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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: WAC-03-004-54574 Office: CALIFORNIA SERVICE CENTER Date: DEC 30 2004

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 initially approved by the Director, California Service Center. The Director later revoked the approval. The petition 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 October 2, 2002.

The item for the proffered wage on the Form ETA 750 is blank, and no amended or updated copy of the Form ETA 750 is found in the record. On the petition, the offered wages are stated as $1,000.00 per week. On the Form ETA 750B, signed by the beneficiary on September 10, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of $2.1 million, to have net annual income of $500,000, and to currently have 140 employees.

In support of the petition, the petitioner submitted the following: a copy of the petitioner's articles of incorporation dated January 29, 1993; a copy of the petitioner's business license issued on July 1, 2000 by the City of Milpitas, California; a copy of the petitioner's business certificate issued on March 31, 2001 by the City of San Jose, California; a copy of a brochure describing the petitioner's business; a Declaration Regarding Financial Capacity dated August 14, 2002 and signed by the petitioner's chief executive officer and financial officer; a job announcement for the offered position with an undated certificate of posting signed by the petitioner's managing director; 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 January 15, 1996; a copy of the beneficiary's Registered Nurse license issued on January 15, 1996 by the [redacted] copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 25, 1995 by the [redacted] College of Nursing, Manila, Philippines, with accompanying course transcript; and copies of five training certificates issued to beneficiary for nurse training courses in the Philippines in 1997, 1998 and 1999.

In a decision dated November 8, 2002, the director approved the petition. However, the director later determined that the petition had been approved in error. The director issued a Notice of Intent to Revoke (ITR) dated January 9, 2004. In the ITR the director stated that the evidence was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner was accorded thirty days to submit additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated that evidence on that issue must be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a letter dated February 3, 2004 stating that the petitioner's fiscal year ends on January 31, 2004 and that its tax return for the year 2003 was currently being prepared. In the letter, counsel requested an extension of 30 days within which to submit the requested documents.

Counsel later submitted a letter dated March 5, 2004 accompanied by the following documents: copies of the petitioner's Form 1120 U.S. corporation income tax returns for 2001, 2002 and 2003; copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for all four quarters of 2003; a copy of a home equity approval notification dated April 11, 2003 in the amount of $321,000.00 from Countrywide [redacted], to the petitioner's managing director and the petitioner's chief executive officer and financial officer; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner in the amount of $100,000.00 at Wells Fargo Bank; and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of $100,000.00 with the Washington Mutual Bank, with the information on the petitioner's current loan balance omitted.

In a decision dated March 18, 2004, the director noted that CIS records indicated that numerous other I-140 petitions filed by the petitioner had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages of from one to three beneficiaries, but that the evidence did not establish the petitioner's ability to pay additional employees. The director therefore revoked the petition.

On appeal, counsel submits a brief and the following additional evidence: a letter dated April 16, 2004 from a certified public accountant explaining the petitioner's cash and accrual accounting methods; a balance sheet for the petitioner dated January 31, 2003, prepared on an accrual basis; a copy of a narrative describing the petitioner's history and operations; a copy of a sample record from 2002 of an employee of the petitioner for the payroll period December 8, 2002 to December 14, 2002, for work at the Regional Medical Center of San Jose, showing a time sheet, a payroll register, the petitioner's invoice to the hospital, and the check payment made by the hospital; copies of contracts between the petitioner and the United States Department of Veterans' Affairs,

California, the government of San Mateo County, California, the government of Santa Clara County, California, the of an unidentified location; and h an office in Illinois; and copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for the last quarter of 2002 and the first quarter of 2004. On appeal, counsel also submits duplicate copies of several documents which were submitted prior to the director's decision to revoke the petition.

In his brief, counsel states that financial statements for the petitioner in the record prepared on an accrual basis provide a more accurate summary of the petitioner's financial condition than do the tax returns relied upon by the director, and that those statements show that the petitioner has substantial financial resources. Counsel also 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 140 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." Pursuant to this regulation, the petitioner submitted a Declaration Regarding Financial Capacity dated August 14, 2002 and signed by the petitioner's chief executive officer and financial officer. The text of the declaration states as follows:

> This is to certify that [the petitioner] is a private entity and its financial statements are not made available publicly. This is also to confirm that [the petitioner] has been in existence since 1990 and currently has more than 124 employees with an annual income of more than $2.1 million. It has more than sufficient financial capacity to pay for the wages of [the named beneficiary] who is the beneficiary of an I-140 petition by our company.

Although the regulation at 8 C.F.R. § 204.5(g)(2) allows CIS to accept a declaration by a financial officer of a petitioner, the regulation does not require CIS to defer to the opinion of any such financial officer. The regulation requires that any such statement be one "which establishes the prospective employer's ability to pay the proffered wage." The sentence in the regulation which allows for the submission of a statement by a financial officer of a petitioner therefore does not imply that every such statement must be deemed sufficient to establish a petitioner's ability to pay the proffered wage. Rather, the effect of that sentence in the regulation is to allow an additional form of acceptable evidence for any petitioner which has at least 100 employees, in addition to tax returns, annual reports, or audited financial statements, which are acceptable forms of evidence for all petitioners.

In the instant case, the statement by the petitioner's chief executive officer and financial officer lacks detailed financial information indicating the basis for the conclusion that the petitioner has the ability to pay the proffered wage to the beneficiary. Moreover, the statement makes no reference to other I-140 petitions filed by the petitioner. As discussed in more detail below, CIS records show that the petitioner has filed numerous I-140 petitions in recent years. The statement by the petitioner's chief executive officer and financial officer fails to consider the issue of the petitioner's ability to pay the proffered wage to the beneficiary in the instant

petition while also paying the proffered wages to the beneficiaries of the other petitions filed by the petitioner. For these reasons, the statement fails to establish the petitioner's ability to pay the proffered wage to the beneficiary during the relevant time period.

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, nor do any other documents in the record indicate 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. According to the petitioner's tax returns in the record, the petitioner's tax year runs from the first of February each year to the thirty-first of January the following year. The petitioner's tax returns show the following amounts on line 28: $42,066.00 for 2001 (February 1, 2001 to January 31, 2002); $183,708.00 for 2002 (February 1, 2002 to January 31, 2003); and $60,289.00 for 2003 (February 1, 2003 to January 31, 2003). The figure for 2001 is not directly relevant to the instant case, since the priority date of October 2, 2002 falls in the following tax year. The figures for 2002 and for 2003 show amounts which are 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's attached to the petitioner's tax returns yield the following figures for net current assets: -$131,718.00 for the end of the petitioner's 2001 tax year

(January 31, 2002); -$7,465.00 for the end of its 2002 tax year (January 31, 2003); and -$100,449.00 for the end of its 2003 tax year (January 31, 2004). 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 ITR. That evidence was received by CIS on March 8, 2004. At that time the petitioner's tax return for 2003 was the most recent one available. 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 and $60,289.00 on line 28 of its 2003 return would be sufficient to establish the petitioner's 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 and revoked 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.

The record before the director included copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for all four quarters of 2003. The financial figures shown on the DE 6 reports appear to be generally consistent with the petitioner's other financial evidence. Those reports show payment of wages to the petitioner's employees in the following amounts: $614,132.48 for the first quarter of 2003; $777,876.04 for the second quarter of 2003; $760,552.54 for the third quarter of 2003; and $639,789.40 for the fourth quarter of 2003.

Although the financial figures on the DE 6 reports appear to be consistent with the petitioner's other evidence, the numbers of employees shown on the DE 6 reports are not consistent with the petitioner's claim on the I-140 petition filed in October 2002 that the petitioner then had 140 employees. The total numbers of employee names on the reports are as follows: 92 employees in the first quarter of 2003; 95 employees in the second quarter of 2003; 96 employees in the third quarter of 2003; and 87 employees in the fourth quarter of 2003. The monthly totals of employees as stated on the reports range from a low of 62 for the first month of the first quarter (January 2003) to a high of 78 for the second month of the third quarter (August 2003). The differences between the monthly totals and the total employee names on each quarterly report indicates significant turnover in the petitioner's workforce during each quarter of 2003. In claiming to have 140 employees as of October 2002, the petitioner states a number which is approximately double the highest monthly total of employees shown on the DE 6 reports for 2003.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence,

and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence concerning the number of the petitioner's employees.

The record before the director also included three line of credit documents, namely a copy of a home equity approval notification dated April 11, 2003 in the amount of $321,000.00 from Countrywide Home Loans, Inc., to the petitioner's managing director and the petitioner's chief executive officer and financial officer; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner in the amount of $100,000.00 at Wells Fargo Bank; and a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of $100,000.00 with the Washington Mutual Bank, with the information on the petitioner's current loan balance omitted. Counsel states in his brief that those documents indicate lines of credit available to the petitioner and that those documents are further evidence of the petitioner's ability to pay the proffered wage.

Notwithstanding counsel's assertion, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. 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). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are integral parts of many business operations, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Moreover, in the instant case, the line of credit documents in the record fail to indicate how much of the lines of credit have been used by the petitioner. Therefore they fail to show any additional financial resources available to the petitioner. In addition, one of the lines of credit shown in the documents does not represent credit available to the petitioner, but rather credit available to the petitioner's managing director and chief executive officer and financial officer. The narrative description of the petitioner in the record indicates that those two persons are the owners of the petitioner. It is a basic principle of corporation law 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, financial resources of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

For the foregoing reasons, the evidence submitted prior to the director's decision to revoke the petition 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 returns for 2001, 2002 and 2003, and correctly calculated the petitioner's year-end figures for net current assets for each of those tax years. Those figures are set forth above.

The director noted that CIS records indicated that numerous other I-140 petitions filed by the petitioner had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to no more than three beneficiaries, and found that the evidence did not establish the petitioner's ability to pay additional employees. No information on the proffered wages paid to the beneficiaries of other

petitions 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 three beneficiaries. Presumably, the director had access to the files containing 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. The director correctly stated that the petitioner has filed numerous I-140 petitions. As noted above, those petitions included 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 revoke the petition was therefore correct, based on the evidence submitted prior to that 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. The petitioner's evidence submitted on appeal includes a letter dated April 16, 2004 from a certified public accountant explaining the petitioner's cash and accrual accounting methods and purposes. That letter states that the petitioner uses a cash basis in its tax returns, because the petitioner is a service company. Companies which sell products and therefore have inventories are required to file taxes on an accrual basis, according to the letter. The letter states that for internal purposes the petitioner maintains its accounting records on an accrual basis, a method which generally presents a more stable picture of a company's financial situation from year to year, according to the letter.

Also submitted on appeal is a balance sheet for the petitioner as of January 31, 2003, prepared on an accrual basis. Although the balance sheet appears immediately below the accountant's letter in the exhibits submitted on appeal, the accountant's letter speaks in only general terms about the accounting methods followed by the petitioner, and

makes no reference to the balance sheet for January 31, 2003. The balance sheet therefore appears to be an unaudited financial statement.

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 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.

The evidence newly submitted on appeal includes copies of contracts between the petitioner and the United States Department of Veterans' Affairs, [redacted] of [redacted] the government of [redacted] he government of Santa Clara County, California, the San Jose [redacted] f an unidentified location; [redacted] of San Jose, California, an [redacted] a Delaware Corporation with an office in [redacted] llinois;

None of the 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).

Also newly submitted on appeal is a copy of a sample record from 2002 of an employee of the petitioner for the payroll period December 8, 2002 to December 14, 2002, for work at the Regional Medical Center of San Jose, showing a time sheet, a payroll register, the petitioner's invoice to the hospital, and the check payment made by the hospital. The sample payroll record provides detailed information on the manner in which the petitioner conducts its business, and it indicates that the petitioner earned significant income as a result of the placement of that employee. Nonetheless, 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.

Finally, the evidence newly submitted on appeal includes copies of the petitioner's Form DE 6 California quarterly wage and withholding reports for the last quarter of 2002 and the first quarter of 2004. Those reports show payment of wages to the petitioner's employees in the following amounts: $477,618.65 for the fourth quarter of 2002; and $749,672.07 for the first quarter of 2004. The total numbers of employees names on the reports are as follows: 61 employees in the fourth quarter of 2002; and 94 employees in the first quarter of 2004. The monthly totals of employees as stated on the two DE 6 reports newly submitted on appeal range from a low of 42 for the first month of the fourth quarter of 2002 (September 2002) to a high of 76 for the third month of the first quarter of 2004 (March 2004). As with the DE 6 reports submitted previously, the differences between the monthly totals and the total employee names on each quarterly report indicates significant turnover in the petitioner's workforce during each quarter covered by the reports.

As discussed above, the DE 6 reports for 2003 contained information inconsistent with the petitioner's claim on its I-140 petition to have 140 employees as of the filing date in October 2002. The information on the newly submitted DE 6 report for the fourth quarter of 2002 is even more directly inconsistent with that claim. The DE 6 report for the fourth quarter of 2002 shows 42 employees for the first month of the quarter (September 2002) and 48 employees for the second month of the quarter (October 2002). The record contains no explanation for these inconsistencies concerning the number of the petitioner's employees as of the priority date. *See Matter of Ho*, 19 I&N Dec. at 591-592.

Notwithstanding the extensive 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, the evidence in the record raise several other issues. The first concerns a significant omission on the Form ETA 750 submitted with the I-140 petition. The Form ETA 750 is incomplete with regard to the offered rate of pay, as the blocks in item number 12 for basic and overtime rates of pay are blank. The job announcement in the record states the basic rate of pay as $25.00 per hour, but no evidence in the record states the overtime rate of pay for the offered position.

The Form ETA 750 also raises an evidentiary inconsistency. Item number 7, for the address where the beneficiary will work, states the same address as the petitioner's own address shown in item 6 of the Form ETA 750. But such a work location 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.

The beneficiary's possible work locations indicated by the petitioner's contracts also are evidence that the posting of the notice of job availability did not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the "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).

The purported posting dates are also inconsistent between the notice and the certificate of posting. The notice of job availability notice is dated "08-07-2002" and it states "Posting Date: 01-01-2001 to 07-31-2002." The

notice therefore states a posting period of nineteen months. The certificate of posting is undated, and states that the notice was posted "for a period of at least ten (business) days, from January 1, 2002 to July 31, 2002." The certificate therefore states a posting period of seven months.

Furthermore, 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). 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 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. Although several of the contracts in the record are for nurse staffing services at specific hospitals, the contract with [redacted] a Delaware Corporation with an office in Oakbrook Terrace, Illinois, does not limit the potential work location to any specific hospital. Moreover, one contract is with Alameda Hospital, but the location of that hospital is not stated in that contract or elsewhere in the record.

Another issue raised by the evidence concerns whether the petitioner's offer of employment to the beneficiary is for full-time work, or for temporary work on an as-needed basis. The narrative description of the petitioner's business in the record states that the petitioner's principal business is the placement of nurses with client medical facilities. Therefore the majority of the petitioner's employees may be assumed to be earning wages comparable to the proffered wage in the instant petition. Yet the DE 6 reports in the record show few of the petitioner's employees receiving compensation at rates which are near the $52,000.00 annual proffered wage. The DE 6 reports indicate that many of the petitioner's employees worked for only limited periods of time during the reported quarters, since the compensation reported for many employees per quarter is far below the $12,000.00 level which would represent a quarterly portion of the $52,000.000 annual proffered wage.

The following table shows the numbers of employees in various compensation categories, based on information taken from the petitioner's DE 6 reports. The first category in each quarter shows the number of employees who earned at least $13,000.00 that quarter, equivalent to an annual rate of $52,000.00. The other categories show the number of employees receiving quarterly compensation from $10,000.00 to $12,999.99 (annual rates of from $40,000.00 to $51,999.99), from $5,000 to $9,999.99 (annual rates from $20,000.00 to 39,999.99) and less than $5,000 (annual rates less than $20,000.00).

2002	4th Quarter	Total employees receiving compensation	61 employees
		Earned $13,000 or more	10 employees (16.4%)
		Earned $10,000 to $12,999	5 employees (8.2%)
		Earned from $5,000 to $9,999	12 employees (19.7%)
		Earned less than $5,000	34 employees (55.7%)
2003	1st Quarter	Total employees receiving compensation	92 employees
		Earned $13,000 or more	17 employees (18.5%)
		Earned $10,000 to $12,999	6 employees (6.5%)
		Earned from $5,000 to $9,999	15 employees (16.3%)
		Earned less than $5,000	54 employees (58.7%)

2003	2nd Quarter	Total employees receiving compensation	95 employees
		Earned $13,000 or more	20 employees (21.1%)
		Earned $10,000 to $12,999	13 employees (13.7%)
		Earned from $5,000 to $9,999	15 employees (15.8%)
		Earned less than $5,000	47 employees (49.5%)
2003	3rd Quarter	Total employees receiving compensation	96 employees
		Earned $13,000 or more	23 employees (24.0%)
		Earned $10,000 to $12,999	5 employees (5.2%)
		Earned from $5,000 to $9,999	17 employees (17.8%)
		Earned less than $5,000	51 employees (53.1%)
2003	4th Quarter	Total employees receiving compensation	87 employees
		Earned $13,000 or more	21 employees (24.1%)
		Earned $10,000 to $12,999	1 employee (1.1%)
		Earned from $5,000 to $9,999	19 employees (21.8%)
		Earned less than $5,000	46 employees (52.9%)
2004	1st Quarter	Total employees receiving compensation	94 employees
		Earned $13,000 or more	22 employees (23.4%)
		Earned $10,000 to $12,999	7 employees (7.4%)
		Earned from $5,000 to $9,999	19 employees (20.2%)
		Earned less than $5,000	46 employees (48.9%)

The above figures show that more than 75% of the petitioner's employees received compensation of less than $13,000.00 each quarter, less than the annual rate of the proffered wage of $52,000.00. The figures show that more than 50% of the petitioner's employees received compensation of less than $5,000.00 each quarter, an annual rate of less than $20,000.00. The information on the DE 6 reports shows that in fact many employees received compensation of less than $1,000.00 each quarter, an annual rate of less than $4,000.00. Those figures strongly suggest that the great majority of the petitioner's employees worked for the petitioner only when their services were needed by one of the petitioner's client medical facilities.

The record in the instant case contains no direct evidence on the intended employment status of the beneficiary with the petitioner during any periods in which beneficiary's services are not requested by any medical facility which is a client of the petitioner. 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."

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.