

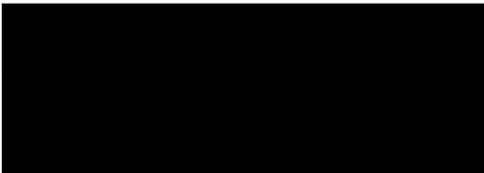


U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

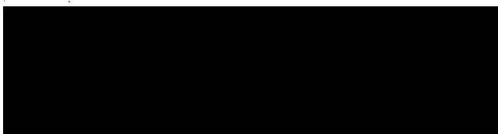
Date: DEC 12 2006

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IN RE:

Petitioner:

Beneficiary:

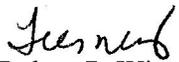


PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: 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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

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

The record contains a Form G-28 Notice of Entry of Appearance. However, only the beneficiary in this matter signed that notice. The record contains no indication that the petitioner has consented to be represented. All submissions will be considered, but the decision in this matter will be provided only to the petitioner.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a health care staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor 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 the petitioner has had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service has determined that there are not sufficient U. S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U. S. workers similarly employed.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.” The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to

the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3), 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. § 656.20 (2004)¹ states, in pertinent part,

(c) Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work

The prevailing wage rate is defined by the regulation at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by [20 C.F.R. § 656.21(b)(3)], shall be determined as follows:

. . . .

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the Department of Labor regulations as in effect prior to the PERM amendments.

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

....

b) For purposes of this section, except as provided in paragraphs (c) and (d), "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment"

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.²

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 C.F.R. § 204.5(d). Here, the petition was filed with CIS on February 2, 2004. The proffered wage as stated on the Form ETA 750 is \$42,000 per year.

On the petition, the petitioner stated that it was established during 2002 and that it employs three workers. The petition states that the petitioner's gross annual income is \$500,000. In the space reserved on the petition for the petitioner's net annual income the petitioner inserted "N/A." On the Form ETA 750, Part B, the petitioner did not indicate that it had employed the beneficiary. Both the Form ETA 750 labor certification and the Form I-140 visa petition indicate that the petitioner would employ the beneficiary in its offices at 200 Centennial Avenue, Suite 209, in Piscataway, New Jersey.

In support of the petition, the petitioner submitted the 2002³ Form 1120S, U.S. Income Tax Return for an S Corporation, of Logistic Solutions Incorporated (LSI). That return shows that LSI declared a loss of \$47,210

² The OWL requires that the city, state, and county of the employment location be known in order to identify the prevailing wage rate.

as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year LSI had \$5,155,847 in current assets and \$3,485,525 in current liabilities, which yields net current assets of \$1,670,322.

The petitioner also submitted a letter, dated January 29, 2004, on the petitioner's letterhead. That letter states that the petitioner has three employees and an estimated gross annual income of \$500,000 for 2004. The petitioner offered no support for that estimate and this office notes that it was made only 29 days into the year. That letter refers to the petitioner variously as [REDACTED] and as The [REDACTED]. This office notes that the petitioner is [REDACTED].

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 24, 2004, requested additional evidence of that ability.

The service center noted that the petitioner had provided LSI's tax return, but that LSI is not the petitioner. The service center requested a copy of the petitioner's 2002 tax return. The Service Center also stated that, in lieu of its tax return, the petitioner might provide annual reports accompanied by audited or reviewed financial statements.⁴

The service center requested copies of the 2003 W-2 Wage and Tax Statements the petitioner issued to each of its three claimed employees. Further, the service center noted that the petitioner, a nurse placement service, had filed more than 100 alien worker petitions and requested evidence that it is able to place that many nurses with clients.

In response the petitioner provided, (1) a letter, dated December 10, 2003, from an accountant, (2) copies of the petitioner's formation documents, (3) monthly bank statements pertinent to accounts of the petitioner, (4) copies of various contracts that are described further below, (5) a copy of the lease of LSI's business premises, and (6) a letter, dated April 5, 2004, from the petitioner.

The December 10, 2003 accountant's letter states that the petitioner is a single member limited liability company owned by LSI. That letter continues that for tax purposes the petitioner is a nonentity whose income is reported on the corporate income tax return of LSI.

³ Because the priority date of the petition is February 2, 2004 financial information pertinent to prior years would ordinarily not be considered directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2004 were available when the petition was submitted, however, this office will review data from previous years.

⁴ Despite the language in the Service Center's request, the regulation at 8 C.F.R. § 204.5(g)(2) stipulates that the petitioner must provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage. There is no provision to accept reviewed financial statements. In any event, the financial statements subsequently provided are neither audited nor reviewed, but produced pursuant to a compilation.

One of the contracts provided is an agreement by a subsidiary of the New Jersey Hospital Association to act as a liaison between healthcare organizations and the petitioner. This office finds that this contract is not evidence which is relevant to the petitioner's claim that it has the continuing ability to pay the proffered wage beginning on the priority date.

Another contract submitted into the record is a contract between the petitioner and [REDACTED], New Jersey. That contract indicates that the petitioner will refer nurses or other health care professionals to [REDACTED] and that [REDACTED] will either make them employees; utilize their services as contract workers and pay the petitioner for their services; or utilize them as contract workers for a trial period and then employ them. That contract does not stipulate that [REDACTED] is obliged to employ a certain number of nurses referred by the petitioner pursuant to that agreement. The contract specifies that it may be terminated with 30 days notice. This contract is not relevant to the petitioner's claim that it has the continuing ability to pay the proffered wage beginning on the priority date.

Three of the contracts submitted are between the petitioner and the following clients: Countryside Care Center of Delhi, New York; Premier Therapy Services, Incorporated, of New Hope, Pennsylvania; and United Methodist Homes of Endwell, New York. Pursuant to those agreements the clients would pay set hourly fees to the petitioner for nurses placed with them. The agreements do not specify any minimum number of nurses they will employ pursuant to that arrangement. Each contract specifies that it may be terminated with 30 days notice. These contracts also are not relevant to the petitioner's claim that it has the ability to pay the proffered wage from the priority date onwards.

Another contract submitted is between the petitioner and [REDACTED] of Piscataway, New Jersey. That contract calls for the petitioner to provide an unspecified number of nurses to Rehab Resources. It does not specify whether those nurses would become employees of the petitioner or of Rehab Resources. This contract is not relevant to the petitioner's claim that it has the ability to pay the proffered wage.

The petitioner's April 5, 2004 letter states that the petitioner and LSI file a consolidated tax return. In that letter the petitioner stated that it was providing the W-2 Wage and Tax Statements of its employees. The petitioner did not, however, provide those requested documents.

The director found that the evidence did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and denied the petition on December 3, 2004. In discussing that ability, the director considered evidence pertinent to [REDACTED] income and assets as relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, but found that the evidence does not establish [REDACTED] ability to pay the wages of all of the approximately 210 the aliens for whom the petitioner has petitioned. The issue of the inclusion of [REDACTED] income and assets in the determination of the petitioner's ability to pay the proffered wage is addressed below.

On appeal, the petitioner asserts that the service center failed to issue a request for evidence prior to denying the petition.⁵ This office notes that the service center issued a request for evidence in this matter on March 24, 2004 and that the petitioner responded to that request during April 2004.

⁵ Specifically, on page four of the appeal brief, the petitioner states that if the service center were not going to

The appeal also states, "The record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage." What evidence the petitioner meant to refer to is unclear and the petitioner offered no additional information or argument on that point. This office is unable to locate any such evidence in the record and finds that the record does not establish that the petitioner has been paying the proffered wage or any portion of that wage to the beneficiary since the priority date, nor even during any part of the ensuing period.

The petitioner states that the "core business" of [REDACTED] is "placing . . . professionals in contract-to-hire and permanent full-time positions with leading companies across the world." The petitioner states that LSI wholly owns the petitioner, and that during 2003 LSI had gross revenue of \$17,759,443 and a salary and wage expense of \$10,685,541. The petitioner states that [REDACTED] gross revenue and wage expense show the petitioner's ability to pay the proffered wage. The petitioner further states that the contracts submitted "will ensure that we generate sufficient revenues and income to pay our employees' salaries."

The petitioner notes that a May 4, 2004 memorandum from CIS's Associate Director of Operations states, "CIS adjudicators should make a positive ability to pay determination [if] **the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage.**" [Emphasis in the original.] The petitioner asserts that, therefore, the petition in the instant case should be approved.

The petitioner cites various statistics pertinent to the financial performance of [REDACTED] and asserts that in "situations such as this, [CIS] should defer to [the petitioner's] business judgment and recognize that [it], as a successful business organization for several years, would not hire [the beneficiary] if [it] did not have the financial resources necessary to pay the proffered wage." The petitioner does not make explicit the specific circumstances that it asserts obviate its obligation to demonstrate the ability to pay the proffered wage in accordance with the requirements of 8 C.F.R. § 204.5(g)(2). Petitioner's reliance on the income and assets of [REDACTED] is addressed below.

With the appeal the petitioner provides (1) copies of LSI's 1999, 2000, 2001, and 2003 tax returns, (2) copies of LSI's financial statements for various periods, (3) evidence pertinent to a credit line extended to LSI by a commercial lender, (4) a copy of a form containing financial information pertinent to [REDACTED] owners and submitted to that commercial lender, (5) copies of additional LSI bank statements, (6) a letter, dated August 20, 2004, from Philadelphia Bangalore Consulting, Incorporated (PBC), (7) an undated letter from PBC addressed To Whom It May Concern, (8) two letters of recommendation from the petitioner's clients, (9) copies of various contracts that are described further below, (10) web content from the site of the New Jersey Hospital Association, (11) a letter dated November 12, 2004 from PBC to a New York law firm that specializes in immigration law, (12) certificates showing that the petitioner is a member of the New Jersey Hospital Association, and (13) web content pertinent to some of the petitioner's clients and some other health care companies indicating that they are attempting to hire additional nurses.

find that the petitioner had established its continuing ability to pay the proffered wage the service center should, in the alternative, have "exercised favorable discretion and provided [the petitioner] an opportunity to provide [CIS] with additional evidence" Further, in an addendum to the Form I-290B appeal, the petitioner stated "Under these circumstances it was inappropriate for the Service to . . . deny the Form I-140 petition without first issuing a request for additional evidence."

The additional tax returns submitted show financial data of LSI. The compiled financial statements provided show financial data for LSI and its affiliates. Only the compiled balance sheets submitted show segregated financial data for the petitioner, [REDACTED]. No copies of annual reports, federal tax returns, or audited financial statements for the petitioner are in the record.

One of the contracts provided is between the petitioner and PBC. Pursuant to the terms of that agreement PBC will refer registered nurses or other healthcare professionals to the petitioner for placement "as dictated by the staffing needs" of the petitioner and PBC will receive one-half of the gross margin paid to the petitioner for that placement. This contract does not indicate that the petitioner has need of any set number of nurses or that it has entered into any contract(s) to fill a certain number of nursing positions. This document is not relevant to the petitioner's claim that it has the continuing ability to pay the proffered wage beginning on the priority date.

Four of the contracts provided are between PBC and [REDACTED] and Nazareth Hospital. No evidence in the record suggests that any of the parties to those contracts are related to the petitioner. These contracts are not relevant to the petitioner's ability to pay the proffered wage.

Other contracts submitted into the record are between the petitioner and [REDACTED] of Piscataway, New Jersey; Excellence Rehab Physical Therapy, PC, of Bronx, New York; Barnert Hospital of Patterson, New Jersey; VTA Management Services of Brooklyn, New York; Health Care Services of NY/NJ, LLC; and Kensington Hospital of Philadelphia, Pennsylvania. Pursuant to those agreements the clients would pay set hourly fees to the petitioner for nurses placed with them.⁶ The agreements do not specify any minimum number of nurses that will be employed pursuant to these arrangements. Each contract specifies that it may be terminated with 30 days notice.

Another contract is between the petitioner and [REDACTED] of New Jersey. That contract specifies that [REDACTED] will identify 20 nursing positions for the petitioner to fill, that the nurses will be hired directly by [REDACTED] and that [REDACTED] will pay the petitioner a fee for that placement.

One of the contracts is between the petitioner and [REDACTED]. It licenses the petitioner to use the business name "[REDACTED]" in India and other countries that might be subsequently designated and to sublicense other companies to use that business name. Another four contracts in the record are for sublicense by the petitioner of the business name [REDACTED] to companies operating in India and Bangladesh. The petitioner also provided documents showing that [REDACTED] offers preparatory classes for nursing licensure tests.

None of these documents are relevant to the petitioner's claim that it has the continuing ability to pay the proffered wage from the priority date onwards. These documents will not be considered further.

⁶ In some cases the client would not be the end user of the nurses' services, but would place them with an end-user.

The August 20, 2004 letter from [REDACTED] is addressed to the petitioner and indicates that [REDACTED] then had 25 nursing positions available at four Pennsylvania health care facilities and would refer any registered nurses the petitioner had available to those positions. The undated letter from PBC also indicates that it then had contracts to place 25 nurses at the four Pennsylvania medical facilities and would be happy to place nurses "from the inventory of [the petitioner]" in those positions.⁷

The PBC letter addressed to an immigration law firm is not relevant to the petitioner's claim that it has the ability to pay the proffered wage.

Subsequently the beneficiary submitted a letter dated August 14, 2005 and additional evidence. Neither the letter nor the additional evidence addresses the issue of the petitioner's continuing ability to pay the proffered wage beginning on the priority date or any other material issue in this case.

The May 4, 2004 Yates' memorandum relied upon by the petitioner does not support a finding that the petition should have been approved. The memorandum does state that the petition should be approved if the petitioner's net current assets exceed the proffered wage.⁸ That memorandum, however, did not consider the circumstances of the instant case, in which the petitioner has filed multiple petitions. The petitioner must show the ability to pay the wages proffered to each of the beneficiaries of pending petitions, not merely the wage of the instant beneficiary.

The petitioner's credit line is not relevant to the petitioner's ability to pay the proffered wage because money obtained on credit represents a liability, not an asset. The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients, but that does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage itself on a 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. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender.

The bank statements submitted are also not relevant to the instant petition. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

⁷ This letter and the previously described contract between the petitioner and PBC show that the petitioner and PBC utilize nurses from *various* sources. As such, it may not be said that PBC is guaranteeing by way of this letter and/or this contract to employ a certain number of the *petitioner's* nurses during a specified time frame.

⁸ As is discussed further below, the net current assets shown on the tax returns submitted are not necessarily those of the petitioner.

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.⁹

The unaudited financial statements submitted shall not be used to demonstrate the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial statements submitted were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner cites various financial statistics from the tax return of [REDACTED] and asserts that they show the petitioner's ability to pay the proffered wage. In the decision of denial the director appears to have considered those figures to be relevant to the petitioner's ability to pay the proffered wage. This office disagrees.

The petitioner is a limited liability company (LLC). An LLC is taxed as a partnership and generally reports income and expenses on a Form 1065, U.S. Return of Partnership Income. In this case the petitioner reports its income and expenses unsegregated from its owner's income and expenses on its owner's consolidated corporate return. The petitioner's accountant states that the petitioner is therefore a "nonentity." As an LLC, however, the petitioner is a legal entity separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958).

The debts and obligations of the petitioner are not the debts and obligations of its corporate owner or of anyone else,¹⁰ notwithstanding that the petitioner reports its income and expenses on its owner's consolidated tax return. Without additional evidence and authority in support of the accountant's assertion that the petitioner is not a separate entity, this office will treat LSI and the petitioner as separate entities.

Further still, the General Provisions of the petitioner's Limited Liability Operating Agreement states, at GP4.3(a) that ". . . the Members shall not [generally] be personally liable to any third party for any debt, obligation or liability of the Company." The sole member of the petitioner is [REDACTED]. Thus, not only is [REDACTED] protected from liability for the petitioner's debts, obligations, and liabilities by operation of law, but it also made clear in drafting the operating agreement that it fully intended to be insulated from them. The income and assets of [REDACTED] will not be treated as funds available to pay the petitioner's debts and obligations, including wage expenses.

⁹ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

¹⁰ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

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 employed and paid 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 a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, its annual reports, or its audited financial statements, 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 total 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 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. See *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The proffered wage is \$42,000 per year. The priority date is February 2, 2004.

In the instant case the petitioner provided no copies of annual reports, federal tax returns, or audited financial statements of its own.¹¹ The petitioner urges, however, that the contracts provided "and the revenue they guarantee for the petitioner, will ensure that it has sufficient income to pay the beneficiary's [sic] their salaries."

The contracts provided, however, do not demonstrate that any of the companies with whom the petitioner contracts are obliged to employ any of the petitioner's nurses. Further, they may unilaterally elect to cancel their contracts with the petitioner with 30 days notice. This office finds that the contracts provided do not, contrary to the petitioner's assertion, guarantee it any revenue at all.

As stated above, the petitioner provided no copies of annual reports, federal tax returns, audited financial statements or any other reliable evidence of its ability to pay additional wages. Therefore the petitioner has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

¹¹ Even if LSI were determined to be the petitioner in this case, and the financial data pertaining to [REDACTED] were analyzed, the petition would not be approvable because [REDACTED] is unable to demonstrate the ability to pay the wages proffered to the many beneficiaries for whom the petitioner and [REDACTED] have petitioned with its profits, with its net current assets or otherwise.

The record in this matter raises additional issues that were not addressed in the decision of denial.

The regulations at 20 C.F.R. §§ 656.22(b)(2) and 656.20(g)(3) indicate that notice of the job offered must be posted at the location of intended employment unless the position is represented by collective bargaining. The record in this case contains no indication that collective bargaining represents the petitioner's employees. The notice of the proffered position states that it was posted from January 2, 2004 to January 22, 2004, but does not state where it was posted.

Further, both the Form ETA 750 and the Form I-140 in this matter state that the beneficiary would be employed at [REDACTED], New Jersey. The balance of the record indicates, however, that the location at which the beneficiary would be employed, the state in which the beneficiary would be employed, and even the beneficiary's actual potential employer have not yet been determined.¹²

The petitioner is obliged to demonstrate that it posted the notice of the proffered position in accordance with the regulations and that the Form ETA 750, if approved, would be valid for employment of the alien at the specific site. The petitioner has not identified the location at which it posted notice of the proffered position or the hospital or other site at which it would employ the beneficiary.

The purpose of the notice requirement is to accord U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. In the instant case, those similarly employed would be nurses at the client hospital at which the beneficiary would be employed.¹³ Posting the notice of the proffered position at any other location would not notify the affected U.S. workers and would not satisfy the notice requirement of 20 C.F.R. §656.20(g)(2). The notice of this position appears to have been posted at the petitioner's administrative offices, which does not satisfy the requirement of the pertinent regulation. Because this ground was not included as a basis of the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, today's decision will not be based, even in part, on this ground. If the petitioner seeks to overcome this decision on motion, however, it should address this issue.

That the location at which the petitioner would employ the beneficiary is unknown makes it impossible to determine whether the petitioner proposes to employ her at the prevailing wage for nurses *in the area of intended employment* as required by 20 C.F.R. §656.40. This raises the question of whether the labor certification, if approved, would be valid at the location at which the petitioner would subsequently employ the beneficiary. Again, this office declines to base this decision, in whole or in part, on this ground. If the petitioner seeks to overcome this decision on motion, however, it should address this issue.

¹² The evidence does not indicate that any nurses work at the petitioner's offices. Further, only two of the petitioner's contracts are with [REDACTED] N.J. and not all of the petitioner's contracts are even with health care providers in New Jersey. Finally, some of the contracts indicate that the petitioner would refer a nurse to an end-user, who would employ that nurse and pay the petitioner a referral fee.

¹³ See the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); see also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32, 244 (July 15, 1991).

Further still, some of the contracts between the petitioner and end-users indicate that the end-users may themselves hire nurses referred by the petitioner and pay a referral fee. The regulation at 20 C.F.R. § 656.3 states:

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

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

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary’s actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286.

Matter of Artee, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of employees contracted to an end-user. The commissioner held that the nature of the petitioner’s need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists who were to be temporarily outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or

less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

These precedent cases, considered together, establish that an agency that refers workers may qualify as those workers' employer within the meaning of 20 C.F.R. § 656.3. To do so, however, it must be the beneficiary's actual employer, rather than referring potential employees to other employers for a fee. Some of the contracts in the instant case indicate that workers referred pursuant to those contracts would continue on the petitioner's payroll. Other contracts make equally clear that workers referred pursuant to those contracts would, or might, become employees of the end-user, not the petitioner. Workers whom the petitioner anticipates referring, rather than employing, are not eligible for the instant visa category.

Further, the record does not make clear whether the petitioner proposes to pay the beneficiary for full-time employment regardless of whether it is able to utilize the beneficiary's services full-time, or anticipates paying only for those hours during which it is able to place the beneficiary.

The petitioner is not permitted, under the instant visa category, to maintain a pool of workers whose pay is conditional upon their placement with a health care provider. By filing a petition pursuant to the instant visa category the petitioner is stating that it will employ the beneficiary full-time, and the petitioner must guarantee the beneficiary full-time pay even if full-time employment is unavailable. Because the decision of denial did not rely on this ground, and the petitioner was not accorded an opportunity to address it, today's decision is not based, even in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it is urged to address that issue.

Further, on April 2, 2004 the Vermont Service Center requested copies of the petitioner's 2003 W-2 Wage and Tax Statements. The petitioner has not provided those requested documents. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.¹⁴

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

¹⁴ Pursuant to *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988) evidence requested before the petition was denied will not be considered if submitted on appeal or on motion. Mere submission of the requested W-2 forms on motion without more would be insufficient to overcome this basis of denial pursuant to 8 C.F.R. § 103.2(b)(14).

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

ORDER: The appeal is dismissed.