U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN-06-140-51902 Office: NEBRASKA SERVICE CENTER Date: **MAR 17 2008**

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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of healthcare services and personnel. It seeks to employ the beneficiary permanently in the United States as a registered nurse (professional nurse). The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and that the petitioner had failed to establish its ability to pay the proffered wages to the beneficiaries of the petitioner's multiple petitions. 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 9, 2007 denial, the main issues in this case are whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations, and whether or not the petitioner has established its ability to pay the proffered wages to all the beneficiaries of the petitions it has filed.

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 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 April 11, 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.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

> (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
>
> (b) *General documentation requirements.* A *Schedule A* application must 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 proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 656.15 (Schedule A), 656.16 (Sheepherders), 565.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall 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 20 CFR 516.4 or occupational safety and health notices required by 20 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.

(3) The notice of the filing of an Application for Alien 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 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[1]. On appeal, counsel submits a brief, an employment agreement dated April 4, 2007 between the petitioner and the beneficiary (April 4, 2007 agreement), and five receipt notices for appeals filed by the petitioner. Other relevant evidence in the record includes notice of job opportunity, an employment agreement dated March 13, 2006 between the petitioner and the beneficiary (March 13, 2006 agreement), facility staffing agreements between the petitioner and Meadow Park Rehabilitation and Health Care Center, Regis Care Center, Regal Heights Rehabilitation and Healthcare Center, and Forest Hills Orthopedic Group, the affidavit of [redacted], the 2005 individual income tax return filed by [redacted] and a list of the petitions filed by the petitioner.

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)(ii). 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. In the instant case, the petitioner provides healthcare services and personnel. It is engaged both in the provision of healthcare services at its rehabilitation center at [redacted] in New York City and at client sites including hospitals, nursing homes, medical clinics, schools, and other institutions. While the ETA Form 9089 indicates [redacted] as the beneficiary's primary worksite, counsel asserted in response to the director's request for evidence (RFE) dated September 8, 2006 that: "Additionally, the beneficiary will provide services at several client sites including Meadow Park Rehabilitation and Health Care Center, Regis Care Center, Regal Heights Rehabilitation and Health Care Center, and Forest Hills Orthopedic Group." Counsel's assertion is supported by the March 13, 2006 agreement and facility staffing agreements between the petitioner and Meadow Park Rehabilitation and Health Care Center, Regis Care Center, Regal Heights Rehabilitation and Healthcare Center, and Forest Hills Orthopedic Group submitted in response to the director's RFE. The March 13, 2006 agreement states that: "The Employer agrees to hire the Employee in the capacity as a nurse. The Employee agrees to be assigned in any facility and homecare in all five (5) boroughs as the Employer deems it necessary in fulfillment of the terms set forth herein. ... Employee acknowledges that placement at Employer will be in the sole discretion of the Employer Director and who shall have full authority to assign employee to certain facility..." It appears that the beneficiary will perform her duties as a registered nurse at the petitioner's rehabilitation center located at [redacted], New York, NY as well as the five client sites. As the director correctly determined, the places of physical employment would be the [redacted] Meadow Park Rehabilitation and Health Care Center, Regis Care Center, Regal Heights Rehabilitation and Healthcare Center, and Forest Hills Orthopedic Group. The petitioner must post the notice of filing at the petitioner's rehabilitation center and all other possible facilities where the beneficiary would perform the duties as a registered nurse. The notice of job opportunity indicates that the notice was posted in the petitioner's rehabilitation center at [redacted] only. In addition, the notice of job opportunity is not signed and the record does not contain any attestation from the petitioner attesting the notice was actually posted for a period of at least 10 consecutive business days. Therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10.

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[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).

On appeal, counsel submits another employment agreement and asserts that the petitioner and the beneficiary have amended the beneficiary's employment contract to clearly specify that the beneficiary will be employed solely at the petitioner's headquarters office. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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). Since the petitioner failed to post the notice in compliance with regulations prior to the filing, 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. *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

The regulation at 20 C.F.R. § 656.10(d)(3) requires the notice of the filing must state that any person may provide documentary evidence bearing on the application to the Certifying Office and provide the address of the appropriate Certifying Officer. The notice of job opportunity in the record contains an address at [redacted] as the appropriate Certifying Officer's address. As previously noted, the PERM regulation was effective as of March 28, 2005, and applies to the instant case. While the address provided in the notice of job opportunity may be an appropriate address under the old DOL regulation, it is no longer the address of the appropriate certifying officer within the PERM regulation. The petitioner failed to post the notice of filing in compliance with the requirements of the regulations because it failed to provide the correct address of the appropriate certifying officer.

The regulations also require that 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. The record does not contain any evidence that the notice was published in any and all in-house media of the petitioner electronically or in print in accordance with normal procedures used by the petitioner when recruiting, within its organization, for registered nurses.

Therefore, counsel's assertions on appeal cannot overcome the director's decision and the evidence submitted on appeal is not sufficient to prove that the petitioner had posted and published in its in-house media a notice of filing in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8).

The second issue in the director's decision to be discussed is whether or not the petitioner had demonstrated its ability to pay the multiple beneficiaries the proffered wages from the priority date to the present.

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 [CIS].

Here, the ETA Form 9089 was accepted on April 11, 2006. The proffered wage as stated on the ETA Form 9089 is $55,000 per year. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $1,000,000, to have a net annual income of $500,000, and to currently employ twenty (20) workers. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its 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 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 did not claim to have worked for the petitioner and the petitioner did not submit the beneficiary's W-2 form, 1099 form or any other documentary evidence showing the petitioner paid the beneficiary in 2006 and onwards. Therefore, the petitioner failed to establish its ability to pay through examination of wages paid to the beneficiary from 2006, the year of the priority date, to the present.

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 evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC) and reported its income on schedule C of its member's Form 1040 individual tax return. Although taxed as a sole proprietor, a LLC's owner or member enjoys limited liability similar to owners of a corporation. A LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[2] An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Similarly, unlike a sole proprietorship, CIS will not consider the single member's adjusted gross income as the LLC's net income and

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[2] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

will not consider the single member's other liquefiable assets and personal liabilities as part of the petitioner's ability to pay. Further, the petitioner in the instant case as a LLC is not obligated to establish that the owner of the petitioner had sufficient adjusted gross income and liquefiable assets to support her personal living expenses in addition to pay the proffered wage and business expenses.

Therefore, for a LLC filing its tax return with its owner's individual income, CIS considers net income to be the figure shown on line 31, Net profit or loss, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of Schedule C, Profit or Loss From Business, for the petitioner for 2005. As previously noted, the priority date in the instant case is May 19, 2006 and the regulation requires the petitioner demonstrate its ability to pay the proffered wage from the year of the priority date until the beneficiary obtains lawful permanent residence. Therefore, the petitioner's Schedule C for 2005 is not necessarily dispositive. The record before the director closed on December 1, 2006 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2006 was not due yet. However, the petitioner did not submit any other regulatory-prescribed evidence for 2006 to establish its ability to pay the proffered wage in the year of the priority date, nor did counsel explain why such evidence for 2006 was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Furthermore, although 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, counsel does not submit any documentary evidence to establish the petitioner's ability to pay the proffered wage in 2006 despite the fact that the petitioner's federal tax return for 2006 should have been available as of that date while the instant appeal was filed. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2006 because it failed to meet its burden of proof for the initial evidence on its ability to pay.

The AAO will review the petitioner's Schedule C for 2005 in the record to determine whether the petitioner had the ability to pay the proffered wage prior to the time of filing. The Schedule C stated the petitioner's net income of $962,634 in 2005. Therefore, the petitioner's net income in 2005 was sufficient to pay the beneficiary the proffered wage, and thus, the petitioner established its ability to pay the proffered wage to the instant beneficiary for that year.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed 37 I-140 immigrant petitions in 2005, and all of them, except for one petition which was denied in 2005, were approved or pending in 2006; and the petitioner filed another 36 I-140 immigrant petitions in 2006. Although counsel claimed that the petitioner withdrew 35 petitions, counsel did not submit any evidence to support his assertion. 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).

Therefore, the petitioner must establish its ability to pay the proffered wage for at least 72 beneficiaries of the petitions either approved or pending in 2006. The record of proceeding does not contain any evidence showing that the petitioner has established its continuing ability to pay the proffered wages to each of these beneficiaries as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence through the examination of wages already paid to these beneficiaries in the relevant year. Presumably, the petitioner has filed the petitions 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 $3,960,000.[3] Therefore, without the evidence of the petitioner's ability to pay through the examination of wages paid to the beneficiaries in 2006, the petitioner failed to establish its ability to pay the proffered wages to the beneficiaries of approved or pending petitions in 2006 with its net income reported on its 2005 tax return.

As an alternative method to determine the petitioner's ability to pay, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] 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. However, in the instant case, the submitted petitioner's schedule C for 2005 did not contain any information pertinent to the petitioner's current assets, current liabilities and net current assets and the petitioner did not submit its annual report or audited financial statements for 2006 and thereafter to demonstrate that it had sufficient net current assets to pay the beneficiaries of the approved and pending petitions as well as the instant beneficiary in 2006 and onwards. Therefore, it is not clear whether the petitioner had sufficient net current assets to pay all proffered wages.

Therefore, the petitioner failed to establish its ability to pay the beneficiaries all the proffered wages at the time the petition was filed and failed to continue to have such ability until the present.

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.

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[3] Assuming that the same proffered annual salary of $55,000 as the instant case is offered to all the beneficiaries of the approved or pending petitions.

[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.