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U.S. Citizenship
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Services

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FILE: WAC 05 083 50150 Office: CALIFORNIA SERVICE CENTER Date: **AUG 06 2007**

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 immigrant visa petition was denied by the director of the California Service Center. The petitioner submitted a Motion to Reopen/Reconsider to the director which was subsequently dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The immigrant visa petition is denied.

The petitioner described itself as a hospital on the initial I-140 petition; however evidence in the record identify it as a business that locates and secures healthcare personnel to provide services on a temporary basis.¹ 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 at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date, and also failed to establish that the petitioner would employ the beneficiary as a permanent, full-time employee.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 29, 2005 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary will be employed on a fulltime permanent basis. The AAO will examine whether the petitioner is the employer of the beneficiary, and will offer the beneficiary full time permanent employment, and then will examine whether the petitioner has the ability to pay the proffered wage.

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 31, 2005. 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. 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).

¹ A temporary staffing agreement signed by the petitioner and Fremont-Rideout Health Group submitted to the record identifies the petitioner as such.

I. **The petitioner established that it is the actual employer and thus may not rely upon the financial status of its third-party clients.**

The first issue to be discussed in this case is (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. This issue arises on appeal since the petitioner suggests that the AAO consider the financial resources of a third party to whom the petitioner claims to be providing the services of the beneficiary under a contract of lease.

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.

Additionally, 8 C.F.R. § 204.5(c) states the following: "*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

With the initial petition counsel submitted a copy of an agreement between the petitioner and Fremont-Rideout Health Group, dated November 5, 2001, for a one-year period of time. This agreement states that the petitioner, described as a "search and recruitment company," would charge placement fees for permanent employees on a contingency basis, with the terms of the agreement, payment, and billing confidential and not revealed to persons or entities including but not limited to any candidates that the petitioner provides to Fremont-Rideout. The agreement also states that fees are due in the event that a candidate referred by the petitioner is hired or retained in any capacity, whether as an employee, consultant or independent contractor by Fremont Rideout or an affiliate within a one year period of the submittal of the candidate. The petitioner also submitted a letter between it and a candidate in South Africa, in which it identified itself as the candidate's employer contracted out to Fremont Rideout Health Group, and that as a contractor with Fremont Rideout Health Group, the beneficiary was eligible for health benefits. This document also stated that the recipient of the letter would receive a specific salary, paid every other week, and that the individual would be contracted out to The Fremont-Rideout Health Group and that the petitioner would review the recipient of the letter's salary according to the Fremont-Rideout handbook guidelines. The letter written by Dave Coen, the petitioner's CEO, states that the beneficiary's employment with the petitioner is "at will."

In response to the director's request for further evidence, the petitioner submitted two additional contracts between it and Fremont Rideout Health Group, 726 Fourth Street, Maryville, California. One document is a temporary staffing agreement for short term nursing assignments, while the other agreement appears to be an updated contract identical to the contract submitted with the initial I-140 petition for a one year agreement to provide services. The date of signing the one year agreement is July 1, 2005. The temporary staffing agreement states that the client agrees to pay the petitioner for each employee in accordance with the agreement and client fee schedule, while the one-year agreement to provide permanent placements does not specify who specifically pays the salaries of the nurses placed under the permanent placement agreement.

The petitioner stated that although the director requested a contract that specifies the number of contractors to be hired and the terms of employment, the Fremont-Rideout Health Group notified the petitioner of its vacancies as they arose, and the petitioner responded by providing suitable employees to fill these positions, either as the petitioner's employee on placement at the hospital or as permanent placements at the hospital where the hospital becomes the employer. The petitioner identified five previously petitioned employees.

The petitioner also submitted a contract of employment between itself and the beneficiary dated December 28, 2004 that states the beneficiary will provide competent and professional nursing services to the petitioner's clients. The contract is for a three-year period of time and further states that the petitioner will place the beneficiary at a client site and reserves the right to move the beneficiary to different client sites if and as needed. The contract also states that the petitioner will remain the beneficiary's employer and will comply with all applicable state and federal law.

The AAO notes that the contract between the beneficiary and the petitioner submitted to the record does not specify whether the placement of the beneficiary will be on a temporary or permanent basis. On appeal, counsel states that the petitioner will be "leasing" the beneficiary to the hospital under contract, however, the petitioner does not identify any specific hospital in its staffing agreement with Fremont Rideout Health Group. The Form ETA 750 simply identifies the petitioner as the employer with the petitioner's Irvine address given at the place of employment.

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.*

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 has been unclear about the placement of the beneficiary – in the initial petition, the petitioner identified the beneficiary’s placement as being with the Freemont-Rideout Health Group, while on motion and on appeal, the petitioner claims the beneficiary will work at Rideout Memorial Hospital in Marysville, California. Based on the information contained on the Form ETA 750, the beneficiary would be working at the petitioner’s office in Irvine, California.² *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Nevertheless, with regard to the identification of the actual employer of the beneficiary, based on the contract signed by both the petitioner and the beneficiary submitted in response to the director’s request for further evidence, the petitioner appears to be the actual employer of the beneficiary and will provide her with either short term or long term nursing jobs for a defined period of time. The record is not clear that such employment would constitute permanent employment. However, as discussed in *Matter of Artee*, the nature of the nursing shortage and the ongoing need for registered nurses, as evidenced by the existence of the Schedule A petition process, would add some weight to the proposition that the petitioner’s offer to the beneficiary would constitute permanent rather than temporary employment. Thus, the part of the director’s decision with regard to whether the petitioner is the actual employer and providing permanent employment shall be withdrawn.

II. The petitioner failed to establish the ability to pay the proffered wage.

The second issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in 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

² The lack of clarification as to the place of employment also raises questions as to the actual prevailing wage that the petitioner should be paying the beneficiary.

wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's 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. 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on January 31, 2005.³ The proffered wage as stated on the Form ETA 750 is \$24.00 per hour (\$49,920 per year).

As stated previously, the AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴. On appeal, counsel submits no further evidence. The record also contains the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for tax years 2002 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in the year 2000, to have a gross annual income of \$250,000, and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on January 18, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel states that the petitioner, based on the salary to be paid to the beneficiary by the hospital that will lease the beneficiary's services, has the ability to pay the proffered wage. Counsel also notes that the petitioner's gross receipts or sales in 2004 were \$686,040, with a net income of \$23,613. Counsel also cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and states that the employment of the beneficiary will increase his income and thus, the petitioner has the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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).

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

³ The date the I-140 petition was submitted to Citizenship and Immigration Services (CIS).

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2005 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax year 2005.

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. Contrary to counsel's assertion, 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.

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.

As stated previously, the petitioner submitted its tax returns for tax year 2002 and 2004. Since the priority date, established by the date the Form ETA 750 was submitted to CIS, is January 31, 2005, neither tax return is dispositive as to the petitioner's ability to pay the proffered wage. However, it is noted that as of the priority date the petitioner's tax return for 2005 would not have been available. Thus, in these proceedings, the AAO will examine the petitioner's tax return for tax year 2004 to determine the petitioner's ability to pay the proffered wage. The petitioner's tax return for 2004 demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$49,920 per year from the priority date:

- In 2004, the Form 1120 stated a net income⁵ of \$23,613.

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the proffered wage. Furthermore, as noted in the director's decision, and by the petitioner, the petitioner has at least three other beneficiaries on pending petitions. With regard to tax year 2004, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage, much less any other beneficiaries with pending I-140 petitions filed in tax year 2004. Thus, it does not appear that the petitioner had the ability to pay the proffered wage based on its net income in tax year 2004.⁶

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.⁷ 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 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. As stated previously, the petitioner's tax returns for 2002 and 2004 are not dispositive in these proceedings. Nevertheless, the AAO will examine the petitioner's 2004 tax return in these proceedings. The petitioner's 2004 tax return indicates that the petitioner's net current assets during 2004 were \$17,101.

Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage of \$49,920.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date, and cites *Matter of Sonogawa*. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time

⁶ As stated previously, these two tax years are prior to the establishment of the priority date for the instant petition. Therefore the discussion as to the petitioner's net income in these years is simply illustrative.

⁷ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner. The petitioner provided no further evidence on such factors as the petitioner's longevity, or its reputation in its field that would warrant any further examination of the overall circumstances of the petitioner, based on *Sonegawa*.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition shall be denied.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the position. 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).

As stated previously, 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. In the director's request for further evidence, he also noted that the petitioner could submit evidence that the beneficiary had passed the NCLEX-RN examination prior to the filing date of the Schedule A petition. The petitioner then submitted the beneficiary's state of Vermont nursing license without further clarification. The petitioner also submitted to the record a letter from the state of California Board of Registered Nursing, dated January 27, 2005 that stated the beneficiary had met all licensing requirements except for submitting a valid U.S. Social Security number.

The letter from the California Board of Registered Nursing dated January 27, 2005 does not indicate that the beneficiary passed the NCLEX-RN examination. Counsel provides no further evidence as to why this letter, which is certified by counsel rather than the state of California, would be considered sufficient evidence as to the beneficiary's passage of the NCLEX-RN exam as stipulated in a CIS memorandum with regard to nursing licensure.⁸ The record then indicates that the beneficiary passed the CGFNS examination on May 23, 2005,

⁸ Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards*, HQ70/6.13, (December 20, 2002).

after the priority date April 31, 2005. Thus, the record does not contain sufficient evidence that the beneficiary was qualified to perform the duties of the position as of the April 31, 2005 priority date.

It is also noted that the posting notice submitted to the record does not identify the place of employment for the proffered position. *See* 20 C.F.R. § 656.20 (g)(1). 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.⁹ It is noted that “workers similarly employed” in the instant petition will be nurses in hospitals, not personnel in the petitioner’s administrative offices. Further, the petitioner has not established that it provided notice of the filing of the labor certification application to the bargaining representative or that there is no such bargaining representative in the occupational classification.

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. The petition is denied.

⁹ *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).