



U.S. Citizenship
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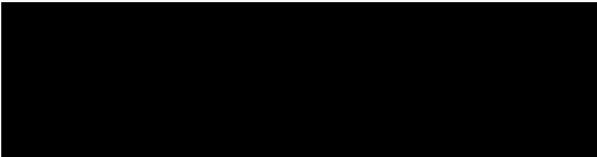


FILE: LIN 04 129 51696 Office: NEBRASKA SERVICE CENTER Date: JAN 25 2006

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center certified a decision denying the instant petition to the Administrative Appeals Office (AAO). Upon review of the decision, the AAO affirms the director's decision. The immigrant visa petition is denied.

The petitioner is a healthcare medical staffing service. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director, in his decision certified to the AAO, 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, that the petitioner had not established pre-arranged employment for the beneficiary in accordance with 20 C.F.R. § 656.22(b), that the petitioner did not establish that the proffered wage was the prevailing wage, based on the unanticipated nature of the beneficiary's potential work sites, and that the petition did not satisfy the requirements at 20 C.F.R. 656.22(b)(2) and 656.20(g)(1) with regard to employee notification of the posting notice.

The petitioner submitted an appeal to the service center that was incorrectly accepted as a motion to reopen the proceedings. Nevertheless the service center forwarded the petitioner's appeal to the AAO for consideration. The AAO will review both the certified decision and the petitioner's appeal in these proceedings. Counsel submits a brief as well as additional documentation.

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 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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on June 20, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States 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 United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification 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 20 C.F.R. § 656.20(g)(3).

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$1,976,374, and an net annual income of \$342,999. The petitioner claims to have 35 employees. In support of the petition, the petitioner submitted Form 1120S, its corporate income tax return for 2002. This document indicated the petitioner had ordinary income of -\$104,704.

In the cover letter for the I-140 petition, the petitioner stated that it had more than 50 openings for Nursing Staff RN, the position it was offering to the beneficiary. According to the petitioner, it keeps fulltime nurses on staff and on salary and then relocates them to areas with shortages. The petitioner stated that it agreed to pay an annual salary of \$33,696 plus benefits for the permanent positions. When the position required travel outside the nurse's local residential area, the petitioner would pay living expenses including rent and other benefits. The other benefits included health insurance, immigration assistance, airfare, and other related expenses. According to the petitioner, these expenses averaged per nurse approximately an additional \$15,500 a year. The petitioner stated that travel nurses or who are sent to locations across the United States to compensate for local nursing shortages, stated that travel assignments last from eight weeks to one year, with the average assignment being six months. The petitioner stated that salary and benefits were guaranteed and that recruited employees would be paid full salary and benefits regardless of temporary lapses in between assignments.

The petitioner also stated that it expected a 2003 gross revenue of approximately two million dollars and a projected 2004 income of five million dollars, which the petitioner described as a 40 percent increase in revenue and a testament to the growth and stability of the company. The petitioner also stated that as the petitions for nurses are approved and it begins to fill its larger contract obligations for its client hospitals, the petitioner's 2005 revenue is projected to be \$16 million. The petitioner added that it had attracted more than \$550,000 in investment capital this year and had staffing contracts with hospitals for more than 100 nurses.

The petitioner also stated that the minimum qualifications for these positions is that the beneficiary was a graduate of an approved school of nursing; was currently licensed as an RN in the state of current practice, or was eligible to take the state exam; had passed the CGFNS exam; and was willing and available to relocate to various unanticipated locations throughout the United States. The petitioner noted that no nursing experience was required.

The petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2002.¹ The petitioner also submitted nine examples of staffing contracts with hospitals and healthcare providers, nine samples of individual staffing addenda for current nursing placement, and nine newsletter or other media articles written about the petitioner and its CEO.

The nine samples of contracts included the following institutions: Yampa Valley Medical Center, Steamboat Springs, Colorado; Volunteers of America Care Facilities, d/b/a Valley Manor Care Center, Montrose, Colorado; Mt. San Raphael, Trinidad, Colorado; Hospice and Palliative Care of Western Colorado, Grand

¹ Financial information preceding a Schedule A petition's filing date is not necessarily dispositive of a petitioner's continuing ability to pay the proffered wage beginning on the priority date. In this case, 2002 precedes the filing date in 2004.

Junction, Colorado; Southwest Memorial Hospital, location unidentified; Vail Valley Medical Center, Vail, Colorado; Griman Medical Center, Moscow, Idaho; and The Memorial Hospital, Craig, Colorado. Of the nine documents submitted by the petitioner, six described the recruited nurses as independent contractors. These six institutions also required three years of work experience in general nursing practice, and one year of assignment to specialty and critical care areas. St. Luke's Regional I Medical Center specified that licensure was required, but did not identify any work experience prior to hiring. Vail Valley Medical Center required one or more years of experience in addition to education and training.

With regard to the beneficiary's qualifications, the petitioner submitted the beneficiary's CGFNS certificate that indicated she had passed the nursing examination; a registration certificate to practice nursing in India; the beneficiary's nursing degree from India; her transcripts and resume; and a copy of the beneficiary's current passport. With regard to the requisite filing documentation, the petitioner submitted a copy of its posting notice that stated the notice was posted at the petitioner's corporate headquarters in Carbondale, Colorado, from November 25, 2003 to December 19, 2003. The petitioner also submitted a letter from [REDACTED] Certifying Officer, Employment and Training Administration, Region 6, which stated that in those cases where the job site is unanticipated, the posting should be posted at the employer's main/headquarters office, where the job opportunity is located. Mr. [REDACTED] attached a copy of FM No. 48-94, dated May 16, 1994, an excerpt from Technical Assistance Guide(TAG) No. 656 Labor Certifications and an article from ILW that addressed issues concerning the posting notice. Mr. [REDACTED] also stated that the guidance in the TAG also stated that employers should be encouraged to seek U.S. workers by posting notices of the job at more than one or at all its places of business. The petitioner did not submit the attachments listed by Mr. [REDACTED] in his letter to the record. The petitioner did submit an email message form [REDACTED] Foreign Labor Certification, dated December 16, 2003, that stated the prevailing wage for the Carbondale, Colorado area was \$14.37 an hour. The petitioner stated that it pays and will pay more than the prevailing wage annually as a guaranteed base salary, and that separate from and in addition to this base salary, the petitioner's nurses would be provided with bonuses and various reimbursements including rent and living expenses while on assignment. The petitioner stated that these benefits were valued at approximately \$16,500 per year.

In his decision certified to the AAO, the director determined that the evidence submitted did not establish that the petitioner satisfied the requirements at 20 C.F.R. § 656.22(b)-prearranged employment, or 20 C.F.R. §§ 656.22(b) and 656.20(c)(2)-prevailing wages, or 20 C.F.R. §§ 656.22(b)(2) and 656.20(g)(1)-employee notification. In addition, the director determined that the record did not reflect that the petitioner had the ability to pay the proffered wage as of the petition's filing date.

Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification 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 20 C.F.R. § 656.20(g)(3).

Under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

In addition, 20 C.F.R. § 656.20(c) states:

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 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;
.....
- (9) The conditions of employment listed I paragraphs (C)(1) through (8) shall be sworn to (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746 on the Application for Alien Employment Certification form.

With regard to whether the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date, 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In the director's denial of the petition, the director stated that a staffing service proposing to employ and place alien nurses at work-sites throughout the United States may qualify under 8 C.F.R. § 204.5(1)(3)(i), provided the petitioner is the actual employer of the alien beneficiary. The directors cited to *Matter of Smith*, 12 I &N Dec. 772 (D.D. 1968); and *Matter of Artee Corporation*, 18 I&N Dec. 366(Comm. 1982). The director stated that in the instant petition the petitioner indicated it would be the actual employer. As stated previously, in the decision certified to the AAO, the director determined that the evidence submitted did not establish that the petitioner satisfied the requirements at 20 C.F.R. § 656.22(b)-prearranged employment, or 20 C.F.R. §§ 656.22(b) and 656.20(c)(2)-prevailing wages, or 20 C.F.R. §§ 656.22(b)(2) and 656.20(g)(1)-employee notification. In addition, the director determined that the record did not reflect that the petitioner had the ability to pay the proffered wage as of the petition's filing date.

With regard to the first issue raised by the director, pursuant to 20 C.F.R. § 656.22-prearranged employment, the director stated that the evidence included contracts entered into by the employer, but these did not identify or otherwise provide for the beneficiary. Furthermore, the director noted the petitioner contended that its work-sites were "unanticipated" and that thus it was not possible to predict the location of the nurses' next assignments. The director determined that in the absence of contracts or other evidence of prearranged employment pertaining to the beneficiary, the petitioner did not satisfy the requirement of 20 C.F.R. § 656.22.

With regard to the next issue raised by the director, pursuant to 20 C.F.R. §§ 656.22(b) and 656.20(c)(2)-prevailing wage requirements, the director noted that the petitioner contended the beneficiary's work site was unanticipated, and that the petition also reflected that the beneficiary's work address was Carbondale, Colorado, and unanticipated locations throughout the United States. The director determined that if the petitioner offers a particular wage and cannot or will not identify a particular work site at which the alien will work, the petitioner cannot make a determination, pursuant to the regulatory guidance, that "the wage offered equals or exceeds the prevailing wage." The director stated that the issue involved "more than a processing technicality," as the petitioner proposed to pay the alien \$33,690 per year, based on the premise that the wage is the prevailing wage for a registered nurse working in Carbondale, Colorado. The director stated that this premise was unsound as the petitioner did not operate a health care facility in Carbondale and the alien would presumably not perform registered nurse duties until reporting to his or her initial assigned healthcare facility elsewhere. The director then stated that the impact of paying the Carbondale wage is that the petitioner almost certainly would not be paying the alien a wage that equals or exceeds the prevailing wage at the various other locations where the beneficiary would actually perform nurse duties. The director compares the prevailing wage for nurses in Denver, Colorado, namely \$39,354 with the prevailing wage for a nurse in Sacramento, California, namely \$46,925, and noted that if the beneficiary were assigned to either locality, he or she would be paid substantially less than the prevailing wage at these two locations. Finally the director stated that the arrangement proposed by the petitioner and its outcome conflicted directly with the regulations. The director also noted that it is a reasonable threshold requirement for Schedule A nurse petitions, that the employer submit evidence of prearranged employment for the alien beneficiary identifying the alien's initial work-site. 20 C.F.R. 656.22 (b)(1).

The director also stated that CIS recognized that staffing services have a legitimate need for operating flexibility in changing assignments to meet evolving client needs; however, an employer proposing to employ an immigrant worker cannot possibly determine if a proffered wage level meets or exceeds a prevailing wage without first fixing, at a minimum, the location of the worker's initial work-site. The director also noted that the petitioner is required by 20 C.F.R. § 656.20 to actually pay the alien a wage that equals or exceeds the prevailing wage at all locations where he or she actually works.

With regard to the third issue raised by the director, and pursuant to 20 C.F.R. §§ 656.22(b)(2) and 656.20(g)(1)-employee notification, the director noted the letter submitted to record from the DOL Certifying Officer, Region 6. The director stated that CIS did not question the authenticity of the letter and also recognized that the petitioner has a legitimate interest in complying with regulatory requirements as efficiently as possible. Nevertheless, the CIS found the letter to be inapplicable to the facts of the instant petition. The director stated that the petitioner's contention that work-sites cannot be anticipated might make more sense in reference to potential future clients. However, if the underlying rationale behind notification was to provide advance notice to potentially affected United States workers, the director stated that it could be argued that registered nurses currently working for the healthcare facilities with which the petitioner seeks to contract stood to be impacted the most. Even if the requirement of notification was in reference to potential future clients, the director stated that CIS would reject the contention that the petitioner's staff needs are "unanticipated" because the petitioner enters into contracts with healthcare facilities in advance of delivery of its services. The director stated that the regulations written make no requirement for notification of healthcare facility workers, only the employer's own employees. The director stated that it was eminently reasonable to presume an employing corporation knows the location of its own staff. The director cited to supplementary information to the Department of Labor regulations published at 56 Fed. Reg. 54920, 54924 (October, 23, 1991) in reference to Conference report H.R. Rep. 1010-955 with regard to proper notification. This information states the following:

The notice provision in the Conference report provide that when a labor certification is filed, the employer must notify the bargaining representative (if any) of the employer in the occupation classification in the area. This meant that, for example, if an employer has three sites situated in a particular area (as defined by the Department of labor), the employer is required to notify the bargaining representative at each of the locations. . .

Finally the director stated that it was no doubt more convenient for a petitioner to make one centralized posting, doing so did not satisfy the regulatory requirement nor was it likely to provide actual notification to the petitioner's employees, the majority of whom work at other locations. Therefore the director determined that the petitioner had not met the notification requirements of 20 C.F.R. §§ 656.20 or 656.22.

With regard to the final issue addressed by the director, namely, whether the petitioner established that it had the ability to pay the proffered wage, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the March 31, 2004 priority date, which is the date CIS accepted the petition for processing. The proffered wage as stated on the Form ETA 750 is an annual salary of \$33,696. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In his decision, the director stated that the petitioner's corporate federal tax return for 2002 was the only tax return available when the petition was filed and examined the financial resources on this document. The director stated that the petitioner's tax return indicated an ordinary loss of -\$104,704 for 2002, as well as \$1,633,375 in "cost of contracted nurses" on Schedule A and Statement 3. The director calculated that the compensation of officers, salaries and wages, and cost of contracted nurses, which totaled \$1,773,945, if divided by prospective wages/other expenses per nurse of \$49,196,² would equal 36.05 staff members. Based on this calculation, the director

² The director calculated the sum of \$49,196 by adding the proposed wage of \$33,696 to expenses of \$15,550. The director stated that the petitioner in its cover letter on page five indicated expenses of \$16,550 but that the lower amount of \$15,550 was applied in the decision for purposes of review. The director erroneously uses \$15,550. On page three of its cover letter, the petitioner stated that costs involving transportation and immigration assistance, among other items, totaled \$15,500 per recruited nurse.

stated that the 2002 tax return did not establish that as of March 21, 2004³, the petitioner had the ability to pay the proffered wage in addition to its current staffing obligations.

The director also stated that CIS took administrative notice from its electronic record that the petitioner seeks to add a significant number of other nurse beneficiaries to its payroll in the immediate future. The director stated that the petitioner had 55 pending immigration petitions filed with the Nebraska Service Center as of July 8, 2004. The director stated that if 50 beneficiaries were to be paid a comparable base salary as that offered to the beneficiary, it would represent an additional financial obligation of \$1,684,800. The director added that if the additional \$15,500 in costs per nurse were taken into account, the petitioner would have to show the financial ability to pay \$2,462,000 in additional payroll costs. The petitioner's 2002 tax returns did not demonstrate that the petitioner had the ability to pay such wages.

The director also stated that although copies of contracts with healthcare facilities help verify general petition information, with respect to the petitioner's ability to pay the proffered wage, the contracts have limited evidentiary value. First, contracts in themselves do not represent revenue in hand, but point to anticipated future revenue upon delivery of services. While perhaps indicative of future business, they do little toward establishing ability to pay at the time the petition was filed and the priority date was established. Second, it would be common for a corporation to conduct most aspects of its business by means of contract, however not all contracts are performed or are profitable. Significant recent fluctuations in the size of the petitioner's staff suggest that the health care staffing business is not inherently profitable or stable that the existence of business contracts should be given probative weight beyond that described earlier. The director noted that in the corporate new releases submitted to the record, the news release of March 2001 stated the petitioner had a staff of 79 employee, while the release of September 2001 indicated a staff of "nearly" 125 employees.⁴ The director then stated that in evaluating the petitioner's financial condition and its ability to pay the proffered wage, CIS places primary reliance on the historical data in the financial documents specified in 8 C.F.R. § 204.5(g)(2), namely, audited financial statements, annual reports, or tax returns.

In conclusion, the director stated that the evidence taken as a whole is persuasive that the petitioner at the time of filing the petition was a viable business; however, the evidence did not demonstrate that the petitioner had the concurrent ability to pay the proffered wage. The director then stated that the record presented evidence of the petitioner's ineligibility on multiple grounds, and denied the petition.

New counsel for the petitioner submitted a brief to the Nebraska Service Center which was accepted as an appeal. The Nebraska Service Center in turn sent the brief to the AAO.

In the petitioner's brief, counsel states that the CIS committed legal error by finding that the petitioner incorrectly used its headquarters as the "place of employment" for the purpose of compliance with employee notice, and by its determination as to prevailing wage and offer of prearranged employment requirements in the case of a traveling employee with uncertain worksites around the country. Counsel also stated that CIS committed legal and factual error in calculating petitioner's ability to pay the beneficiary's salary, and abused its discretion by

³ The actual filing date is March 31, 2004.

⁴ Although the director appeared to suggest that the increased number of the petitioner's staff positions from March to September 2001 was an example of adverse staffing fluctuations, this does not appear to be a persuasive statement. The difference of staffing from 125 employees in September 2001 to 35 employees in March of 2004, as indicated in the I-140 petition is more relevant to the issue of staffing fluctuations.

failing to meaningfully analyze documents demonstrating ability to pay. In this latter statement, counsel further explained that the CIS abused its discretion by rejecting evidence of the petitioner's reasonable expectation of future profits as evidence of its ability to pay the proffered wage in violation of BIA and AAO precedent decisions.

Counsel also stated that CIS incorrectly grouped the future salaries of all unapproved nurse beneficiaries for whom the petitioner submitted employment-based immigrant visa petitions in denying the petition of the beneficiary in the instant petition.

With regard to the director's comment that the fixing of at least the initial worksite of the beneficiary in advance appears to be an integral first step in a bona fide application under Schedule A, counsel states that the Department of Labor (DOL) has dealt with the issue of roving employees in the labor certification context for many years and has developed a very clear rule that it applied for jurisdiction, wage and posting notice requirements. The rule is that if a labor certification beneficiary will work in various and unanticipated locations, the Department of Labor will consider the company headquarters to be the "work site" for application purposes. Counsel refers to a DOL Employment and Training Administration Field Memorandum No. 8-94 issued by Barbara Ann Farmer, Administrator for Regional Management, May 16, 1994 (The "Farmer Memorandum") and the May 6, 2004 letter from Martin Rios, previously described. Counsel states that a fundamental tenet of administrative law is that great deference must be paid to an agency's interpretations of its own regulations. *INS v. National Crs. For Immigrants' Rights*, 502 183, 189 (1991).

Counsel states that this decision stated that an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference. Counsel states that if CIS were to apply this rule of interpretation developed over many years by the DOL, it would have determined that the petitioner had met the requirements of the applicable portion of 20 C.F.R., Part 656. Counsel also noted that official CIS policy recognizes that DOL interpretations of its own regulations "are entitled to great weight.", and cites to CIS Operations Instruction § 204.4(d)2). Counsel states that when a CIS officer is unable to determine whether a beneficiary qualified for Schedule A labor certification, he or she may request an advisory opinion from DOL. If the CIS officer disagrees with the DOL advisory opinion, "an individual letter will be addressed to the DOL, setting forth the basis for the disagreement and requesting the DOL's comments with respect to the position of the CIS officer." In the instant petition, counsel asserts that the official CIS process for obtaining accurate and sensible interpretation of the DOL regulations was not followed. Counsel states that CIS's ad hoc determination of what the "place of employment" should be, results in a set of unintelligible rules that could not possibly serve as the basis for the preparation of a future Schedule A labor certification.

Counsel then states that the director's determination that the petitioner had not satisfied the DOL notification requirement contained at 20 C.F.R. 656.20 or 656.22 with regard to posting notices is flawed because it is based upon the obligation that a unionized employer has, and not on obligations that apply to companies that are not unionized. Counsel further states that, in the CIS citation of the original law's legislative history, the portion quoted by CIS states that if an employer is unionized and has more than one worksite then the employer must notify bargaining representatives at all worksites. According to counsel, CIS misconstrues the citation to mean that labor certification petitioners must post notices at all worksites in a particular area of employment.

Counsel asserts that the CIS cite does not relate to the petitioner because the petitioner is not unionized. Counsel states that the posting requirement must be fulfilled either by notifying bargaining representatives of the filing of a labor certification or if there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of employment. 20 C.F.R. § 656/20(g)(1)(ii). Counsel states that it is clear there are two separate means by which employer must comply with the notice requirement and that one means applies to

unionized employers and the other applies to non-unionized employers. Since the petitioner is not unionized, counsel asserts that the obligation to notify bargaining representatives at various worksites in an area of intended employment does not apply. Counsel also states that the part of the regulation that correctly applied to the petitioner states that a notice must be placed at either the facility or the location of employment. Counsel states that in the instant petition, the location of employment is uncertain, and that DOL has a long-standing rule of interpretation that has been applied nation-wide for well over a decade, which requires employers filing labor certifications for positions that will be performed at various unanticipated locations to post notice to its employees at the employer's headquarters. Counsel again refers to the Farmer Memorandum and the letter from Martin Rios to previous counsel.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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 the full proffered wage in 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. As noted by the director, the 2002 tax return was the only one available at the time of adjudicating the instant petition. In its brief, counsel submits the petitioner's 2003 corporate income tax return, which indicates the petitioner, had ordinary income of \$62,374 in 2003.

If the proffered wage is \$33,696, and the petitioner's additional expenses are either \$15,500 or \$16,500, it appear that the petitioner's ordinary income in 2003 could pay the proffered wage as long as no other petitioners with similar proffered wages are pending. However, according to both the director and counsel, in the year preceding August 2004, the petitioner submitted some 55 to 63 petitions. Although the record of proceedings does not indicate the proffered wage for any of the additional beneficiaries, it is clear that the petitioner's ordinary income for 2003 would not be sufficient to pay the sum of these proffered salaries.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to

cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ On a corporate tax return, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 tax returns reflect the following information for the following years:

	2002	2003
Taxable income ⁶	\$ -104,704	\$ 62,374
Current Assets	\$ 201,154	\$ 137,475
Current Liabilities	\$ 241,075	\$ 124,814
Net current assets	\$ -39,921	\$ 137,475

According to the director, the petitioner had 55 pending I-140 petitions as of July 2004, three months after the filing date. In the petitioner's brief submitted to the Nebraska Service Center on August 11, 2004, counsel states that the petitioner has filed 63 petitions for Indian nurses over the past year. Presuming that the proffered salaries for all intended beneficiaries are the same as the instant petition, the petitioner could pay no further salaries out of its net income or net current assets for 2002. With regard to the petitioner's taxable income and net current assets for 2003, the petitioner could pay an additional nurse salary based on its taxable income in 2003, or four additional salaries based on its net current assets for 2003.

However, given the number of pending I-140 petitions as of July 2004, the petitioner does not appear to have sufficient financial resources to pay for 55 to 63 pending petitions. Thus, the petitioner has insufficient funds to pay an additional wage out of its net income in 2002 after reducing its net current assets by its obligation to pay the additional proffered wages in its approved petitions. Thus, the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date based on the evidence contained in the record of proceeding for the year 2002 and 2003.

The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover each nurse's salary. However, even if CIS chose to accept the petitioner's

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

contracts as evidence of projected income, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner described projected gross incomes for 2003, 2004 and 2005; however, the petitioner did not establish the relationship between these projected figures and the actual costs of paying the recruited nurses plus the projected expenses of \$33,696 salary, administrative expenses of \$15,500 a year per new hire, and/or additional living expenses and other benefits for nurses who travel to other locations.⁷

The petitioner has failed to demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurses and all concomitant expenses of the business. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

With regard to the issue of multiple unanticipated work sites, counsel's interpretation as to the second prong of 20 C.F.R. § 56.20(g)(1) is not persuasive. First, while the first prong does address unionized petitioners, there is no reason to interpret that the second prong which is used to illustrate the need to post a job notice in non-unionized petitioners, also indicates that the notice may be posted in the petitioner's corporate offices. The nurses hired by the petitioner will not work in the petitioner's corporate offices as registered nurses, but rather in health care facilities. In addition, the knowledge provided to the petitioner's administrative staff of an additional 55 to 63 available nursing jobs by posting job notices in the petitioner's corporate office is not observing the intent of the job posting requirements.

The petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.⁸ It is noted that "workers similarly employed" in the instant petition will be nurses in hospitals, not personnel in the petitioner's administrative offices. It is also reasonable to interpret the DOL guidance from Mr. ██████ as pertaining to businesses where the employees work in the same location, and not to a business where the administrative offices are at a different location than the site of employment. Without more persuasive evidence, the petitioner has not established that it satisfied the regulations with regard to posting of job notices.

In addition, counsel refers to two decisions mentioned by the director in his decision, namely *Matter of Smith*, 12 I&N Dec. 772(D.D. 1968); and *Matter of Artee Corporation*, 18 I&N Dec. 366 (Comm. 1982). The director stated in his denial that the petitioner indicated it would be the actual employer; however the director stated that in the absence of contracts or other evidence of prearranged employment pertaining to the beneficiary, the petitioner did not satisfy the requirement for prearranged employment. On appeal counsel

⁷ The petitioner mentioned another sum of \$16,500 in the cover letter for the petition on page five. The record is not clear as to whether this sum is strictly to cover expenses for traveling nurses, and thus would represent an additional cost to the petitioner, in addition to the \$15,500 in immigration, transportation costs mentioned on page three of the cover letter.

⁸ 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).

states that CIS incorrectly stated that since the beneficiary's worksites are uncertain the petitioner has not demonstrated prearranged employment for labor certification purposes. Counsel states that the petitioner has guaranteed the beneficiary employment with the petitioner itself, and that while the beneficiary's worksite is not established, her status as a regular full-time employee of the petitioner is not in question. The AAO concurs with counsel and the director that the petitioner is the actual employer of the beneficiary. The AAO would question, however, whether either precedent decision cited by counsel stands for the proposition that the actual employer must only post the posting notice at its corporate headquarters.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), 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.*

Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. 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 temporarily to be 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.

Upon review of the findings in these precedent decisions, they are not dispositive of whether the petitioner can post job notices only at its corporate headquarters. The issue is not whether or not the beneficiary will be an employee of the petitioner, but rather whether or not "workers similarly employed" will be provided with a meaningful opportunity to comment on the job posting. 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).

With regard to the issue of whether the proffered wage meets the prevailing wage, given the unanticipated work sites, the regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.⁹ Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: “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.” See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations 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 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.¹⁰ The prevailing wage rates are broken down into

⁹ Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner’s compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e).

¹⁰ The city, state, and county of the employment location must be known order to identify the prevailing wage rate.

two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), employees in OWL Level I positions are:

(B)eginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.

They may assist staff performing tasks requiring skills equivalent to a level II and may perform high-level work for training and development purposes.

These employees work under close supervision and receive specific instruction on tasks and results expected.

The level I job can require education and/or experience, but it does not require an advanced level of understanding to perform the job duties. Level I includes entry-level jobs, but may also include some supervised activities, which exceed those normally, considered as entry level.

The proffered position resembles an entry-level nursing position as it does not specify an advanced level of training or experience or supervisory duties. This office finds that the proffered position is a skill Level I position for prevailing wage purposes.

The DOL OWL states that the prevailing wage for a Level 1 registered nurse in Carbondale, Colorado during 2004 is \$34,902. Thus, if the petitioner had demonstrated that it intended to employ the beneficiary in Carbondale, Colorado at an annual wage of \$33,696, it would have demonstrated that it is offering the prevailing wage to the beneficiary.¹¹ The actual prevailing wage rate is impossible to determine, however, because the petitioner failed to state the location at which it would employ the beneficiary. Thus, the petitioner failed to meet its evidentiary burden that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers. For this additional reason the petition may not be approved.

The petitioner did not submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2004. Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has also failed to specify the intended geographic location of the proffered position and meet its regulatory obligations concerning its posting notice, and prevailing wage rate.

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. The AAO concurs with the director's decision to deny the petition.

ORDER: The appeal is dismissed. The petition is denied.

¹¹ The petitioner has to be within 95 per cent of the DOL-mandated prevailing wage to be in compliance with the prevailing wage regulatory guidance. 95 per cent of the prevailing wage is \$33,155.95, and thus, the proffered wage of \$33,696 is more than 95 per cent of the prevailing wage.