U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: EAC 05 005 51920 Office: VERMONT SERVICE CENTER Date: FEB 03 2006

IN RE: Petitioner: [redacted]
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.

Robert P. Wiemann, Director
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 petitioner is a health care staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification, accompanied the petition.

The director determined that the evidence did not establish the following: (1) that the petitioner had posted a notice of the proffered position in accordance with the requirements of 20 C.F.R. § 656.20(g)(3); (2) that the wage offered in this case equals or exceeds the prevailing wage as required by 20 C.F.R. § 656.20(c)(2); (3) that the petitioner itself would employ the beneficiary, rather than referring the beneficiary to another employer; and, (4) that the petitioner has the ability to pay the proffered wage. 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.

The regulation at 20 C.F.R. § 656.20 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:
> >
> > > (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.[1]

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.

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

The regulation at 20 C.F.R. § 656.22, Application for labor certification for Schedule A occupations, states, in pertinent part,

> (b) The application for Alien Employment Certification form shall include:
>
> . . .
>
> > (2) Evidence that notice of filing the application Alien Employment Certification was provided . . . as prescribed in § 656.20(g)(3) . . . .

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

> Any notice of the filing of an Application for Alien Employment Certification shall:
>
> (1) In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> > (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
> >
> > (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment.
>
> . . .
>
> (3) 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 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 October 6, 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 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 [redacted], in Piscataway, New Jersey.

In support of the petition the petitioner submitted a letter, dated August 19, 2004, on the petitioner's letterhead. That letter states that the petitioner has three employees[2] and an estimated gross annual income of $500,000 for 2004. The petitioner offered no support for that estimate. That letter refers to the petitioner variously as [redacted] and as [redacted] of [redacted] This office notes that the petitioner is [redacted].

A list of attachments submitted with that letter stated that the petitioner was providing "Copies of [redacted] recent income tax returns, financial statements, [and] company brochure." No tax returns, financial statements, or company brochures were submitted with the petition.

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 October 25, 2004, requested, *inter alia*, additional evidence of that ability. The Service Center specifically requested that the petitioner provide its 2003 income 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.[3]

The service center also requested copies of the petitioner's Form 941 quarterly returns for the first three quarters of 2004 and a copy of any contract between the petitioner and the beneficiary.

In response the petitioner provided, (1) a letter, dated December 10, 2003, from an accountant, (2) copies of the petitioner's formation documents, (3) a copy of [redacted]s office space lease, (4) copies of [redacted] 1998, 1999, 2000, 2001, 2002, 2003, Form 1120S, U.S. Income Tax Returns for an S Corporation, (5) copies of [redacted]'s compiled financial statements for various periods, (6) evidence pertinent to a credit line extended to [redacted] by a commercial lender, (7) monthly bank statements pertinent to accounts of the petitioner, (8) copies of various contracts that are described further below, (9) a letter, dated August 20, 2004, from [redacted] to the petitioner, (10) two letters of recommendation from the petitioner's clients, (11) an undated letter from [redacted] addressed To Whom It May Concern, (12) a letter, dated May 15, 2004, from the petitioner to the beneficiary, (13) an undated "Addendum to the Employment Offer," (14) wage and employment tax data pertinent to LSI's operations, and (15) a letter, dated December 29, 2004, from the petitioner.

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[2] On the Form I-140, filed 48 days after the date of this letter, the petitioner reported eight employees.

[3] 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.

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

The 2003[4] Tax Return [redacted] hows tha[redacted] declared ordinary income of $192,001 during that year. The corresponding Schedule L shows that at the end of that year [redacted] had current assets of $3,652,692 and current liabilities of $2,132,993, which yields net current assets of $1,393,926.

The additional tax returns submitted also show financial data of [redacted] The compiled financial statements provided show financial data fo[redacted]nd 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.

The August 20, 2004 letter from [redacted] addressed to the petitioner 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 [redacted] 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.[5]

The May 15, 2004 letter from the petitioner to the beneficiary explicitly states that the petitioner will not pay any salary to the beneficiary until the beneficiary has taken the NCLEX-RN examination and been placed at an end-user's facility. That letter also states that if the beneficiary initially passes the examination the petitioner seek employment for the beneficiary as a nurse at an initial salary of $20.20[6] per hour, but that if the beneficiary initially fails the examination the petitioner will seek to employ the beneficiary as a nurse technician at a salary between $8 and $12 per hour.[7]

The undated addendum to the employment offer states that after the beneficiary has passed the NCLEX-RN examination the petitioner will locate employment at a facility to be subsequently determined. The addendum makes no provision for payment of the proffered wage to the beneficiary during the period prior to the beneficiary's employment at such a facility. The addendum also makes clear that the beneficiary may be employed by the petitioner or may be referred to another employer.

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[4] Because the priority date of the petition is October 6, 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 2003.

[5] This letter and the previously described contract between the petitioner and [redacted] how that the petitioner and [redacted] utilize the same pool of nurses, as needed, rather than that [redacted] an be counted upon to employ any particular number of the petitioner's nurses.

[6] That hourly wage equals an annualized salary of $42,016.

[7] That hourly wage range equals an annualized salary of between $16,640 and $24,960.

One of the contracts provided is between the petitioner and [redacted] Pursuant to the terms of that agreement [redacted] will refer registered nurses or other healthcare professionals to the petitioner for placement and receive one-half of the gross margin paid to the petitioner for that placement. The relevance of that document to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is unclear.

Four of the contracts provided are between [redacted] and [redacted] and [redacted] No evidence in the record suggests that any of the parties to those contracts are related to the petitioner. The relevancy of those contracts to any issue before this office is unclear and they will not be further addressed.

One of the contracts provided is an agreement by a subsidiary of the [redacted] act as a liaison between healthcare organizations and the petitioner. In an appendix to that contract the petitioner agrees to pay [redacted] $5,000 initially, an additional $15,000 during the ensuing year, plus three percent of all per diem referrals procured by [redacted] for the petitioner within the state of New Jersey, $1,000 for each permanent placement similarly procured, and two percent of fees received pursuant to trade association prospects outside New Jersey. The petitioner did not explain in what way this document tends to demonstrate the petitioner's ability to pay the proffered wage and its relevance is unclear. That document will not be discussed further.

Other contracts are between the petitioner and [redacted] New Jersey; [redacted] of Bronx, New York [redacted] New Jersey; [redacted], New York; [redacted] and [redacted] Pennsylvania. Pursuant to those agreements the clients would pay set hourly fees to the petitioner for nurses placed with them,[8] although 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.

Another contract is between the petitioner and [redacted] of Paramus, 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 of [redacted], 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 any number of nurses that [redacted] obliged to employ pursuant to that agreement. The 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.

The petitioner's December 29, 2004 letter states that the petitioner is a single member limited liability company and wholly-owned subsidiary of [redacted] That letter further cites [redacted] gross receipts and its salary and wage expense as evidence of the petitioner's ability to pay the proffered wage. The letter further states that

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

the various contracts the petitioner has entered into "will ensure that we generate sufficient revenues and income to be pays [sic] our employees' salaries."

The director denied the petition on March 1, 2005. The director noted that the evidence does not show that the petitioner itself would employ the beneficiary. The director also noted that, as none of the end-user contracts provided name the beneficiary as a potential employee, the contract pursuant to which the beneficiary would be employed is unknown.

The director further found that, because the location at which the beneficiary would be employed is unknown, the evidence does not indicate that the notice of the proffered position was posted at that address or otherwise in accordance with the requirements of 20 C.F.R. 656.20(g)(1).[9] Further still, the director noted that because the location at which the beneficiary would be employed is unknown, the evidence does not demonstrate that the proffered wage equals or exceeds the predominant wage as required by 20 C.F.R. § 656.20(c)(2).

The director also found that the petitioner had failed to demonstrate its ability to pay the proffered wage. In discussing that ability, the director considered evidence pertinent to [redacted]s 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]s ability to pay the wages of all of 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 erred in denying the petition.

As evidence that the proffered wage is equal to or greater than the predominant wage paid to workers similarly employed in the area of intended employment the petitioner states that it is submitting printouts of OES wage surveys from nine areas within which the petitioner has entered into contracts with health care providers. The petitioner notes that the average of the predominant annual wages stated on those surveys is $41,860, and argues that the proffered wage of $42,000 in this case, therefore, "meet(s) the prevailing wage requirements established by the Department of Labor, and will not adversely affect the wages and salaries of similarly employed U.S. Workers."

In fact, the petitioner submitted wage surveys from seven jurisdictions.[10] The petitioner does not state that the survey data presented covers all of the areas to which it might refer the beneficiary. Further, the surveys show that the predominant wage for Level 1 nurses is $45,261 in the Jersey City, New Jersey area, $43,555 in the Philadelphia, Pennsylvania area, $46,571 in the Newark, New Jersey area, $44,928 in the Bergen-Passaic, New Jersey area, and $46,176 in the Nassau-Suffolk, New York area. The petitioner does not adequately

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[9] The regulation at 20 C.F.R. § 656.20(g)(1)(ii) requires that, if the petitioner's employees are represented by collective bargaining, the petitioner shall provide notice of the proffered position by submitting it to the collective bargaining representative, rather than by posting.

[10] The jurisdictions for which the petitioner provided prevailing wage data for Level 1 registered nurses are [redacted] New Jersey, $40,976 per year; Jersey City, New Jersey, $45,261 per year; Trenton, New Jersey, $41,995 per year; Philadelphia, Pennsylvania, $43,555 per year; Newark, New Jersey, $46,671 per year; Bergen-Passaic, New Jersey, $44,926 per year; and Nassau-Suffolk, New York, $46,176 per year.

explain why the labor certificate provided should be considered valid for employment in those areas, where the proffered wage would not equal or exceed the prevailing wage as required by 20 C.F.R. § 656.20(c)(2).

Further still, the average of the prevailing wage for entry-level nurses in the seven areas for which the petitioner provided data is $44,269.29, rather than the average the petitioner stated. The proffered wage does not equal or exceed the average predominant wage for similar positions in the various areas pertinent to which the petitioner submitted wage surveys. Further, the labor certification would be invalid for any of the area in which the proffered wage did not equal or exceed the predominant wage. The petitioner has failed to demonstrate that the proffered wage equals or exceeds the prevailing wage in the location in which the beneficiary would be employed as required by 20 C.F.R. § 656.20(c)(2). The petition was correctly denied on this ground.

As to the issue of the posting of the proffered position, the petitioner states that each of the hospitals with which it contracts posts its own vacancy announcements detailing positions it needs filled. In support of that assertion the petitioner provides printouts of web content of various hospitals advertising various vacancies. None of those announcements accords with the requirements of 20 C.F.R. § 656.20(g), and they do not obviate the petitioner's need to comply with the requirements of that regulation.

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 site of her intended employment. The petitioner has not identified the hospital 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.[11] 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). 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. As the petitioner did not comply with those requirements, the petition was correctly denied on this additional ground.

As to the petitioner's ability to pay the proffered wage, the petitioner notes that a May 4, 2004 memorandum from [redacted] 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." The petitioner asserts that, therefore, the petition in the instant case should be approved.

The petitioner also cites its contracts with health providers as evidence of its ability to pay the proffered wage. The petitioner asserts that the contracts "ensure that [the petitioner] will continue to generate sufficient

[11] *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).

revenues and income to be able to pay [its] employees' salaries.] The petitioner further 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).

The documentation provided by the petitioner includes bank statements, unaudited financial statements, and documents pertinent to its credit line. Although the petitioner did not mention those documents in its argument on appeal, this office will address them.

The petitioner's credit line is of no relevance. 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 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 during the course of, for instance, a calendar year.

The bank statements submitted are similarly of unconvincing. 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.[12]

The unaudited financial statements submitted cannot 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 LSI and asserts that they show the petitioner's ability to pay the proffered wage. In the decision of denial the director considered those figures to be relevant to the petitioner's ability to pay the proffered wage. This office disagrees.

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[12] 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.

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 the owners or anyone else,[13] 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 LSI. Thus, not only is LSI 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 LSI will not be treated as funds available to pay the petitioner's debts and obligations, including wage expenses.

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 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, or greatly in excess of the proffered wage, is generally 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. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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[13] 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.

The proffered wage is $42,000 per year. The priority date is October 6, 2004.

In the instant case the petitioner provided no copies of annual reports, federal tax returns, or audited financial statements of its own.[14] 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 the petitioner is able to place a large number of nurses.[15] Further, hospitals with which the petitioner has contracted 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 that the petitioner will be able to pay the proffered wage.

Even if the tax returns submitted had been those of the petitioner, and the net current assets on those returns the petitioner's own, the May 4, 2004 memorandum relied upon by the petitioner would 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. That memorandum 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 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.

An additional basis for denying the petition is that the record appears to indicate that, in at least some cases, the petitioner intends to refer alien workers for whom it has petitioned to other employers, rather than employing them itself. On appeal, the petitioner did not address that basis for denial. The petitioner has not, therefore, overcome that basis. The petition was correctly denied on this additional basis.

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

The petitioner's May 15, 2004 letter and the undated addendum indicate that the petitioner will not pay wages to the beneficiary until the beneficiary takes the NCLEX-RN exam and the petitioner is able to place the beneficiary with an end-user. 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

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

[15] The contract with states that it may employ 25 of the petitioner's nurses. The contract with states that it will identify 20 vacancies. The petitioner, however, has filed petitions for 215 aliens, has had more than 39 petitions approved, and has submitted more than 100 appeals to this office. None of the other contracts submitted indicates any minimum number of the petitioner's nurses to be employed.

unavailable. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, today's decision does not rely upon that issue, even in part. If the petitioner attempts to overcome the instant decision on a motion, however, it should address this issue.

Further that letter and addendum indicate that, in the event the beneficiary does not initially pass the NCLEX-RN examination, the petitioner will seek employment for the beneficiary as a nurse technician, rather than as an RN, and will pay the beneficiary a wage considerably less than the wage proffered on the Form ETA 750 alien worker petition. Under the instant visa category, the petition could not be approved if the petitioner intends to employ the beneficiary in a position other than that shown on the Form ETA 750 or pay the beneficiary a wage less than the wage proffered on that form. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, today's decision does not rely upon that issue, even in part. If the petitioner attempts to overcome the instant decision on a motion, however, it should address this issue.

Additionally, on October 25, 2004 the Vermont Service Center requested that the petitioner provide its Form 941 quarterly reports for first three quarters of 2004. The petitioner has not provided those documents and has not provided any explanation of that omission. 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition was denied (1) because the petitioner has not demonstrated that notice of the proffered position was posted in accordance with the requirements of 20 C.F.R. 656.20(g)(1), (2) because the record does not make clear that the proffered wage is equal to or greater than the predominant wage for similar positions in the location in which the petitioner would employ the beneficiary, (3) because the petitioner has not demonstrated that it would employ the beneficiary rather than collecting a fee for referring the beneficiary to another employer, and (4) because the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not overcome any of those grounds for denying the petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.