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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
SRC-02-068-50206

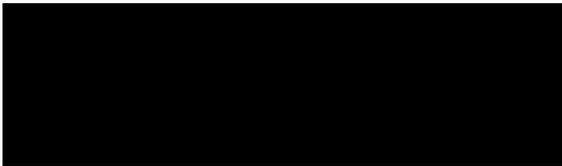
Office: TEXAS SERVICE CENTER

Date: MAR 16 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

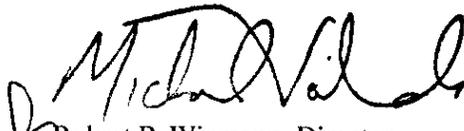
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing services company. 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 and accordingly denied the petition.

On appeal, counsel states that the petitioner's evidence establishes its ability to pay the proffered wage, including evidence pertaining to the finances of the hospital where the beneficiary will work and evidence pertaining to the personal finances of the petitioner's shareholders.

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.

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 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 in the instant petition is December 24, 2001.

The petitioner must demonstrate that it is the intended employer of the beneficiary and must demonstrate its continuing ability to pay the proffered wage beginning on the petition's priority date. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200.00 annually. On the Form ETA 750B, no claim is made that the beneficiary has worked for the petitioner. The Form ETA 750B is not signed by the beneficiary.

On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$100,000.00, to have a net annual income of \$85,000.00, and to currently have two employees.

In support of the petition, the petitioner submitted a copy of an Employee Contract executed October 26, 2001 between the beneficiary and the [REDACTED] Lufkin, Texas; a copy of a letter dated June 25, 2001 from the [REDACTED], with no signature visible on the copy submitted; a copy of an agreement dated November 30, 2001 between the petitioner and the [REDACTED] a copy of the petitioner's Certificate of Incorporation issued November 5, 2001 by the office of the Texas Secretary of State; a copy of a Certificate of Authority issued October 31, 2001 to the petitioner by the Personnel Employment Service, State of Texas; a copy of the petitioner's Internal Revenue Service Form SS-4 dated November 8, 2001; a copy of a notice of job opening for the position of Registered Nurse with the petitioner, with posting dates stated as November 10, 2001 to December 12, 2001; a copy of a Certificate of the Commission on Graduates of Foreign Nursing Schools (CGFNS) issued to the beneficiary in March 1990; a copy of a qualification certification as a

registered nurse issued to the beneficiary on September 5, 1991 by the University of the State of New York; a copy of a registration certificate as a registered nurse issued to the beneficiary by the University of the State of New York with registration period ending date of August 31, 1992; a copy of a certificate issued the beneficiary on September 6, 1983 by the [REDACTED] for completion of the nurses examination and registration as a registered nurse; a copy of a certificate issued the beneficiary on September 6, 1983 by the [REDACTED] for completion of the midwives examination and registration as a registered midwife; a copy of the beneficiary's examination results dated February 9, 1979 for her Bachelor of Science Degree Examination; a copy of the beneficiary's secondary school leaving certificate issued in Kerala, India, on November 29, 1983; a copy of a Bachelor of Science in Nursing degree granted to the beneficiary on July 30, 1983 by the All-India Institute of Medical Sciences, New Delhi, India; copies of several pages of the beneficiary's Indian passport; a copy of an affidavit dated March 26, 1992 by [REDACTED] stating the beneficiary's birth date and family information; a copy of the beneficiary's social security card; a copy of the beneficiary's Resident Alien card with expiration date of August 5, 2002; a copy of a Reentry Permit issued January 6, 1995 to the beneficiary by the Immigration and Naturalization Service; a copy of an affidavit dated March 19, 1992 by [REDACTED] stating the date and location of the beneficiary's birth; a copy of an affidavit dated March 19, 1992 by [REDACTED] stating the date and location of the beneficiary's birth; a copy of a letter dated April 28, 1995 from the Vice-President for Human Resources of [REDACTED] stating the beneficiary's employment with that hospital as a registered professional nurse from January 7, 1991 until April 15, 1995; and a copy of a certificate from the Nursing Director [REDACTED] stating the beneficiary's employment with that hospital as a staff nurse from January 18, 1986 until October 31, 1990. With the petition, counsel submitted duplicate copies of the petition, the ETA 750, and all supporting documents.

In a request for evidence (RFE) dated April 3, 2002 the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. The director specifically requested a copy of the petitioner's 2001 corporate tax return, a copy of the petitioner's Form 941 quarterly tax reports for the last quarter of 2001 and the first quarter of 2002, and copies of the petitioner's bank statements from November 2001 to the date of the RFE.

In response to the RFE, counsel submitted copies of a Financial Statement and Monthly Operating Statements from the [REDACTED] dated December 31, 2001.

In a decision dated September 11, 2002 the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director found that evidence pertaining to the financial situation of the [REDACTED] and pertaining to the petitioner's agreements with that institution were not acceptable evidence to establish the petitioner's ability to pay the proffered wage. The director accordingly denied the petition.

On appeal, counsel submits a brief and the following additional evidence: a copy of a letter dated August 13, 2004 from a person in the office of Nurse Recruiting of the [REDACTED] confirming a continuing job offer to the beneficiary; copies of Form 1040 U.S. Individual Income Tax Returns for 2001, 2002 and 2003 of [REDACTED] one of the petitioner's shareholders, and her husband; a copy of an affidavit dated August 2, 2004 by [REDACTED] another of the petitioner's shareholders, stating that the petitioner has not earned any income; a copy of a second affidavit dated August 2, 2004 by [REDACTED] stating the names of the three shareholders of the petitioner and affirming their willingness to financially support the petitioner; a copy of a third affidavit dated August 2, 2004 by [REDACTED] stating that he and his wife are 50% shareholders of the petitioner; a copy of a Decision and Order of the Board of Alien Labor Certification Appeals in the case *In the Matter of*

*Ranchito Coletero, on behalf of Maria Lordes Retiguin*, BALCA Case No. 2002-INA-105 (January 8, 2004); a copy of a record of a special meeting of the petitioner's directors and shareholders in 2003, with no specific date stated; copies of share certificates issued by the petitioner to the petitioner's three shareholders; a copy of the Form 1040 U.S. Individual Income Tax Return for 2001 of [REDACTED] and his wife [REDACTED]; copies of monthly statements of the Wells Fargo Bank, Houston, Texas for an account of [REDACTED] for the months of April, July and October 2002, and May, August and October 2003; copies of three statements dated June 11, 2004 of the Texas First National Bank, Houston, Texas for three certificates of deposit under the names of three minors and each also under the name of [REDACTED] and copies of financial statements of the [REDACTED] dated December 31, 2001, December 31, 2002 and November 30, 2003.

The notice of appeal and the foregoing documents were received by CIS on August 23, 2004.

Counsel later submitted a letter dated September 3, 2004 and the following additional documents: a copy of a letter dated August 26, 2004 from a person in the office of Nurse Recruiting of the [REDACTED] describing that institution's relationship with the petitioner; additional copies of financial statements of the [REDACTED] dated December 31, 2001 and December 31, 2002; and a copy of a financial statement of the [REDACTED] dated December 31, 2003.

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 record before the director contained several documents pertaining to the [REDACTED]. Those include a copy of a letter dated June 25, 2001 from the [REDACTED] with no signature visible on the copy submitted; a copy of an Employee Contract executed October 26, 2001 between the beneficiary and the [REDACTED] Lufkin, Texas; and a copy of an agreement dated November 30, 2001 between the petitioner and the [REDACTED].

The foregoing documents indicate that the beneficiary is to be employed not by the petitioner but rather by the [REDACTED].

The letter dated June 25, 2001 from the [REDACTED] states a request "To Whom It May Concern" for workers from India "to work for [REDACTED]". The letter also states monthly minimum proposed salaries for registered nurses.

In the employee agreement executed October 26, 2001 the employer is identified as [REDACTED]. The employer's representative in India is stated to be [REDACTED]. The name [REDACTED] is similar but not identical to the name of the petitioner on the instant I-140 petition, which is [REDACTED].

The agreement dated November 30, 2001 between the petitioner and [REDACTED] is signed by [REDACTED] as president of the petitioner. In that agreement, the petitioner is referred to as "Recruiter," and the [REDACTED] is referred to as "Client." The agreement states that the petitioner's responsibility is to provide candidates for employment to the [REDACTED] including to assure that those candidates have satisfied all legal immigration requirements. The agreement describes fees to be paid to the petitioner by the [REDACTED] for those services, but it describes no further fees to be paid to the petitioner after the commencement of employment by any candidate.

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

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

In the instant petition, the documents discussed above indicate that the petitioner is not the intended employer of the beneficiary. Rather, the [REDACTED] is the intended employer. For this reason, the petitioner's evidence fails to establish the petitioner's compliance with the regulation at 20 C.F.R. § 656.22. The petition therefore cannot be approved.

Even if the petitioner were assumed to be the intended employer, the evidence in the record before the director failed to establish the petitioner's ability to pay the proffered wage.

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)].

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

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

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

In the instant matter the petitioner submitted no tax returns prior to the decision of the director. Nor did the petitioner submit copies of annual reports or of audited financial statements which are the two alternative forms of required evidence specified by the regulation at 8 C.F.R. § 204.5(g)(2). Therefore no analysis could be made of the petitioner's net income or net current assets.

The record before the director contained copies of a Financial Statement and Monthly Operating Statements from the [REDACTED] dated December 31, 2001. But financial documents pertaining to an entity other than the petitioner are not among the types of acceptable evidence stated in the regulation at 8 C.F.R. § 204.5(g)(2).

For the foregoing reasons, even assuming that the petitioner is the intended employer, the evidence submitted prior to the director's decision therefore fails to establish the petitioner's ability to pay the proffered wage.

In his decision, the director failed to address the evidence in the record which indicates that the petitioner is not the intended employer. Rather, the director considered the financial evidence pertaining to the [REDACTED] and found that it could not be used to establish the petitioner's ability to pay the proffered wage. Although the director erred in failing to evaluate whether the petitioner was the intended employer, the director's decision to deny the petition was correct, for the reasons discussed above.

On appeal, the petitioner submits additional evidence. None of the evidence submitted on appeal indicates that the petitioner will be the intended employer. Therefore, even if the evidence is considered on appeal, the petitioner's evidence still fails to establish that the petitioner has complied with the regulation at 20 C.F.R. § 656.22, requiring that the labor certification application be filed by the employer.

The evidence submitted on appeal responds to the director's finding that the petitioner had not established its ability to pay the proffered wage. Counsel 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 decision of the director. Even assuming that the petitioner's evidence established its compliance with 20 C.F.R. § 656.22, the evidence submitted on appeal would fail to overcome the director's decision on the issue of the petitioner's ability to pay the proffered wage.

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 five. 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 RFE 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.

Even if the evidence submitted by the petitioner was properly before the AAO, it would fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

Some of the financial evidence submitted on appeal pertains to the [REDACTED]. This evidence is similar to the financial evidence on that institution submitted prior to the director's decision. As discussed above, financial documents pertaining to an entity other than the petitioner are not among the types of acceptable evidence stated in the regulation at 8 C.F.R. § 204.5(g)(2).

The evidence submitted on appeal also includes a copy of an affidavit dated August 2, 2004 by [REDACTED] one of the petitioner's shareholders. [REDACTED] states that the petitioner is a start-up company and that it has not earned any income. He states that for this reason, the petitioner has not filed any income tax returns. [REDACTED] states that the nurses for whom the petitioner has submitted petitions have not yet arrived in the United States, and that once they arrive in the United States, the petitioner will have income and will file tax returns. This affidavit by [REDACTED] indicates that the petitioner cannot establish its ability to pay the proffered wage using only its own financial resources.

The other financial evidence submitted on appeal pertains to the personal finances of the petitioner's three shareholders. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation at 8 C.F.R. § 204.5 allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at \*3 (D. Mass. Sept. 18, 2003).

Counsel submits a copy of a Decision and Order of the Board of Alien Labor Certification Appeals in the case *In the Matter of Ranchito Coletero, on behalf of Maria Lordes Retiguin*, BALCA Case No. [REDACTED] (January 8, 2004). Counsel offers that decision as authority to consider the personal financial resources of the petitioner's shareholders when evaluating the petitioner's ability to pay the proffered wage. The facts in that case, however, involved a petitioner which was a sole proprietorship. The Board of Alien Labor Certification Appeals ruled that any analysis of the employer's financial resources must not be limited only to the resources directly related to the employing business, but must also include a consideration of other financial resources of the owner. In the opinion, the Board referred to one of its earlier decisions involving a corporate employer in which the financial resources of the shareholders had been considered along with other evidence to be resources available to the employer. However, the facts of that case are not described in detail. In any event, CIS is not bound by

administrative decisions of the Board of Alien Labor Certification Appeals. Administrative decisions binding on CIS are designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. §§ 103.3(c), 103.9(a).

For the foregoing reasons, the evidence submitted on appeal fails to overcome the decision of the director on the issue of the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the evidence in the record fails to establish that the petitioner has complied with the notice requirements in Department of Labor regulations.

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

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

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

(ii) If there is no such bargaining representative, *by posted notice to the employer's employees at the facility or location of the employment*. The notice shall be posted for at least 10 consecutive days.

(Emphasis added).

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

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

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

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

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

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

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

The petitioner submitted a copy of a notice of job opportunity with its petition. The notice states that it was posted at the petitioner's premises from November 10, 2001 to December 12, 2001. That evidence is insufficient to establish that the notice was posted at the actual facility or location of the employment where the beneficiary will work, as required by 20 C.F.R. § 656.20(g)(1).

The Department of Labor has recently published a final rule modifying some portions of the labor certification regulations. The changes will become effective on March 25, 2005. In supplementary information accompanying the final rule the Department of Labor stated the following concerning the notice requirement:

[T]he notice requirement in the regulations has been a statutory requirement since the passage of IMMACT 90. Section 122(b)(1) of IMMACT 90 provide no certification may be made unless the employer-applicant, at the time of filing the application, has provided notice of the filing to the bargaining representative, or, if there is no bargaining representative, to employees employed at the facility through posting in conspicuous places. In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers.

Employment and Training Administration, Department of Labor, 20 CFR Parts 655 and 656, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, at 77338 (Dec. 27, 2004). *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).

In its comments accompanying the new rule, the Department of Labor reaffirmed the necessity of notice even in Schedule A applications, where no attempted recruitment of U.S. workers is required, noting that the documentation which might be provided by interested parties in response to a notice might include documentation on wage or fraud issues which those parties might wish to have considered as evidence. 69 Fed. Reg. at 77338.

The petitioner's failure to comply with the notice requirements in the Department of Labor regulations is a further reason why the instant petition must be denied.

One other issue raised by the evidence in the instant case concerns the present immigration status of the beneficiary. The record contains copies of the beneficiary's Resident Alien card with card expiration date of August 5, 2002; a copy of a Reentry Permit issued January 6, 1995 to the beneficiary by the Immigration and Naturalization Service; and copies of several pages of the beneficiary's Indian passport.

The Resident Alien card shows that the beneficiary was at one time a lawful permanent resident of the United States. The pages of the beneficiary's passport in the record contain a stamp showing an entry to India on May 19, 1995 and contain no later stamps. The expiration date on the beneficiary's Reentry Permit is January 6, 1997. The current address of the beneficiary is stated on the I-140 petition to be in [REDACTED]. The record contains no further information on whether the beneficiary is still a lawful permanent resident of the United States. If so, she would have no need of the instant petition. But if the beneficiary is no longer a lawful permanent resident of the United States, she would not be prohibited from being a beneficiary of an employment-based petition merely because of her previous status as a lawful permanent resident. *See* Paul Virtue, Acting General Counsel, INS, Legal Opinion, Eligibility of Lawful Permanent Residents for Adjustment of Status, Genco opinion 89-90 (December 21, 1989). In deciding the instant appeal, the AAO expresses no opinion on whether the beneficiary is presently a lawful permanent resident of the United States.

In summary, the record before the director failed to establish that the petitioner is the intended employer of the beneficiary, and also failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The petitioner's evidence submitted on appeal also fails to establish that the petitioner is the intended employer or to establish its ability to pay the proffered wage.

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

**ORDER:** The appeal is dismissed.