitioner's managing director; a copy of the petitioner's articles of incorporation dated January 29, 1993; a Declaration Regarding Financial Capacity dated October 15, 2002 and signed by the petitioner's chief executive officer and financial officer; a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 21, 1999 by the University of [REDACTED] Malogog, Bulacan, Philippines, with accompanying course transcript; a copy of the beneficiary's registered nurse license card issued by the Philippines Professional Regulation Commission, showing a registration date of January 11, 2000; a copy of a training certificate issued to beneficiary for a nurse training course in the Philippines in 2002; a copy of the beneficiary's registered nurse license issued May 6, 2002 by the California Board of Registered Nursing; and a copy of the beneficiary's registered nurse license card issued by the California Board of Registered Nursing, with expiration date of January 31, 2004.

The director found the evidence submitted to be insufficient to establish the worksite locations of the beneficiary and insufficient to establish that the petitioner will be employing the beneficiary to fill a specific vacancy. Therefore, in a request for evidence (RFE) dated December 12, 2002, the director requested additional evidence on each of those issues.

In response the petitioner submitted copies of contracts between the petitioner and the [REDACTED] Center, of San Jose, California, [REDACTED] California, All About Staffing, Inc., of Sunrise, Florida, the government of San Mateo County, California, the government of Santa Clara County, California, and the United States Department of Veterans' Affairs, [REDACTED] of Palo Alto, California; copies of printouts from the Internet web site of O'Connor Hospital dated March 1, 2003, showing staff openings; and a copy of an employment agreement between the petitioner and the beneficiary dated September 2, 2002.

In a decision dated March 20, 2003, the director approved the petition. However, the director later determined that the petition had been approved in error. The director issued a Notice of Intent to Revoke (ITR) dated January 9, 2004. In the ITR the director stated that the evidence was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner was accorded thirty days to submit additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated that evidence on that issue must be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted a letter dated January 23, 2004 from the petitioner's managing director stating that the petitioner's fiscal year would end on January 31, 2004 and that its tax return for the year 2003 would not be available within the thirty days granted by the ITR. The managing director requested an extension until such time as the documents would become available. The record shows no further response to the ITR by the petitioner.

In a decision dated March 23, 2004, the director noted that the petitioner had requested an extension of time to respond to the ITR and that no further response had been received by CIS. The director accordingly stated that a decision was being made on the existing record. The director found that the evidence did not establish the petitioner's ability to pay the proffered wage to the beneficiary. The director therefore revoked the petition.

On appeal, the petitioner submits the following documents: copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2001, 2002 and 2003; copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for all four quarters of 2003; a copy of a home equity approval notification dated April 11, 2003 in the amount of \$321,000.00 from Countrywide Home Loans, Inc., to the petitioner's managing director and the petitioner's chief executive officer and financial officer; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner in the amount of \$100,000.00 at Wells Fargo Bank; and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of \$100,000.00 with the Washington Mutual Bank, with the information on the petitioner's current loan balance omitted.

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

The revocation decision of the director was made under the authority of 8 C.F.R. § 205.2(a) which states, "Any [CIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in § 205.1 [governing automatic revocations] when the necessity for the revocation comes to the attention of [CIS]." None of the grounds for automatic revocations under 8 C.F.R. § 205.1 are relevant to the instant petition.

The Board of Immigration Appeals has stated that "the realization by the district director that he erred in approving the petition, however arrived at, may be good and sufficient cause for revoking his approval, provided the district director's revised opinion is supported by the record." *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). In order to evaluate the decision of the director to revoke the petition, therefore, the AAO must evaluate whether that decision is supported by the evidence in the record.

In determining the petitioner's ability to pay the proffered wage, CIS will examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, however, the ETA 750B signed by the beneficiary does not state any work experience with the petitioner. The record contains a copy of an employment agreement between the petitioner and the beneficiary dated September 2, 2002, stating that the beneficiary's rate of pay will be \$25.00 to \$40.00 per hour, and stating other terms and conditions of employment. However, the agreement does not state that employment has already begun, nor does it state the date when the beneficiary is to begin work. Rather, the agreement sets the terms for the beneficiary's employment which is to occur at some unspecified time in the future. The record in the instant case contains no evidence that the beneficiary has been employed by the petitioner. Therefore the petitioner's ability to pay the proffered wage must be established by means other than by evidence of past wage payments to the beneficiary.

The I-140 petition states in Part 5 that the petitioner has 124 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted in full above, states that "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." Pursuant to this regulation, the petitioner submitted a Declaration Regarding Financial Capacity dated October 15, 2002 and signed by the petitioner's chief executive officer and financial officer. The text of the declaration states as follows:

This is to certify that [the petitioner] is a private entity and its financial statements are not made available publicly. This is also to confirm that [the petitioner] has been in existence

since 1990 and currently has more than 124 employees with an annual income of more than \$2.5 million. It has more than sufficient financial capacity to pay for the wages of [the named beneficiary] who is the beneficiary of an I-140 petition by our company.

Although the regulation at 8 C.F.R. § 204.5(g)(2) allows CIS to accept a declaration by a financial officer of a petitioner, the regulation does not require CIS to defer to the opinion of any such financial officer. The regulation requires that any such statement be one "which establishes the prospective employer's ability to pay the proffered wage." The sentence in the regulation which allows for the submission of a statement by a financial officer of a petitioner therefore does not imply that every such statement must be deemed sufficient to establish a petitioner's ability to pay the proffered wage. Rather, the effect of that sentence in the regulation is to allow an additional form of acceptable evidence for any petitioner which has at least 100 employees, in addition to tax returns, annual reports, or audited financial statements, which are acceptable forms of evidence for all petitioners.

In the instant case, the statement by the petitioner's chief executive officer and financial officer lacks detailed financial information indicating the basis for the conclusion that the petitioner has the ability to pay the proffered wage to the beneficiary. Moreover, the statement makes no reference to other I-140 petitions filed by the petitioner. CIS records indicate that the numbers of I-140 petitions filed by the petitioner each year since 1998 are as follows: one in 1998, one in 1999, one in 2000, seven in 2001, thirty-one in 2002 (including the instant petition), seventeen in 2003, and two in 2004. The ten petitions filed from 1998 to 2001 were all approved. Of the thirty-one petitions filed in 2002, fifteen were approved; of the seventeen filed in 2003, six were approved; and of the two filed in 2004, neither one has been approved. Of the petitions which have not been approved, two are still pending the director's decision and the rest were either denied or had prior approvals revoked. For some of the denied and revoked petitions, appeals are now pending with the AAO.

The statement by the petitioner's chief executive officer and financial officer fails to consider the issue of the petitioner's ability to pay the proffered wage to the beneficiary in the instant petition while also paying the proffered wages to the beneficiaries of the other petitions filed by the petitioner. For these reasons, the statement fails to establish the petitioner's ability to pay the proffered wage to the beneficiary during the relevant time period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In the instant case, however, although the director's ITR of January 9, 2004 requested additional evidence on the issue of the petitioner's ability to pay the proffered wage and stated that tax returns were among the forms of acceptable evidence, the petitioner failed to submit copies of any tax returns prior to the director's revocation decision of March 24, 2004. Nor did the petitioner submit any other form of evidence of its financial situation, such as annual reports or audited financial reports, as permitted by 8 C.F.R. § 204.5(g)(2).

The record before the director also included copies of contracts between the petitioner and the San Jose Medical Center, of San Jose, California; [REDACTED] of San Jose, California; All About Staffing, Inc., of Sunrise, Florida; the government of San Mateo County, California; the government of Santa Clara County, California; and the United States Department of Veterans' Affairs, Palo Alto Health Care System, of Palo Alto, California.

None of the petitioner's contracts obligate any health care facility to request any minimum amount of nursing services from the petitioner, nor do they obligate the petitioner to fulfill all requests. For example, the contract

between the petitioner and the Veteran's Administration states, "This is an indefinite-quantity contract for the supplies or services specified in the [attached] Schedule," and further states, "The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract." (Contract with the Veterans' Administration, August 23, 2000, extended by Amendment No. 4, January 22, 2002, page 78). Similarly, the contract with the San Jose Medical Center commits the petitioner to supply registered nurses "upon request" by that health care facility, but with the proviso that the petitioner's obligation to do so is "subject to the availability of qualified nurses." (Agreement with San Jose Medical Center, June 24, 2001, section 2). Although the copies of the petitioners contracts are evidence that the petitioner is considered a viable business by a number of medical facilities, the contracts contain no financial information about the petitioner.

The record before the director also included copies of printouts from the Internet web site of O'Connor Hospital dated March 1, 2003, showing staff openings at that hospital, including many openings for nurses. That evidence was submitted in response to the request in the RFE for evidence that the beneficiary was being recruited to fill a specific vacancy. However, O'Connor Hospital is not the petitioning employer in this case, and a staff vacancy at O'Connor Hospital cannot be claimed by the petitioner as the vacancy for which the beneficiary is being recruited.

The list of vacancies at O'Connor Hospital may be intended by the petitioner to show that O'Connor Hospital will have a need for the petitioner's services of providing temporary nursing personnel. However, the petitioner's contract with O'Connor Hospital, like the other contracts in the record, does not make the petitioner the exclusive agency for providing temporary nursing personnel to that hospital. (Agreement with O'Connor Hospital Relating to Provision of Temporary Nursing Personnel, September 9, 2002, section 2). Therefore the evidence that O'Connor Hospital has vacancies for nurses is insufficient to establish that O'Connor will seek temporary nurses from the petitioner. Moreover, no issue exists in this case over whether a shortage of nurses exists in any labor market served by the petitioner. Since nursing appears on the Department of Labor's Schedule A list of occupations, the Department of Labor has already made a finding that a shortage of nurses exists in the United States. The issue relevant to the instant case is whether medical facilities needing nurses will use temporary nurses employed by the petitioner, rather than using temporary nurses employed by other nurse staffing agencies and rather than directly hiring additional nurses for their own staff. The evidence in the record prior to the director's revocation decision fails to address that issue. That evidence is therefore insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary, while at the same time paying the proffered wages to the beneficiaries of the other approved and pending petitions submitted by the petitioner.

In his decision, the director correctly stated that the petitioner had failed to respond to the ITR. The director therefore proceeded to issue a decision based on the existing record. The director correctly found that the evidence failed to establish the petitioner's ability to pay the proffered wage. Since the record contained insufficient evidence to establish the petitioner's ability to pay the proffered wage even to the single beneficiary of the instant petition, the director did not reach the issue of the petitioner's ability to pay the proffered wages to the beneficiaries of the petitioner's other approved and pending petitions. The decision of the director to revoke the petition was correct, based on the evidence in the record before the director.

On appeal, the petitioner submits additional evidence. The petitioner makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the revocation decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

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

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the ITR issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

The evidence newly submitted on appeal includes copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2001, 2002 and 2003.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. According to the petitioner's tax returns in the record, the petitioner's tax year runs from the first of February each year to the thirty-first of January the following year. The petitioner's tax returns show the following amounts on line 28: \$42,066.00 for 2001 (February 1, 2001 to January 31, 2002); \$183,708.00 for 2002 (February 1, 2002 to January 31, 2003); and \$60,289.00 for 2003 (February 1, 2003 to January 31, 2003). The figure for 2001 is not directly relevant to the instant case, since the priority date of October 22, 2002 falls in the following tax year. The figures for 2002 and for 2003 show amounts which are greater than the proffered wage of \$52,000.00.

As an alternative means of evaluating the petitioner's ability to pay the proffered wages, CIS may also review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than

the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Concerning the instant petition, calculations based on the Schedule L's attached to the petitioner's tax returns yield the following figures for net current assets: -\$131,718.00 for the end of the petitioner's 2001 tax year (January 31, 2002); -\$7,465.00 for the end of its 2002 tax year (January 31, 2003); and -\$100,449.00 for the end of its 2003 tax year (January 31, 2004). Since those figures are negative, they provide no further evidence in support of the petitioner's ability to pay the proffered wage.

The record on appeal closed with the submission of the petitioner's I-290B notice of appeal with accompanying evidence, documents which were received by CIS on April 8, 2004. At that time the petitioner's tax return for 2003 was the most recent one available. If the instant petition were the only one filed by the petitioner, the petitioner's taxable income of \$183,708.00 on line 28 of its 2002 return and \$60,289.00 on line 28 of its 2003 return would be sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. However, as discussed above, CIS records indicate that the petitioner has filed multiple I-140 petitions since 1998. CIS records indicate that of the thirty-one petitions filed in 2002, including the instant petition, fifteen were initially approved. In addition to the instant petition, some of the other approved petitions have now been revoked by the director.

Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. In the instant petition, although the evidence indicates financial resources of the petitioner greater than the beneficiary's proffered wage, the evidence does not contain information about the multiple I-140 petitions filed by the petitioner. Specifically, the record in the instant case lacks information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, about the priority dates of those petitions, and about the present employment status of those other potential beneficiaries.

The record on appeal also contains copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for all four quarters of 2003. The financial figures shown on the DE 6 reports appear to be generally consistent with the petitioner's other financial evidence. Those reports show payment of wages to the petitioner's employees in the following amounts: \$614,132.48 for the first quarter of 2003; \$777,876.04 for the second quarter of 2003; \$760,552.54 for the third quarter of 2003; and \$639,789.40 for the fourth quarter of 2003.

Although the financial figures on the DE 6 reports appear to be consistent with the petitioner's other evidence, the numbers of employees shown on the DE 6 reports are not consistent with the petitioner's claim on the I-140 petition filed in October 2002 that the petitioner then had 124 employees. The total numbers of employee names on the reports are as follows: 92 employees in the first quarter of 2003; 95 employees in the second quarter of 2003; 96 employees in the third quarter of 2003; and 87 employees in the fourth quarter of 2003. The monthly totals of employees as stated on the reports range from a low of 62 for the first month of the first quarter (January 2003) to a high of 78 for the second month of the third quarter (August 2003). The differences between the monthly totals and the total employee names on each quarterly report indicates significant turnover in the petitioner's workforce during each quarter of 2003. In claiming to have 124 employees as of October 2002, the petitioner states a number which is double the number of the 62 employees stated for January 2003 on the petitioner's DE 6 report for the first quarter of 2003. No DE 6 reports were submitted for any quarters earlier than 2003.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. at 591-592, has stated, "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." The record in the instant case contains no explanation for the inconsistencies in the evidence concerning the number of the petitioner's employees.

The evidence newly submitted on appeal also includes three line-of-credit documents, namely a copy of a home equity approval notification dated April 11, 2003 in the amount of \$321,000.00 from Countrywide Home Loans, Inc., to the petitioner's managing director and the petitioner's chief executive officer and financial officer; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner in the amount of \$100,000.00 at Wells Fargo Bank; and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of \$100,000.00 with the Washington Mutual Bank, with the information on the petitioner's current loan balance omitted.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are integral parts of many business operations, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Furthermore, in the instant case, the line of credit documents in the record fail to indicate how much of the lines of credit have been used by the petitioner. Therefore they fail to show any additional financial resources available to the petitioner. In addition, one of the lines of credit shown in the documents does not represent credit available to the petitioner, but rather credit available to the petitioner's managing director and chief executive officer and financial officer. The tax returns in the record state that those two persons are the owners of the petitioner. It is a basic principle of corporation law that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, financial resources of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Notwithstanding the extensive documentation submitted on appeal, the evidence in the record lacks any audited financial statements and lacks any information concerning the prospective new employees of the petitioner as a result of its approved and pending I-140 petitions. Nor does the record in the instant petition contain any information about the proffered wages for the beneficiaries of other petitions filed by the petitioner. Therefore the record fails to establish the petitioner's ability to pay the additional employees on whose behalf it has filed petitions, while also paying the proffered wage to the beneficiary.

For the foregoing reasons, the evidence submitted on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO on appeal.

Beyond the decision of the director, the evidence in the record raise several other issues.

One issue concerns the beneficiary's qualifications for the offered position. The Form ETA 750 states in block 14 that the minimum educational requirements are a Bachelor of Science degree and that the minimum experience requirements are two years in the offered position. The evidence in the record fails to establish that the beneficiary meets either of those qualifications.

The record shows that the beneficiary holds a Bachelor of Science in Nursing granted on March 21, 1999 by the University of Regina Carmeli, Malogog, Bulacan, Philippines. The accompanying course transcript shows that the beneficiary pursued four years of study to obtain that degree. However, the record lacks any educational evaluation stating that the beneficiary's degree is equivalent to a United States bachelor's degree. See 8 C.F.R. § 204.5(l)(2). Although the record contains a copy of the beneficiary's California registered nurse license, holding such a license does not imply that one has a bachelor's degree. According to the Internet web site of the California Board of Registered Nurses, the required course of study for a registered nurse consists of not less than 58 semester units or 87 quarter units of study, in specified course areas. However the required studies do not include completion of a bachelor's degree. See California Board of Registered Nursing, Business and Professions Code of California (extracts), § 2736, <http://www.rn.ca.gov/npa/b-p.htm#2736>, and Title 16, California Code of Regulations (extracts) § 1426, <http://www.rn.ca.gov/npa/title16.htm#1426> (accessed December 9, 2004). Therefore the fact that the beneficiary has been granted a California registered nurse license cannot be deemed to be a finding by the California Board of Registered Nursing that the beneficiary's Bachelor's degree from a Philippines university is equivalent to a United States bachelor's degree.

Concerning the beneficiary's work experience, the ETA 750B signed by the beneficiary on September 30, 2002 states that she worked as a registered nurse in a hospital in Bulacan, Philippines from January 2000 until July 2000 for 40 hours per week, a period of six months, and that she worked as a private duty nurse for an individual in Canalate, Malolos, Bulacan, Philippines from March 2000 until February 2001 for 40 hours per week, a period of eleven months. No documentation from either employer was submitted to corroborate the beneficiary's claimed work experience. Moreover, the periods of claimed full-time employment overlap from March 2000 until July 2000. But even assuming that the beneficiary worked at two full-time jobs during those four months, the beneficiary's total claimed experience as a registered nurse totals only seventeen months, which is seven months less than the two years of experience required on the ETA 750.

Another issue raised by the evidence in the record first concerns an inconsistency in the rate of pay offered to the beneficiary. The Form ETA 750, item 12, states the rate of pay as \$25.00 per hour for the basic rate and \$37.5 per hour for overtime. However, the job announcement in the record states the basic rate of pay as \$27.00 per hour.

The Form ETA 750 also raises another evidentiary inconsistency. Item number 7, for the address where the beneficiary will work, states the same address as the petitioner's own address shown in item 6 of the Form ETA 750. But such a work location is inconsistent with the copies in the record of the petitioner's contracts with governmental and private organizations, which indicate that the beneficiary will be placed in one or more health care facilities. Also, the petitioner's evidence includes a list showing the addresses of those health care facilities as the intended worksites for the beneficiary. The record contains no explanation for the foregoing evidentiary inconsistencies. See *Matter of Ho*, 19 I&N Dec. at 591-592.

The beneficiary's possible work locations indicated by the petitioner's contracts and by its worksite list also are evidence that the posting of the notice of job availability did 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 employment.” 20 C.F.R. § 656.20(g)(1)(ii). *Cf.* 20 C.F.R. § 656.20(g)(3), (8).

In the instant case, the posting certificate signed by the managing director indicates that the job announcement for the offered position was posted at the petitioner’s administrative offices. But by merely posting the notice at its administrative offices, the petitioner has not complied with the regulatory notice requirements. 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. *See* Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991). The petitioner also failed to indicate whether it provided notice to the appropriate bargaining representative or representatives. *See* 20 C.F.R. § 656.20(g)(1)(i).

Furthermore, the information on the purported job announcement is internally inconsistent. The job announcement states that it was posted from “01-01-2002 to 08-15-2002.” Yet the date on the job announcement is “08-19-2002,” more than eight months after the announcement was supposedly posted and four days after the announcement was supposedly removed from posting. The certification of posting signed by the petitioner’s managing director is undated, and it certifies that “[t]he attached notice” had been posted in two locations in the petitioner’s offices. The record lacks any explanation for the internal inconsistencies in the dates on the job announcement. Both the job announcement and the certificate of posting state that the announcement was posted for a period of eight and one half months.

The evidence also fails to establish that the rate of pay stated on the ETA 750, of \$25.00 per hour, or the rate of pay stated on the notice of job availability of \$27.00 per hour, are equal to or greater than the prevailing wage rate for each of the geographic locations where the proffered position would be performed, as required by 20 C.F.R. § 656.20(c)(2). Although several of the contracts in the record are for nurse staffing services at specific hospitals, the contract with All About Staffing, Inc., of Sunrise, Florida, does not limit the potential work location to any specific hospital.

Another issue raised by the evidence concerns whether the petitioner’s offer of employment to the beneficiary is for full-time work, or for temporary work on an as-needed basis. The letter in the record dated October 8, 2002 from the petitioner’s managing director states that the petitioner’s principal business is the placement of nurses with client medical facilities. Therefore the majority of the petitioner’s employees may be assumed to be earning wages comparable to the proffered wage in the instant petition. Yet the DE 6 reports in the record show few of the petitioner’s employees receiving compensation at rates which are near the \$52,000.00 annual proffered wage. The DE 6 reports indicate that many of the petitioner’s employees worked for only limited periods of time during the reported quarters, since the compensation reported for many employees per quarter is far below the \$13,000.00 level which would represent a quarterly portion of the \$52,000.000 annual proffered wage.

The following table shows the numbers of employees in various compensation categories, based on information taken from the petitioner’s DE 6 reports. The first category in each quarter shows the number of employees who earned at least \$13,000.00 that quarter, equivalent to an annual rate of \$52,000.00. The other categories show the number of employees receiving quarterly compensation from \$10,000.00 to \$12,999.99 (annual rates of from \$40,000.00 to \$51,999.99), from \$5,000 to \$9,999.99 (annual rates from \$20,000.00 to 39,999.99) and less than \$5,000 (annual rates less than \$20,000.00).

2003	1st Quarter	Total employees receiving compensation	92 employees
		Earned \$13,000 or more	17 employees (18.5%)
		Earned \$10,000 to \$12,999	6 employees (6.5%)
		Earned from \$5,000 to \$9,999	15 employees (16.3%)
		Earned less than \$5,000	54 employees (58.7%)
2003	2nd Quarter	Total employees receiving compensation	95 employees
		Earned \$13,000 or more	20 employees (21.1%)
		Earned \$10,000 to \$12,999	13 employees (13.7%)
		Earned from \$5,000 to \$9,999	15 employees (15.8%)
		Earned less than \$5,000	47 employees (49.5%)
2003	3rd Quarter	Total employees receiving compensation	96 employees
		Earned \$13,000 or more	23 employees (24.0%)
		Earned \$10,000 to \$12,999	5 employees (5.2%)
		Earned from \$5,000 to \$9,999	17 employees (17.8%)
		Earned less than \$5,000	51 employees (53.1%)
2003	4th Quarter	Total employees receiving compensation	87 employees
		Earned \$13,000 or more	21 employees (24.1%)
		Earned \$10,000 to \$12,999	1 employee (1.1%)
		Earned from \$5,000 to \$9,999	19 employees (21.8%)
		Earned less than \$5,000	46 employees (52.9%)

The above figures show that more than 75% of the petitioner's employees received compensation of less than \$13,000.00 each quarter, less than the annual rate of the proffered wage of \$52,000.00. The figures show that more than 50% of the petitioner's employees received compensation of less than \$5,000.00 each quarter, an annual rate of less than \$20,000.00. The information on the DE 6 reports shows that in fact many employees received compensation of less than \$1,000.00 each quarter, an annual rate of less than \$4,000.00. Those figures strongly suggest that the great majority of the petitioner's employees worked for the petitioner only when their services were needed by one of the petitioner's client medical facilities.

The record in the instant case contains no direct evidence on the intended employment status of the beneficiary with the petitioner during any periods in which beneficiary's services are not requested by any medical facility which is a client of the petitioner. If the intention of the petitioner's management is not to pay the beneficiary during any such periods, such an intention would be inconsistent with the petitioner's offer of employment to the beneficiary as stated on the Form ETA 750. Part 10 of the ETA 750 states that the beneficiary will be employed for 40 hours per week. Moreover, the definition of employment in the Department of Labor regulations states in pertinent part that "[e]mployment means permanent full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3. An offer of intermittent employment on an as-needed basis would not satisfy the requirement for an offer of "permanent full-time work."

Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wage, these issues need not be discussed further.

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

ORDER: The appeal is dismissed.