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FILE:

WAC-06-081-50472

Office: TEXAS SERVICE CENTER

Date: OCT 02 2008

IN RE:

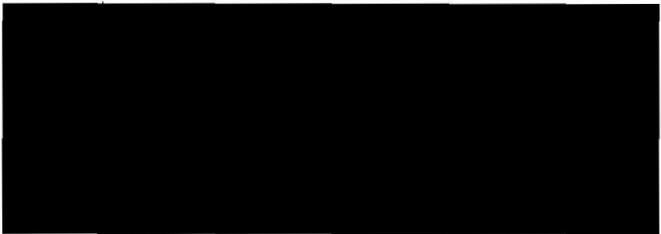
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the Texas Service Center denied the immigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a healthcare recruiter. It seeks to sponsor 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 denied the petition after determining that the petitioner was not the beneficiary's actual employer, that the job offer was not permanent and full-time, and that the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Counsel submits a brief and copies of previously submitted evidence in connection with the certification.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 January 17, 2006 with accompanying ETA Form 9089, Application for Permanent Employment Certification (Form I-9089 or labor certification application). The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Thus, PERM applies to the instant case.

Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 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. § 656.5, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

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. 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. § 656.10(d).

The AAO reviewed the record of proceeding concerning all requirements under Schedule A applications under its *de novo* review authority and determined that the petitioner has established the beneficiary's qualifications to perform the duties of the proffered position and that the wage offered in this case meets the prevailing wage rate for nursing positions in Pinal County, Arizona according to DOL's online wage library in accordance with 20 C.F.R. §§ 656.15 and 656.40. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296.

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition.

In its initial petition, the petitioner submitted a letter to CIS dated December 30, 2005 stating that it would employ the beneficiary for a permanent position, describing her duties, and stating her compensation rate plus a benefits package. Additionally, with the initial submission, the petitioner submitted a letter dated December 1, 2005 from the petitioner to the beneficiary offering her employment and informing her of her first assignment at the office of [REDACTED] in Casa Grande, Arizona. The petitioner stated that it would compensate her and provide a comprehensive employee benefit package. A posting notice was posted at Dr. [REDACTED] location.

In addition, there are two contracts, one between the petitioner and DocComply Solutions in Healthcare (DocComply), dated December 9, 2005, and one between DocComply and Dr. [REDACTED] dated November 17, 2005. As the director pointed out, both contracts contain the same provisions. The director quoted the most relevant provisions in her decision. In the contract between the petitioner and DocComply, the petitioner states that it screens potential healthcare workers and is responsible for the administrative aspects of those foreign healthcare workers' immigration and qualifications for obtaining employment authorization to work in the United States. *See* 1. and 2.a. through 2.h. A recital at the beginning states that the healthcare workers "will be employed by [the petitioner] and retained by [DocComply] on a per diem basis for a trial period after which said candidate will become an employee of [DocComply]..." DocComply's responsibilities are to hire the healthcare workers on a full-time basis, pay the petitioner a sum for the healthcare worker, and complete forms submitted to CIS<sup>1</sup>. *See* 3.a. through 3.d. The term of agreement is one year. *See* 4. The contract does not specifically mention the beneficiary. As noted above, the contract between DocComply and Dr. [REDACTED] contains the same provisions with the same corresponding citations.

The record of proceeding has no evidence concerning the employee benefit package that would be provided to the beneficiary. The contracts contain no provisions concerning who is responsible for compensating the beneficiary for work performed and the employee benefits package. The director correctly identified a critical issue in this case, namely, the identification of a specific contract covering the parameters of the beneficiary's employment. The petitioner must establish eligibility at the time of the visa petition's filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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<sup>1</sup> However, the petitioner signed the visa petition and Form 9089.

On certification, counsel states that “[t]he immediate contract between the [p]etitioner and [DocComply] is for one year with an automatic one-year renewal [sic] as a result of traditional business practices.” Counsel also states that the beneficiary would be permanently employed either through renewed contracts with DocComply or new contracts with other companies seeking to fill nursing shortages. Counsel also states that there is no regulatory requirement for the beneficiary’s name to appear in a contract.

For ascertaining whether or not the petitioner is the beneficiary’s “actual employer,” the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

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

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

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

The petitioner indicated on Form I-140 that the position is a full-time, permanent position for a registered nurse. However, the contracts between the petitioner, DocComply, and Dr. [REDACTED] do not actually specify who the beneficiary's actual employer will be. Neither the letter between the petitioner and the beneficiary nor the contracts clarify that the *beneficiary* would be working 40 hours per week or state anything about her specifically being offered full-time employment and the specific conditions of her employment such as reporting hours. The posting notice does not state that the position is full-time or anything about reporting hours. The petitioner submitted the petition and Form ETA 9089 in this case and has an agreement to be the employer but according to its contract with DocComply, DocComply would hire an unnamed healthcare worker full-time for 40 hours per week. If that healthcare worker was the beneficiary, then it is unclear who the actual employer would be since it seems both the petitioner and DocComply are acting as actual employers since one claims to be and may be paying the beneficiary's salary and the other would be in charge of hiring, which is an act of an actual employer. DocComply has the same agreement with Dr. [REDACTED] so again, it is unclear who the actual employer would be without clarity in the agreements themselves or specification with regard to the actual beneficiary<sup>2</sup>. The letter between the petitioner and the beneficiary does not clarify matters either since it is between the petitioner and the beneficiary and merely states her location and indicates that the petitioner would pay her wages. However, that obligation is not explained in the agreements among the petitioner, DocComply, and Dr. [REDACTED] or by counsel in his brief submitted on certification.

Therefore, because of these issues concerning the contracts and the fact that the same contracts are signed between three different entities without any specific binding document pertaining to the beneficiary, the petitioner has not established that it will pay the beneficiary's wages, provide employment benefits, have the authority to hire and fire the beneficiary, or at all times control the beneficiary's full-time work assignments (if they are full-time). Finally, if the contracts in the record are applicable to the beneficiary's proposed employment, *Ord* would stand for the premise that the petitioner could not be the actual employer since the petitioner states in its agreement with DocComply that it is an independent contractor and merely screens and places employee candidates with DocComply. *Ord* held that an actual employer would not be a mere placing agent.

The director determined that the one-year clause in the contracts between the petitioner, DocComply and Dr. [REDACTED] undermined the notion that the beneficiary would be employed in a permanent, full-time position. However, the provision referenced by the director at paragraph 4 is about the general term of a general contract not necessarily the length of employment being proposed. The early termination clause found in paragraph 5 makes clear that the petitioner receives its placement payment regardless of a healthcare worker lasting for one year with DocComply (or DocComply's placement of a worker with [REDACTED]). The same problem occurs, however, as correctly identified by the director, that the lack of specificity with respect to the beneficiary makes it impossible to determine whether or not the beneficiary is being offered permanent, full-time employment and whether or not the petitioner is the actual employer as that is legally defined.

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<sup>2</sup> For example, an addendum to a contract pertaining to the terms of the beneficiary's employment with regards to the arrangements between the petitioner, DocComply and Dr. [REDACTED] might illuminate the specific responsibilities and obligations and therefore define the legal nature of the employee-employer relationship.

Thus, the AAO concurs with the director's decision that the preponderance of the evidence in the record of proceeding does not show that the petitioner is the beneficiary's actual employer and that the job offer is permanent and full-time.

The second issue to be discussed in this decision is whether or not the petitioner has demonstrated that it has the continuing ability to pay the proffered wage beginning on the priority date. The director stated that the petitioner filed thirty-one other immigrant petitions and thus its ability to pay is "not clearly established" because of those multiple pending sponsorships and wage obligations. Counsel states on certification that the petitioner's net current assets are sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also states that the beneficiary and the petitioner's other hired nurses will generate more profits than the costs associated with their employment and thus increase the petitioner's revenues.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. *See* 8 C.F.R. § 204.5(d). **Here, the priority date is January 17, 2006.** The proffered wage as stated on the Form ETA 9089 is \$24.25 per hour (\$50,440 per year<sup>3</sup>).

Relevant evidence in the record includes the petitioner's audited financial statements for the period ended October 31, 2005. The evidence in the record of proceeding indicates that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 2005, to have a gross annual income of \$1,578, and to currently employ one worker. The petitioner claimed to have sufficient net current assets to pay the proffered wage and its audited financial statements reflect that it did have \$1,765,023.63 in net current assets on October 31, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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<sup>3</sup> Assuming 40 hours per week, although this is not specified.

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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expense should be considered as cash is misplaced. 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

According to the audited financial statements in the record of proceeding, the petitioner's net income is \$23.63 as of October 31, 2005 and does not demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

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.<sup>4</sup> If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

If the petitioner intends to hire 32 immigrant workers, presumably at the same wage offering as the instant petition, then it must show that it has \$1,614,080 available to it from the date the priority date was established for each petition. The petitioner demonstrated with regulatory-prescribed evidence that it had \$1,765,023.63 in net current assets on October 31, 2005, which would be greater than the total amount it would be obliged to demonstrate that it had available to it.

However, since the priority date is in 2006, any additional proceedings in this matter would require submission of regulatory-prescribed evidence covering as much of that year as possible. Additionally, counsel argues that the petitioner receives more revenue than it costs the petitioner to employ the nurses it intends to hire. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if CIS chose to accept the petitioner's contracts as evidence of projected income, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business, especially if the petitioner is responsible for the purchase of worker's compensation, professional liability, health insurance, or other benefits, such as transportation and legal fees. Such detail would be required to balance the profit the petitioner claims it will receive against the costs it will assume in employing more nurses.

Another problem with the petitioner demonstrating its continuing ability to pay the proffered wage is that it is unclear, as discussed above, that it is the actual employer and entity obligated to pay the proffered wage. If either Dr. [REDACTED] or DocComply are the actual employer in this matter, then either of those business entities would need to demonstrate the ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Additionally, if either Dr. [REDACTED] or DocComply are a successor-in-interest to the petitioner, they would also need to show their ability to pay the proffered wage. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Without sufficient documentation that the petitioner is the actual employer and accurate petitioning entity in this case, the petitioner has not demonstrated that it has the continuing ability to pay the proffered wage beginning on the priority date. Thus, the AAO also concurs with the director's decision regarding this issue but for different reasons than she set forth.

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Beyond the decision of the director, the AAO found an additional reason why the petition may not be approved. The record of proceeding does not contain a posting notice that complies with the regulatory requirements<sup>5</sup>. Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

In applications filed under §§ 656.5 (Schedule A), 656.10 (General instructions), 656.15 (Schedule A occupations), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the *Application for Permanent Employment Certification* and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

- (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. Documentation may consist of a copy of the letter and a copy of the *Application for Permanent Employment Certification* form that was sent to the bargaining representative.
- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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 locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). . . .

(Emphasis in italics in original).

Additionally, 20 C.F.R. § 656.10(d)(3) requires the following:

The notice of the filing of an *Application for Permanent Employment Certification* must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

With the initial petition, the petitioner submitted a posting notice that meets the requirements of 20 C.F.R. §§ 656.10(d)(3)(i), (ii), and (v), and (d)(4). The petitioner's posting notice, however, in violation of 20 C.F.R.

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<sup>5</sup> 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).

§ 656.10(d)(3)(iii), failed to provide the address of the appropriate Certifying Officer. The petitioner's posting notice directs any person to provide documentary evidence to the DOL security workforce agency (SWA) location in Atlanta, Georgia. The location of the proffered position, according to the Form I-140, Part 6, Item 4, and Form ETA 9089, items H.1 and H.2, and documentation as described in detail above is at Dr. [REDACTED]'s office in Casa Grande, Arizona, which is also listed as the work location on the posting notice itself. According to DOL, Arizona falls under Region 6 so its regional certifying officer with jurisdiction over an Arizona worksite would be U.S. Department of Labor/ETA, [REDACTED]

[REDACTED] See <http://www.doleta.gov/regions/regoffices/> (accessed August 18, 2006). Arizona also maintains a local SWA in Phoenix at Alien Employment Certification, [REDACTED] See <http://www.de.state.az.us/esa/AECwgform.asp> (accessed August 18, 2006). Adding confusion to the posting notice is a line directing applicants to send their resumes to Adam International, Inc. at DocComply's address in New Jersey. Even if the petitioner were confused about the address of the certifying officer with jurisdiction over this matter, DOL's regional office with jurisdiction over New Jersey is in New York not Georgia. So whether the petitioner was going by Arizona or New Jersey, DOL's office in Georgia has no jurisdiction over a worksite or employer in Arizona or New Jersey.

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.<sup>6</sup> Because of the defect in the posting notice concerning applicants' potential notification and grievance procedures, the petition could not be approved for this reason as well.

Thus, the AAO affirms the director's decision that the petitioner has failed to demonstrate that it will be the beneficiary's actual employer, offering permanent, full-time employment, and has the continuing ability to pay the proffered wage beginning on the priority date. Additionally, the AAO determines that the petitioner failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I nurse petitions.

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 director's decision on July 27, 2006 is affirmed. The petition remains denied.

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<sup>6</sup> 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).