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

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DEC 17 2004

[redacted]

FILE: WAC-03-043-51423 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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, Director
Administrative Appeals Office

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

The petitioner is a health care services firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, as well as to pay the beneficiaries of other approved I-140 petitions filed by the petitioner, and denied the petition accordingly.

On appeal, counsel states that the evidence establishes that each additional employee generates additional profits for the petitioner and thereby establishes the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is November 22, 2002.

The item for the proffered wage on the Form ETA 750 as initially submitted was blank. An amended version of pages one and two of the ETA 750 was later submitted showing the proffered wage as $25.00 per hour, which amounts to $52,000.00 annually. On the Form ETA 750B, signed by the beneficiary on October 31, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on February 1, 1988, to have a gross annual income of $2.1 million, to have net annual income of $150,000, and to currently have 110 employees.

In support of the petition, the petitioner submitted the following: a letter dated October 29, 2002 from the petitioner's managing director describing the petitioner's business and the offered position, and stating a job

offer to the beneficiary; a certificate of a job announcement posting by the petitioner, with attached job announcement; a copy of the beneficiary's California Registered Nursing license issued August 28, 2002; a copy of the beneficiary's California Board of Registered Nursing license card, with expiration date of October 31, 2003; a copy of the beneficiary's professional resume; a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 19, 1994 by Nueva Ecija College, Cabanatuan City, Philippines, with accompanying course transcript; a copy of the beneficiary's Registered Nurse license issued on November 3, 1994 by the Philippines Professional Regulation Commission; a copy of the beneficiary's professional license card as a registered nurse issued by the Philippines Professional Regulation Commission, with date of registration of November 3, 1994; a letter dated December 11, 2000 from the acting chief nurse, Hospital of the [redacted] stating the beneficiary's employment as a nurse with that hospital from May 5, 1995 through the date of the letter; copies of four training certificates of the beneficiary for nurse trainings in the Philippines in 1995, 1996 and 1999; a copy of the biographical information page from the beneficiary's Philippines passport; and a copy of a Form I-94 showing an entry of the beneficiary into the United States on April 23, 2001 as a B-2 visitor.

The director found the evidence submitted to be insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, in a request for evidence (RFE) dated April 2, 2003 the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested evidence of the contracts between the petitioner and the clients where the beneficiary will be providing services, including indications on the number of nurses to be hired, and the term of employment. The director also requested evidence that the proffered wage equals or exceeds the local prevailing wage. The director also found that the Form ETA 750 was submitted with omissions in certain areas, and the director requested the petitioner to complete the omitted areas on a copy attached to the RFE and to resubmit that copy. Finally, the director found that the Form G-28, Notice of Entry of Appearance as Attorney or Representative was not valid as submitted and stated that the Form G-28 must be signed by the petitioner to be valid.

In response, counsel submitted a letter dated June 20, 2003 accompanied by the following documents: a Form G-28 Notice of Entry of Appearance as Attorney or Representative signed by counsel and by the petitioner's managing director; a letter dated June 16, 2003 from the petitioner's managing director stating a job offer to the beneficiary and identifying the intended job location; a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002; a copy of the petitioner's Form 100 Franchise or Income Tax Return for 2002; copies of contracts between the petitioner and O'Connor Hospital, of San Jose, California, the United States Department of Veterans' Affairs [redacted] of Palo Alto, California, th[redacted] the governmen[redacted] California, the [redacted] All About Staffing, Inc., of Sunrise, Florida, and the government of [redacted] a copy of a Prevailing Wage Request Form with a prevailing wage determination b[redacted] dated May 20, 2003; and a copy of an employment agreement between the petitioner and the beneficiary dated September 23, 2002.

In a decision dated September 2, 2003, the director noted that CIS records indicated that more than three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to three beneficiaries of the previously-approved petitions, but that the evidence did not establish the petitioner's ability to pay additional employees. The director therefore denied the petition.

On appeal, counsel submits a brief and the following additional evidence: a letter dated September 30, 2003 from the petitioner's managing director; copies of sample records from 2002 and 2003 of the petitioner for twelve payroll periods showing for each record a time sheet, a payroll register, the petitioner's invoice to a hospital, and the check payment made by the hospital; copies of daily summary reports for May 6 , 7, and 13, 2003 from the Pearce Financial Group, Inc., showing invoice payments to the petitioner; a deposit summary for an account at the Bank of the West showing a deposit on June 4, 2003; a copy of a credit memo from an unidentified institution recording a check payment on June 4, 2003 to the petitioner; and copies of financial statements of the petitioner for the period February to June 2003.

The record also contains a motion submitted by counsel to the director captioned as a motion for reconsideration, with documents submitted in support of that motion. One of those documents is another letter dated September 30, 2003 from the petitioner's managing director, which is identical to the managing director's letter of that same date mentioned above, except for stating that it is submitted in support of the petitioner's motion, rather than in support of the petitioner's appeal. The other documents submitted in support of the motion are duplicates of documents submitted in support of the appeal.

In her brief on appeal, counsel states that the evidence demonstrates that the petitioner's profits increase with each additional employee, because the amounts billed by the petitioner to its client health care facilities are significantly greater that the wages paid by the petitioner to its nurse employees. Counsel therefore states that the evidence establishes the petitioner's ability to pay the proffered wage to the beneficiary.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The I-140 petition states in Part 5 that the petitioner has 110 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted in full above, states that "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." Nonetheless, in the instant case, no statement from a financial officer of the petitioner was submitted.

In determining the petitioner's ability to pay the proffered wage, CIS will also examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, however, the ETA 750B signed by the beneficiary did not state any work experience with the petitioner. The record contains a copy of an employment agreement between the petitioner and the beneficiary dated September 23, 2002, but that agreement does not state that employment has already begun. Rather, the agreement sets the terms for the beneficiary's employment which is to occur in the future. The record contains no evidence that the beneficiary has been employed by the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax return for 2002 covers its tax year of February 1, 2002 until January 31, 2003. That return shows the amount for taxable income on line 28 as $183,708.00. That amount is greater than the proffered wage of $52,000.00.

As an alternative means of evaluating the petitioner's ability to pay the proffered wages, CIS may also review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Concerning the instant petition, calculations based on the Schedule L attached to the petitioner's tax return for 2002 yield the figures for net current assets of -$132,318.00 for the beginning of its 2002 tax year (February 1, 2002) and -$7,465.00 for net current assets for the end of its 2002 tax year (January 31, 2003). Since those figures are negative, they provide no further evidence in support of the petitioner's ability to pay the proffered wage.

The record before the director closed with the submission of the petitioner's response to the RFE. That evidence was received by CIS on June 23, 2003. At that time, the petitioner's 2002 return was its most recent return available. Therefore, if the instant petition were the only one filed by the petitioner, the petitioner's taxable income of $183,708.00 on line 28 of its 2002 return would be sufficient to establish its ability to pay the proffered wage during the relevant period. However, CIS records indicate that the petitioner has filed multiple I-140 petitions since 1998.

CIS records indicate that the numbers of I-140 petitions filed by the petitioner each year since 1998 are as follows: one in 1998, one in 1999, one in 2000, seven in 2001, thirty-one in 2002 (including the instant petition), seventeen in 2003, and two in 2004. The ten petitions filed from 1998 to 2001 were all approved. Of the thirty-one petitions filed in 2002, fifteen were approved; of the seventeen filed in 2003, six were approved; and of the two filed in 2004, neither one has been approved. Of the petitions which have not been approved, two are still pending the director's decision and the rest were either denied or had prior approvals revoked. For some of the denied petitions, appeals are now pending with the AAO.

Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. In the instant petition, although the evidence indicates financial resources of the petitioner greater than the beneficiary's proffered wage, the evidence does not contain information about the multiple I-140 petitions filed by the petitioner. Specifically, the record in the instant case lacks information about wages paid to other potential beneficiaries of I-140 petitions filed by the

petitioner, about the priority dates of those petitions, and about the present employment status of those other potential beneficiaries.

In her letter of June 16, 2003 the managing director states that the petitioner's management intends to place the beneficiary at O'Connor Hospital, in San Jose, California. The record contains a copy of the petitioner's contract with O'Connor Hospital for temporary nursing personnel, dated September 9, 2002. The contract does not require O'Connor Hospital to accept the beneficiary as a nurse placed by the petitioner, nor to accept any specific number of nurses from the petitioner. The contract states that O'Connor Hospital "is not obligated to use [the petitioner] exclusively." The contract commits the petitioner to supply registered nurses "upon request" by O'Connor Hospital, and the petitioner's obligation to provide nurses in response to any such request is "subject to the availability of qualified nurses." (Agreement with O'Connor Hospital, Temporary Nursing Personnel, September 9, 2002, section 2).

The record before the director also included copies of contracts between the petitioner and two other private hospitals, one nurse staffing agency, two county governments, and the United States Department of Veterans' Affairs. The contract with O'Connor Hospital and the contract with one of the other private hospitals (Agreement with San Jose Medical Center, June 24, 2001) contain detailed information on the petitioner's charges to each contracting health care facility for nurses in various specialties and working various shifts. All of the contracts also contain descriptions of the qualifications required of the nurses to be provided by the petitioner. But, like the contract for temporary nursing personnel with O'Connor Hospital, none of the other contracts obligate any health care facility to request any minimum amount of nursing services from the petitioner, nor do they obligate the petitioner to fulfill all requests. For example, the contract between the petitioner and the Veteran's Administration states, "This is an indefinite-quantity contract for the supplies or services specified in the [attached] Schedule," and further states, "The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract." (Contract with the Veterans' Administration, August 23, 2000, extended by Change Order 3, April 1, 2003, page 78). Similarly, the contract with the San Jose Medical Center commits the petitioner to supply registered nurses "upon request" by that health care facility, but with the proviso that the petitioner's obligation to do so is "subject to the availability of qualified nurses." (Agreement with San Jose Medical Center, June 24, 2001, section 2).

For the foregoing reasons, the evidence submitted prior to the director's decision fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In his decision, the director correctly stated the petitioner's taxable income before net operating loss and special deduction on its 2002 return as $183,708.00. The director correctly stated the figure of $7,465.00 as the petitioner's net current liabilities for 2002, which is equivalent to the figure for net current assets of -$7,465.00 for the end of the petitioner's 2002 tax year, as discussed above.

The director noted that CIS records indicated that three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to the three beneficiaries of the previously-approved petitions, but found that the evidence did not establish the petitioner's ability to pay additional employees. No information on the proffered wages paid to those three beneficiaries appears in the record in the instant case, nor does the director's decision state what figures the director used in concluding that the evidence in the instant case established the petitioner's ability to pay the proffered wages to those three beneficiaries. Presumably, the director had access to the files containing those other petitions when he analyzed the evidence in the instant petition.

Although the record in the instant petition does not show the basis for the director's calculations pertaining to the proffered wages for beneficiaries of other petitions filed by the petitioner, the director's decision to deny the instant petition was correct. Although the director referred to only three other petitions submitted by the petitioner, in fact, as discussed above, the petitioner has filed numerous I-140 petitions, including thirty-one petitions filed in 2002, the year in which the priority date was established. In the instant petition, the petitioner did not submit evidence to show its ability to pay the beneficiaries of other approved and pending petitions while also paying the proffered wage to the beneficiary in the instant petition. The director's decision to deny the petition was therefore correct, based on the evidence submitted prior to the director's decision.

On appeal, the petitioner submits a brief and additional evidence. The petitioner makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director.

In her letter dated September 30, 2003, the petitioner's managing director states that the fees the petitioner charges its client health care facilities are significantly higher that the petitioner's costs for wages and associated payroll costs. The managing director states that the petitioner's income increases with each nurse it places in health care facilities. In support of these statements are submitted copies of sample records from 2002 and 2003 of the petitioner for twelve payroll periods showing for each record a time sheet, a payroll register, the petitioner's invoice to a hospital, and the check payment made by the hospital. Also submitted on appeal are copies of daily summary reports for May 6, 7, and 13, 2003 from the Pearce Financial Group, Inc., showing invoice payments to the petitioner; a deposit summary for an account at the Bank of the West showing a deposit on June 4, 2003; and a copy of a credit memo from an unidentified institution recording a check payment on June 4, 2003 to the petitioner.

The payroll records submitted on appeal provide detailed information on the manner in which the petitioner conducts its business, and they are persuasive evidence that the petitioner earns significant income for each of its employees who are placed in health care facilities pursuant to one of the contracts with the petitioner. As noted above, the managing director stated in her letter of June 16, 2003 that management intended to place the

beneficiary in O'Connor Hospital. Three of the sample cases for payroll records submitted in evidence on appeal indicate that the petitioner's billing rates for that facility are more than double the hourly proffered wage. (Case II, 2002, O'Connor Hospital, 9/22/02 – 9/28/02, Case V, 2003, O'Connor Hospital, 7/20/03 – 7/26/03; Case VI, 2003, O'Connor Hospital, 7/27/03 – 8/02/03). Nonetheless, as noted above, the petitioner's contract with the government of O'Connor Hospital does not require that hospital to accept a placement from the petitioner for the beneficiary, not to accept any specific number of nurses placed by the petitioner.

The record lacks evidence sufficient to establish that each of the potential beneficiaries of the petitions filed by the petitioner would be likely to find full-time placement at health care facilities if employed by the petitioner. The petitioner's evidence fails to address the issue of competition among nurse staffing agencies. None of the petitioner's contracts submitted in evidence restrict the contracting health care facilities from seeking nurse staffing assistance from agencies other than the petitioner.

Also submitted on appeal are financial statements consisting of a profit and loss statement for the period February through June 2003 and a summary balance sheet dated June 30, 2003. Those statements bear no indications that they are audited financial statements.

Unaudited financial statements are not persuasive evidence. 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 condition and of its 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.

Notwithstanding the documentation submitted on appeal, the evidence in the record lacks any audited financial statements, and lacks any information concerning the prospective new employees of the petitioner as a result of its approved and pending I-140 petitions. Nor does the record in the instant petition contain any information about the proffered wages for the beneficiaries of other petitions filed by the petitioner. Therefore the record fails to establish the petitioner's ability to pay the additional employees on whose behalf it has filed petitions, while also paying the proffered wage to the beneficiary.

For the foregoing reasons, the evidence submitted on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO on appeal.

Beyond the decision of the director, another issue raised by the evidence concerns the intended employment status of the beneficiary with the petitioner during any periods in which beneficiary's services are not requested by O'Connor Hospital or by any other medical facility which is a client of the petitioner. The managing director's letter of September 30, 2003 explains the petitioner's potential profits from employing the beneficiary, but ignores any costs to the petitioner from having the beneficiary on its payroll at the proffered wage during periods when the beneficiary's services are not needed by a client medical facility. The petitioner's employment agreement with the beneficiary contains no reference to any duties to be performed by the beneficiary during such periods. If the intention of the petitioner's management is not to pay the beneficiary during any such periods, such an intention would be inconsistent with the petitioner's offer of employment to the beneficiary as stated on the Form ETA 750. Part 10 of the ETA 750 states that the beneficiary will be employed for 40 hours per week. Moreover, the definition of employment in the Department of Labor regulations states in pertinent part that "[e]mployment means permanent full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3. An offer of intermittent employment on an as-needed basis would not satisfy the requirement for an offer of "permanent full-time work."

On a related issue, the Form ETA 750, item number 7, states that the address where the beneficiary will work is the same as the petitioner's own address, shown in item 6 of the Form ETA 750. But such an assertion is inconsistent with the copies in the record of the petitioner's contracts with governmental and private organizations, which indicate that the beneficiary will be placed in one or more health care facilities. Moreover, as discussed above, in her letter of June 16, 2003 the petitioner's managing director states the intention of the petitioner's management to place the beneficiary in O'Connor Hospital, of San Jose, California.

Assuming that the beneficiary is to work in O'Connor Hospital, the posting of the notice of job availability does not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at "facility or location of the employment." 20 C.F.R. § 656.20(g)(1). *Cf.* 20 C.F.R. § 656.20(g)(3), (8).

In the instant case, the posting certificate signed by the managing director indicates that the job announcement for the offered position was posted at the petitioner's administrative offices. But by merely posting the notice at its administrative offices, the petitioner has not complied with the regulatory notice requirements. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991). The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s).

Concerning the notice of job availability, the record lacks evidence sufficient to establish that the notice of job availability announcing the offered position complies with 20 C.F.R. § 656.20(g)(8), since the petitioner has not submitted evidence that it is offering a prevailing wage rate for each of the geographic locations where the proffered position would be performed. The regulation at 20 C.F.R. § 656.20(g)(8) states the following: "If an application is filed under the Schedule A procedures at Sec. 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section." The notice of job availability states the rate of pay as $25.00 per hour. That rate is consistent with the proffered wage as stated on the amended Form ETA 750 and on the letter dated June 26, 2003 from the managing director. However the rate of pay of $25.00 per hour is inconsistent with the rate of pay stated in the letter dated October 29, 2002 from the managing director, which states that the beneficiary will be paid $27.00 per hour. The petitioner has the responsibility to explain evidentiary inconsistencies in the record, but the petitioner's evidence in the instant case fails to do so. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Finally, in her letter of June 16, 2003, the managing director stated the intention of the petitioner's management to place the beneficiary in O'Connor Hospital, which is in San Jose, California. The petitioner's evidence does not indicate the county in which San Jose is located, but according to the Internet web site of the National Association of Counties, San Jose is the county seat of Santa Clara County. National Association of Counties, *Santa Clara County*, http://www.naco.org/; *select* About Counties, Find a County, California, Santa Clara County (accessed November 23, 2004). The record contains a prevailing wage determination for "Santa Clara/Santa Cruz," but not for other locations. (Prevailing Wage Request Form, with prevailing wage determination by the California Employment Development Department dated May 20, 2003). Neither the managing director's statement nor other evidence in the record establishes that the

beneficiary's service would be limited to O'Connor Hospital nor to the geographical area of "Santa Clara/Santa Cruz."

Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wage, these issues need not be discussed further.

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.

**ORDER:** The appeal is dismissed.