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**U.S. Citizenship
and Immigration
Services**

B6

[Redacted]

FILE: [Redacted]
SRC 06 275 51496

Office: TEXAS SERVICE CENTER Date: JAN 10 2008

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:

[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 Director, Texas 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 healthcare provider.¹ 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). The director determined that the petitioner had not established that it had the ability to pay the proffered wage as of the 2006 priority date based on either net income or net current assets identified on its 2005 corporate income tax return, the petitioner's bank account, or the petitioner's owner's line of credit. 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.

As set forth in the director's October 4, 2006 denial, the primary issue in this case is whether the petitioner established that it had the ability to pay the proffered wage as of the 2006 priority year date. The AAO will also examine two other issues raised by the evidence in the record, but not addressed by the director in her decision: whether the petitioner is the actual employer of the beneficiary, and whether the petitioner properly posted notice of filing the application for permanent employment certification.

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.

The AAO will first discuss 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 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." 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 [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is September 19,

¹ The petitioner identified itself as such on the I-140 petition. However, in the contracts submitted to the record between the petitioner and two healthcare facilities, the petitioner appears to be a nursing recruitment service.

2006.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New 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.

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). As previously stated, the Form I-140 and accompanying Form ETA 9089 were accepted on September 19, 2006. The proffered wage as stated on the Form ETA 9089 is \$25.43 per hour (\$52,894.40 per year).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits a brief, and letters from [REDACTED], the petitioner's president and [REDACTED] the petitioner's accountant. In her letter, [REDACTED] apologizes that the assets and liabilities of the petitioner were not disclosed on the petitioner's Schedule L on the IRS Form 1120S submitted with the I-140 petition, and refers to the letter from the petitioner's accountant with regard to this omission. [REDACTED] further states that the accountant has prepared an interim financial review for Tudor Healthcare Group and prepared year to date net assets analysis reports for the relevant dates.

In his letter, [REDACTED] explains that he has been the petitioner's accountant since the petitioner's inception on July 2, 2003. [REDACTED] provides a table listing the petitioner's gross current assets, gross current liabilities, and net assets (equity) as of December 31, 2004, December 31, 2005, September 15, 2005, and October 19, 2006.³ [REDACTED] states that the information in the table was extracted from the petitioner's financial reports that were subjected to the accounting firm's review based on standards established by the American Institute of Certified Public Accountants, and that all information is the representation of the petitioner's management. [REDACTED] adds that Schedule L is not required to be completed because the petitioner had less than \$250,000 in assets and gross receipts, and that the petitioner indicated as much by checking the box "yes" in Schedule B, Item 9 on the IRS Form 1120S. The record also contains a copy of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³This table indicates that as of October 19, 2006, the petitioner had net assets of \$138,140.

On appeal, the petitioner also submits an interoffice memorandum written by William R. Yates, former Association Director for Operations, CIS, dated May 4, 2004.⁴

The record also contains a copy of the monthly statement for the petitioner's savings account with Citibank, New York, New York. This document indicates the petitioner had savings of \$65,493.02 as of July 27, 2006. The petitioner also submitted a copy of a Citibank line of credit account in the name of [REDACTED] and [REDACTED], that indicates available credit of \$230,000, as of August 28, 2006. The petitioner also submitted copies of two recruitment contracts between the petitioner and Lawrence Hospital Center, Bronxville, New York, and Morningside House, Bronx, New York.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage through its positive net assets and net income, and cites the Yates memo. Counsel also states that the petitioner's net income is not the only measure that can be used to demonstrate the petitioner's ability to pay the proffered wage. Counsel cites *Matter of Rabbi Leib Tropper*, 2004-INA-74 (May 9, 2005), a decision by the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA). Counsel cites this decision for the proposition that a certifying office must consider a petitioner's overall fiscal circumstances in determining whether an employer had the ability to pay the wages for a proffered position. Counsel notes that although *Matter of Rabbi Leib Tropper* concerns a sole proprietorship, the analysis provided in the decision is relevant. Counsel also refers to the Yates Memo that states in pertinent part, that CIS adjudicators should make positive determinations with regard to petitioners' ability to pay when the initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage. Counsel states that the record establishes that the petitioner has both net current assets and net current income greater than the proffered wage, and that as such, the petition should be approved. Counsel submits an additional letter dated December 4, 2006 to correct his statement with regard to the petitioner having net current income greater than the proffered wage. Counsel in this letter states that the petitioner has net current assets greater than the proffered wage only.

The evidence in the record of proceeding shows that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on May 18, 2003, to have \$40,488 in gross annual income, and to currently have one employee. On the Form ETA 9089, signed by the beneficiary on September 9, 2006, the beneficiary did not claim to have worked for the petitioner.

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

⁴ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel cites the interoffice Yates memorandum for the proposition that the petition should be approved because the petitioner has both net current assets and net current income greater than he proffered wage. Counsel further on appeal amends his statement and states that the petitioner has net current assets that are greater than the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum. In the instant matter, however, the record is not clear as to why counsel cites the Yates memorandum. As stated previously, the petitioner did not complete the Schedule L for its 2005 tax return, and submitted no other regulatorily prescribed evidence establishing its net current assets for 2005. Therefore, the petitioner has not established its net current assets for tax year 2005, and the AAO cannot examine the petitioner's ability to pay the proffered wage based on its net current assets, as will be discussed further in these proceedings.

As noted previously in the director's decision, the petitioner's sole shareholder's joint line of credit is not viewed as an additional source of funding with which to pay the proffered wage. First, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Second, a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition.

The AAO also notes that the petitioner's shareholder's line of credit account statement, as well as the petitioner's savings account statement, identify financial assets of the petitioner or the petitioner's president prior to September 19, 2006, the date of submission of the I-140 petition and ETA Form 9089. As such these documents are not dispositive of whether the petitioner had additional financial resources as of the priority date. However, since the petitioner's corporate income tax return for tax year 2006 would not have been available at the time of filing, the AAO will examine the petitioner's 2005 tax return to determine the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submits its accountant's statement with regard to the petitioner's gross current assets, gross current liabilities, and net assets as of four dates, only one of which is relevant to the instant petition, namely, October 19, 2006. The petitioner's accountant states that as of October 19, 2006, the petitioner had gross current assets of \$141,663, gross current liabilities of \$3,523, and net assets of \$138,140. The petitioner's accountant states these figures are based on a review of the petitioner's financial reports.

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 petitioner's accountant's statement submitted on appeal makes clear that his remarks are based on a review of the petitioner's financial statements, as opposed to an audit of the statements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS), and accountants only express limited assurances in reviews. As the accountant'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. Thus, the accountant's statement that counsel submits on appeal is not persuasive evidence.

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 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 2006.

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 Chang* at 537.

As stated previously, the petitioner submitted its tax return for tax year 2005. Since the priority date, established by the date the Form ETA 9089 was submitted to CIS, is September 19, 2006, the petitioner's tax return for tax year 2005 is generally not dispositive as to the petitioner's ability to pay the proffered wage in 2006. However, it is noted that as of the priority date, the petitioner's tax return for 2006 would not have been available. Thus, in these proceedings, the AAO will examine the petitioner's tax return for tax year 2005 to determine the petitioner's ability to pay the proffered wage. The petitioner's tax return for 2005 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 2005, the Form 1120S stated a net income⁵ of -\$18,666.

Therefore, for the year 2005, 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. 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.

⁵Where 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income shown on its Schedule K for tax year 2005, the petitioner's net income would be found on Schedule K of its tax return. However, the petitioner did not provide any income/loss reconciliation on line 18, of Schedule K. Therefore, the AAO will use the figure on line 21.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 return for 2005 is generally not dispositive as to the petitioner's ability to pay the proffered wage in 2006. Nevertheless, the AAO will examine the petitioner's 2005 tax return in these proceedings. The petitioner's 2005 tax return indicates that because the petitioner had gross receipts of less than \$250,000 it was not required to file a Schedule L with its corporate tax return. While counsel's assertion regarding the Schedule L is correct, the petitioner did not submit audited financial statements or annual reports detailing its net current assets for 2005. Therefore the AAO cannot examine the petitioner's net current assets during tax year 2005. Thus, for tax year 2005, contrary to counsel's assertion, the petitioner did not have sufficient net income or net current assets to pay the proffered wage of \$52,894.40.

Therefore, from the date the Form ETA 9089 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. Counsel cites *Matter of Rabbi Leib Tropper*, 2004-INA-74 (May 9, 2005), a BALCA precedent decision. Counsel cites this decision for the proposition that a certifying officer must consider a petitioner's overall fiscal circumstances in determining whether an employer had the ability to pay the wages for the proffered position. Counsel does not provide legal authority for the applicability of BALCA's precedent decision to these proceedings occurring under the Department of Homeland Security. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nor does counsel submit how CIS's regulatory authority to verify the petitioner's ability to pay the proffered wage is obviated by DOL. As stated previously, 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).

Matter of Sonogawa 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 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

⁶According 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.

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 2005 was an uncharacteristically unprofitable year for the petitioner. The petitioner had been in business only three years prior to filing the petition and claimed to have only one employee at the time of filing the petition. The petitioner provided no further evidence on such factors as the petitioner's historical growth, 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 AAO concurs with the director's decision.

Beyond the decision of the director, the petitioner also has not established that it is the actual employer of the beneficiary or that it properly posted the job notice pertinent to the proffered position pursuant to 20 C.F.R. § 656.15.

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 AAO will first discuss whether the petitioner is the beneficiary's actual employer. 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. 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 two contracts between the petitioner and one healthcare provider, Lawrence Hospital Center, and another entity identified as Morningside, with no clear identification of this entity's involvement in the healthcare profession. The record contains no contract between the petitioner and the beneficiary. Furthermore, both documents for Morningside and Lawrence Hospital are identified as Recruitment Agreements with stated recruitment service fees provided to the petitioner for referrals of nurses to either entities. Finally, the petitioner indicated on the ETA Form 9089 that the beneficiary would work at its corporate headquarters.⁷ Such a placement does not establish that the beneficiary would be performing the duties of a registered nurse for a healthcare facility.

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

⁷ Item H-1, of the Form 9089.

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.

With regard to the instant petition, the petitioner appears to be a recruiting facility and not the beneficiary's actual employer. The AAO notes that both contracts submitted to the record by the petitioner state in Article 4 that Morningside House and Lawrence Hospital Center would pay the salaries of any staff recruited by the petitioner. Thus these two companies will be the actual employer, rather than the petitioner. Thus, the petitioner has not established that it is offering full time, permanent employment to the beneficiary.

The AAO will now discuss whether the petitioner properly posted the notice of the submission of an Application for Permanent Employment Certification for the proffered position.

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 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 noted on the ETA Form 9089, Section I, Recruitment Information, item e.25, that it had no labor bargaining agent and that it had posted a notice in a conspicuous place at the place of employment, ending at least 30 days before but not more than 180 days before the date of the application is filed. The posting notice contained in the record states that the notice was posted at the petitioner's office from July 10, 2006 to July 24, 2006. 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 at the facility or location of employment or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of vacancies similar to that which is the subject of the application for permanent employment certification in this matter.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. 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 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 record does not reflect that the petitioner posted notice of filing an application for permanent employment certification at the facility or location of the employment for ten consecutive business days, but rather at the petitioner's office. The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1)(ii). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.10(d)(1)(ii) to mean the place of physical employment. Thus, in the instant petition, the terms facility or location of the employment mean where the beneficiary will perform services as a registered nurse. This office finds that the petitioner's posting of the job notice at its office is not sufficient to meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii). Thus, the petitioner has not established that it has fulfilled its regulatory obligation with regard to posting notices.

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.