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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 11 2007
EAC-05-061-51947

IN RE: Petitioner:
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:

[redacted]

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 preference visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (Form ETA 750) with the Immigrant Petition for Alien Worker (Form I-140). The director 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. The director denied the petition accordingly.

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 February 2, 2006 denial, the only issue in this case is 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.

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

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. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS]." 8 C.F.R. § 204.5(d). Here, the priority date is December 27, 2004. The proffered wage as stated on the Form

ETA 750 is $22.00 per hour ($45,760 per year[1]). The Form I-140 indicates that the beneficiary is not in the United States and on the Form ETA 750B the beneficiary did not claim to have worked for the petitioner.

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 appeal.[2] Relevant evidence in the record includes the petitioner's corporate federal tax return for 2004, the petitioner's financial statements for the year of 2004 and the nine months of 2005 with accountant reports, Form NYS-45 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return for all four quarters of 2004, copies of approval notices on the petitions filed by the petitioner, a list of names of registered nurses who have arrived between late 2004 and during the year 2005 in the United States, and a copy of the actual newspaper clipping regarding the petitioner's acquiring a staffing agency in Nutley, New Jersey. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of $6,500,000, to have a net annual income of $1,100,000, and to currently employ 150 workers. 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers. However, the submitted Forms NYS-45 for 2004 show that the petitioner had 89 employees in the first quarter, 86 in the second quarter, 81 in the third quarter and 86 in the fourth quarter of 2004. The petitioner failed to establish that it employs 100 or more workers. Therefore, CIS will not accept any statement from a financial officer of the petitioner as evidence to establish the petitioner's ability to pay the proffered wage.

In addition, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from a financial officer of the petitioner. The director indicated that the petitioner had over 25 pending petitions for nurses with the Vermont Service Center at the time of filing the instant petition. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of $1,144,000. Given that the number of immigrant petitions reflects an increase of the petitioner's workforce, we cannot rely on a letter from a financial officer referencing the ability to pay a single unnamed beneficiary.

As we decline to rely on a financial officer's letter, we will examine the other financial documentation submitted.

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[1] Based on working 40 hours per week as set forth on the Form ETA 750A. It is noted that the petition shows the proffered wage of $865 per week which equals to an annual salary of $44,980. The AAO considers $45,760 as the proffered annual salary in accordance with the Form ETA 750 in the instant case.

[2] 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) and the record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 Sonegawa*, 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 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 beneficiary was abroad and did not claim to have worked for the petitioner. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2004 onwards.

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). The petitioner's reliance on its gross income and gross profit on appeal is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. On appeal counsel asserts that the petitioner had "recruitment expenses" of $502,719 in 2004 as one of the methods to establish the petitioner's ability to pay. Similarly counsel's reliance on the petitioner's recruitment expenses in determining its ability to pay the proffered wage is also misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 Chang* at 537.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. The record contains a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2004. The petitioner's tax return for 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $45,760 per year from the priority date:

- In 2004, the Form 1120S stated a net income[3] of $198,263.

As an alternative method, CIS will also 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.[4] 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. In the instant case, the petitioner did not report its current assets or current liabilities on Schedule L of the Form 1120S for 2004, and thus the petitioner's net current assets during 2004 were $0.

Therefore, for the year 2004 the petitioner did not have sufficient net current assets to pay the proffered wage, while the petitioner had sufficient net income to pay the proffered wage to the instant beneficiary, and thus

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[3] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."
Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

[4] 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.

has established its ability to pay the beneficiary the proffered wage in the year of the priority date through the examination of its net income.

However, as previously discussed, the record contains CIS approvals of Form I-140 immigrant petitions filed by the petitioner. Among them there are 36 approved petitions with a priority date in 2004 for the beneficiaries who were abroad. Therefore, the petitioner must show that it had sufficient income or net current assets to pay at least 37 proffered wages in 2004. The petitioner's tax return for 2004 shows that the petitioner had net income of $198,263. With this amount, the petitioner could pay only four beneficiaries the proffered wages at the same level as the instant beneficiary. Therefore, the petitioner failed to establish its ability to pay all the proffered wages in 2004, and the instant petition is not approvable.

The record contains the petitioner's financial statements for 2004 and the nine months of 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements states that: "A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole, accordingly, I do not express such an opinion." The accountant's report makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal counsel asserts that the petitioner has "accounts receivable" of more than $3,107,758 and "cash in the bank" of more than $826,905, totaling $3,934,663 and with this amount, the petitioner has the ability to pay all, and even more than the 25 new nurses it is currently petitioning. CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage and accounts receivable and cash in the bank are part of the petitioner's current assets. However, the petitioner's current assets must be balanced by the petitioner's current liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. The amount counsel relies on in determining the petitioner's ability to pay the proffered wage is from the unaudited financial statements. As discussed above, counsel's reliance on unaudited financial statements is misplaced. In addition, the amounts of accounts receivable and cash in the financial statements are inconsistent with the petitioner's tax return. Moreover, they are not balanced by the petitioner's current liabilities, and the record does not contain any regulatory-prescribed evidence, such as annual report, tax returns, or audited financial statements, to provide the petitioner's current assets and current liabilities. Therefore, the AAO cannot determine the petitioner's net current assets and further cannot determine whether the petitioner had sufficient net current assets to pay all pending proffered wages in 2004.

Counsel also urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, the assertions of counsel do not constitute evidence. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, no detail or documentation has been provided to explain how the beneficiary's employment as a registered nurse will significantly increase profits for the petitioner.[5] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax return. Counsel does not explain how the beneficiary's future employment and the future profits increase from the beneficiary's future employment could establish the petitioner's ability to pay all proffered wages in 2004, the year of filing. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel notes on appeal that CIS approved many other immigrant petitions similarly filed by the petitioner. The director's decision does not indicate whether she reviewed the prior approved of the other immigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International,* 19 I&N dec. 593,597 (Comm. 1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Therefore, counsel's assertion on appeal cannot overcome the director's decision and the evidence submitted with appeal is not sufficient to establish the petitioner's continuing ability to pay all proffered wages from the priority date to the present. The AAO concurs with the director's ground of denial.

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

The first issue beyond the director's decision is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The regulation at 20 C.F.R. § 656.22(c)(2) provides:

> An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has

[5] For example, no evidence was submitted detailing the rate the nurse's services would be charged at and the overhead expenses associated with employing the nurses.

> passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

With the initial filing the petitioner did not submit any documentary evidence to show that the beneficiary has passed the CGFNS examination or holds a full and unrestricted license of nurse in the State of New York. Therefore, the director issued a request for evidence (RFE) on August 23, 2005 requesting a CGFNS certificate, a full and unrestricted nursing license from New York state or a letter from the state which confirms that the beneficiary has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN) and is eligible to be issued a license to practice nursing in that state. In response to the director's RFE, the petitioner did not submit any documentary evidence the director expressly requested in the RFE dated August 23, 2005 except a request for an extension of time to obtain and submit the CGFNS Certificate because the beneficiary's process of obtaining her CGFNS Certificate from CGFNS took longer than expected. However, the record including the evidence submitted on appeal does not contain any documentary evidence showing that the beneficiary had passed the CGFNS examination or held a full and unrestricted nursing license in the State of New York, or a letter from the State of New York confirming that the beneficiary had passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN) and was eligible to be issued a license to practice nursing in that state prior to the priority date.

The petitioner failed to establish that the beneficiary possessed the requisite CGFNS certificate or New York state full and unrestricted nursing license, and thus the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position. Therefore, the petition cannot be approved for this additional reason.

Second, 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 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).

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

> 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).

With the petition, the petitioner submitted a document entitled "Notice of Job Posting." This notice contained the title and duties of the position, along with the requirements, pay rate, working hours, and contact person to apply for the registered nurse position and indicated that the notice was posted on November 15, 2004 and removed on December 15, 2004. At the bottom of the notice, the petitioner also certified the posting, dated December 24, 2004, and signed by Administrative Officer. This certification stated the following:

> This is to certify that we posted in a conspicuous place in our facility visible to employees and visitors, for a period of no less than ten business days, this Notice containing job description, rate of pay and job information. If applicable, we have likewise submitted a copy of this notice to the bargaining representative as per any existing collective bargaining agreement.

The posting notice did not include the actual location where the beneficiary would perform her duties. However, the Forms I-140 and ETA 750 work indicated that the beneficiary would be employed at Amsterdam Nursing Home, instead of the petitioner's business location. CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.20(g)(1)(ii) to mean the place of physical employment. Therefore, in the instant case, the place of physical employment would be Amsterdam Nursing Home at where the beneficiary would perform services as a professional nurse. The petitioner's certification indicted that the notice was posted "in our facility". The record contains a copy of Proposed Staffing Agreement between United Staffing Registry dba United Home Care and Amsterdam Nursing Home by which the petitioner shall provide professional nursing services at Amsterdam Nursing Home. However, it is not clear whether or not Amsterdam Nursing Home is a facility of the petitioner and whether or not the petitioner actually posted the notice at Amsterdam Nursing Home instead of its business location. In response to the director's RFE dated August 23, 2005 requesting a job posting that had been posted in the actual location where the beneficiary would be employed, counsel submitted a copy of the same notice and asserted that it was the job posting that had been posted in the actual location where the beneficiary would be employed. However, counsel did not submit any documentary evidence to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner failed to demonstrate that it posted the notice in the actual location where the beneficiary would be employed prior to the priority date. Any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

Third, the regulation at 20 C.F.R. § 656.20(c)(2) provides, in pertinent part,

> 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.

Although the posting notice included the rate of pay as required, the rate on the posting notice is inconsistent with the Form ETA 750 proffered wage and is not the prevailing wage rate. The notice indicated that the beneficiary was offered an annual salary of $40,000 working at least 37.5 hours per week while the Form ETA 750A stated that the beneficiary would be paid at the rate of $22.00 per hour working 40 hours a week. The petitioner did not submit a copy of the prevailing wage determination for the instant case. The AAO accessed the DOL designated website for prevailing wage rate and finds that the level 1 wage for registered nurse in 2004 in New York, NY PMSA is $23.23 per hour or $48,318 per year.[6] Applying the DOL then 95% rule, the hourly prevailing wage would be $22.07 and the annual salary based on working 37.5 hours per week would be $43,036.50. Therefore, AAO finds that the petitioner failed to post the notice with the prevailing wage rate determined by DOL for the year of the priority date.

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.

[6] http://www.flcdatacenter.com.