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U.S. Citizenship and Immigration Services

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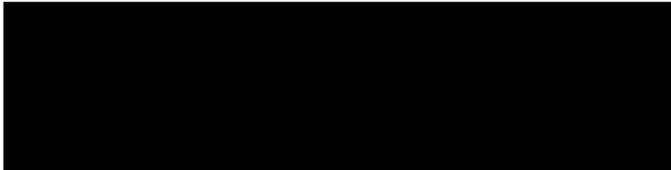
OCT 17 2007

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:
EAC 05 162 51367

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

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

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

The petitioner is a nursing staffing agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). As set forth in the director's March 27, 2006 denial, the director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage as of the priority date, that the prevailing wage determination submitted by the petitioner does not contain an ending validity date, and that the record is unclear as to where the notice of filing of an application for permanent employment certification was posted. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On May 9, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

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 United States workers. New 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.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

- 1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- 2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is May 9, 2005. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$25.00 per hour or \$52,000 annually.

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 AAO takes a *de novo* look at issues raised in the denial of the petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹ On appeal, counsel submits a brief, the petitioner's IRS Form 1065, U.S. Return of Partnership Income, for 2004, summaries of the petitioner's accounts receivable as of December 31, 2004, a letter dated April 25, 2006 from Ameritax Systems regarding the petitioner's accounts receivable, bank statements issued by Bank of America to the petitioner for the last two months of 2004 and the petitioner's business plan. Relevant evidence in the record includes the petitioner's IRS Form 1065, U.S. Return of Partnership Income, for 2003, a letter dated April 14, 2004 from Fleet Bank regarding the petitioner's bank balances, a letter dated May 8, 2004 from JP Morgan Chase Bank regarding the petitioner's bank balance, a letter dated June 10, 2004 from [REDACTED], regarding the petitioner's accounts receivables, the petitioner's IRS Form 1065-B, U.S. Return of Income for Electing Large Partnerships, for 2004, a letter dated November 21, 2005 from Real Time Services, Inc. regarding the petitioner's payroll funding, and various schedules of the petitioner's accounts receivable from 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The record before the director closed on February 9, 2006 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company.² On the petition, the petitioner claimed to have been established on January 1, 2001 and to

¹ 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). 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).

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made

currently employ five workers.³ According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on January 18, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner collects its accounts receivables from its client hospitals and that these receivables provide the petitioner with sufficient income to pay the proffered wage. Counsel also refers to the petitioner's "amended IRS Form 1065" and states that the amended return shows a cash balance at the end of 2004 of \$159,064.00. Further, counsel asserts that the petitioner has maintained sufficient cash balances in its bank accounts to pay the proffered wage. Counsel also asserts that employment of the beneficiary will produce cash savings for the petitioner and improve its financial condition. In addition, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), for the proposition that CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. Counsel states that the petitioner has been in business since May 24, 2002, and has never missed a payroll.

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 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 in any relevant year.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's

using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner is considered to be a partnership for federal tax purposes.

³ This office notes that the petitioner's tax returns indicate that it started business on May 24, 2002.

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.

In 2004, the petitioner's Form 1065-B stated net income of -\$17,535.00.⁴ Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 2004, the petitioner's IRS Form 1065-B, Schedule L, stated end-of-year net current assets of \$864.00. Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Thus, in 2004, 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.

On appeal, counsel asserts that the petitioner collects its accounts receivables from its client hospitals and that these receivables provide the petitioner with sufficient income to pay the proffered wage. In support of this assertion, the petitioner provides a letter dated April 25, 2006 from Ameritax Systems regarding the petitioner's accounts receivable and summaries of the petitioner's accounts receivable as of December 31, 2004.⁶ The record also contains a letter dated June 10, 2004 from Romeo Rancio, EA, CPA, regarding the

⁴ CIS considers net income to be the figure shown on Line 25 of the Form 1065-B, U.S. Return of Income for Electing Large Partnerships.

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

⁶ The letter from Ameritax Systems states that the petitioner "regularly collects its accounts receivables from its client-hospitals in accordance with their agreed terms." The letter further states that the attestation "is based on information provided to and reviewed by us as of December 31, 2004 in connection with our services in preparing the company's amended IRS Form 1065." According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial

petitioner's accounts receivable, a letter dated November 21, 2005 from Real Time Services, Inc. regarding the petitioner's payroll funding, and various schedules of the petitioner's accounts receivable from 2004 and 2005. However, the petitioner has failed to demonstrate that the projected healthcare personnel-generated income would be sufficient to cover the salaries of its employees and all concomitant expenses of the business. Further, the petitioner submitted no contracts with third-party hospitals to establish the contractual relationships between the hospitals and the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel refers to the petitioner's "amended IRS Form 1065" and states that the amended return shows a cash balance at the end of 2004 of \$159,064.00. Counsel did not give an explanation of the rationale for amending the petitioner's 2004 tax return. However, because the petitioner amended its return in the middle of the proceedings, CIS would require an IRS-certified copy to corroborate the assertion that the amended return was actually processed by the IRS. The amended return submitted by the petitioner is not a certified copy. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). 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)). Thus, CIS will only examine the version of the petitioner's 2004 tax return that was initially submitted and not the amended version as submitted on appeal.

Further, counsel asserts that the petitioner has maintained sufficient cash balances in its bank accounts to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also asserts on appeal that employment of the beneficiary will produce cash savings for the petitioner and improve its financial condition. However, 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.

condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Further, on appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), for the proposition that CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. Counsel states that the petitioner has been in business since May 24, 2002, and has never missed a payroll. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns indicate that it started business on May 24, 2002. The petitioner's gross receipts declined from \$948,462.00 in 2003 to \$881,151.00 in 2004. Therefore, the petitioner has not established its historical growth. The petitioner's tax returns indicate that it paid no salaries or wages in 2003 or 2004. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses in any relevant year, and it has not established its reputation within its industry. Thus, assessing the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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 DOL.

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

The director also determined that the prevailing wage determination (PWD) submitted by the petitioner does not contain an ending validity date. On appeal, counsel asserts that the PWD contains an ending validity date. This office agrees with counsel. As required by 20 C.F.R. § 656.15, the petitioner submitted a PWD dated October 13, 2005 from the New Jersey Department of Labor and Workforce Development, which is the state workforce agency (SWA) in the instant case, indicating that the prevailing wage for the position of registered nurse (Level I) is \$22.39 per hour. The PWD indicated that it was valid for at least 90 days and not more than a year from the determination date. Therefore, the PWD does contain an ending validity date. However, beyond the decision of the director, the PWD was not valid on May 9, 2005, the date of filing of the Form I-140.⁷

⁷ 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

The regulation at 20 C.F.R. § 656.40(c) states:

Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The PERM regulations expressly state that an employer must file their applications within the validity period specified by the SWA. The record does not contain a PWD valid on May 9, 2005. Thus, the petitioner did not file its Schedule A application within the validity period specified by the New Jersey Department of Labor and Workforce Development. Therefore, the petitioner failed to comply with the PERM regulation pertinent to the PWD validity period at the priority date.

The director also determined that the record is unclear as to where the notice of filing of an application for permanent employment certification was posted. Relevant evidence in the record includes a notice of posting and certification dated January 18, 2005 on the petitioner's letterhead and an offer of permanent employment issued by the petitioner to the beneficiary dated January 18, 2005. On appeal, counsel submits a Notice of Job Availability dated January 3, 2005 and a Certificate of Posting dated April 3, 2006 on the letterhead of The Allendale Community for Mature Living, 85 Harreton Road, Allendale, New Jersey. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...
- (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). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether

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).

electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

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.

The petitioner submitted two posting notices in connection with the instant case.⁸ The posting notice submitted with the petition was placed on the petitioner's letterhead. The notice specifically states that it is being made in connection with a labor certification application on behalf of the beneficiary. The wage rate for the position of registered nurse is listed as \$25.00 per hour, and the certification of posting indicates that the notice was posted "at the Facility's Bulletin Board" from January 3, 2005 to January 14, 2005. The certification notes that the petitioner's registered nurses are not represented by a bargaining representative and is signed by the petitioner's Executive Manager. The posting notice initially provided by the petitioner does not meet the regulatory requirements governing posting requirements. The posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(1). The posting notice states that it was posted "at the Facility's Bulletin Board." No further explanation is provided by the petitioner as to the location of the posting notice. The petitioner indicated on the ETA Form 750 initially provided with the petition and on Form I-140 that the beneficiary will be performing work at the petitioner's main office located at 130 Boyd Avenue, Jersey City, New Jersey. On Form I-140 submitted in this case, the petitioner indicated that it is a supplemental nurse staffing agency. The petitioner failed to submit evidence of any third party contracts between the petitioner and its clients, it failed to submit the addresses of its client worksites and it failed to provide evidence that the notice was posted at each client worksite where the beneficiary will perform work. The location of employment for notification purposes must be at the location(s) where the beneficiary is actually going to be physically employed, and not at the corporate headquarters or other office of the employer.⁹ Additionally, the petitioner

⁸ Since the initial posting does not meet the regulatory requirements governing posting requirements, as detailed herein, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

⁹ *See* Memo. from [REDACTED], CIS Assoc. Dir. Ops., U.S. Dept. Homeland Sec., to Reg. Dirs., Dist. Serv. Ctr. Dirs., Natl. Benefit Ctr., Dir. Officer Dev. Training Facility, Glynco & Dir. Officer Dev. Training Facility, Artesia, *Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A* (September 23, 2005) (available at http://www.uscis.gov/graphics/lawsregs/handbook/I140_092305.pdf).

did not provide evidence that the notice was published internally using in-house media in accordance with the petitioner's normal internal notification procedures.

Further, the posting notice submitted on appeal does not meet the regulatory requirements governing posting requirements. On the Notice of Job Availability, dated January 3, 2005, the wage rate for the position of registered nurse is listed as \$30.00 per hour,¹⁰ and the notice instructs interested applicants to contact the petitioner at 130 Boyd Avenue, Jersey City, New Jersey. The notice also describes the duties, minimum job requirements and hours for the position of registered nurse. On appeal, counsel also submits a separate certificate of posting dated April 3, 2006 on the letterhead of The Allendale Community for Mature Living, 85 Harreton Road, Allendale, New Jersey. The certificate of posting states that the "above notice has been posted in connection with the filing of an application for permanent alien labor certification." It also instructs that "[a]ny person may provide documentary evidence bearing on the application to the local office of the state employment commission and/or the regional certifying officer of the department of labor." The certification also states that the notice was placed "at the place of employment" from January 3, 2005 to January 14, 2005 and certifies that there is no bargaining representative for the occupational classification. The posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(1) and § 656.10(d)(3). The certification of posting states that the notice was posted "at the place of employment." On appeal, counsel asserts that the notice was posted from March 28, 2005 to April 15, 2005 at The Allendale Community for Mature Living where the beneficiary will be physically employed. However, the petitioner failed to submit evidence of any third party contract between the petitioner and The Allendale Community for Mature Living, and counsel provided no explanation as to why two separate posting notices were submitted. Furthermore, the record does not contain any evidence showing that The Allendale Community for Mature Living is the only place of employment for the beneficiary. 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)). Additionally, the petitioner did not provide evidence that the notice was published internally using in-house media in accordance with the petitioner's normal internal notification procedures. Further, the actual posting notice does not state that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity, it does not state that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor, and it does not provide the address of the appropriate Certifying Officer as required by 20 C.F.R. § 656.10(d)(3).¹¹

Therefore, the petitioner has failed to submit a regulatory-prescribed posting notice that conforms to the regulatory requirements for Schedule A, Group I registered nurses.

The petition will be denied for the reasons discussed above, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

¹⁰ The wage rate listed on Form ETA 9089 is \$25.00 per hour.

¹¹ This office notes that placement of such language in a separate, unposted certification of posting is not sufficient; the regulation at 20 C.F.R. § 656.10(d)(3) requires that the posted *notice* contain such language.