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

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[redacted]

FILE: EAC 03 266 52695 Office: VERMONT SERVICE CENTER Date: DEC 22 2005

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, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter remanded to the director for further consideration.

The petitioner is a staffing and recruitment agency for healthcare facilities. It seeks to sponsor the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits a brief and copies of evidence formerly submitted into the record of proceeding as well as new evidence, namely, copies of the beneficiary's weekly sign-in work sheets, the petitioner's IRS Form 1065 for 2003, and end of the year statements on wages earned in 2002, and 2003.

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

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. The petitioner states it was established in 2001, has three employees and does not identify its gross annual or net annual income. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, in effect prior to November 28, 2005, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.

2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The first issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the

> prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is Sep. The beneficiary's salary as stated on the labor certification is $50,000. The beneficiary's total hours per week are descried as 37.5 hours. The petitioner also indicated on the Form ETA 750 and in a letter entitled "Offer of Permanent Employment" that the yearly salary is $50,000.

In support of the petition, the petitioner submitted the beneficiary's educational credentials and licensure. The petitioner also submitted a document signed by both the beneficiary and the petitioner that described the petitioner's offer of permanent employment, and a posting notice dated June 29, 2003 that describes the proffered position and states the notice was posted at the facility's bulletin board for ten consecutive business days from March 11, 2002 to March 22, 2002.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 29, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its federal corporate income tax returns for 2001 and 2002.[1] The director stated that if the petitioner had employed the beneficiary in 2001 and 2002, the petitioner should submit copies of the beneficiary's Form W-2 Wage and Tax Statements. The director also questioned whether the beneficiary would fill a newly created position, and if not, how long had the proffered position existed. Finally the director requested a copy of the contract between the petitioner and the intended place of employment.

In response, counsel submitted the petitioner's Form 1065, U.S. Return of Partnership Income, for 2002, as well as the petitioner's unaudited balance sheet and income statement for 2002. The petitioner's federal income tax return identified it as a domestic limited liability company. Counsel also submitted two pages of payments received from four nursing facilities. With regard to the beneficiary's wages, counsel submitted Forms W-2 for 2002 and 2003. These documents indicated the beneficiary earned $8,996.88 in 2002, and $13,143.51 in 2003. Counsel stated that the beneficiary worked part-time for the petitioner in 2002 and 2003. Counsel also submitted sample contracts between the petitioner and health care facilities in need of beneficiary's services, as well as the petitioner's business plan.

On April 1, 2004, the director denied the petition. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the filing date, namely, September 29, 2003. The director stated that the petitioner's 2002 Form 1065 indicates a net income of

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[1] Although the priority date for the petition was the actual date of filing the I-140 petition in 2003, the petitioner's income tax return for 2003 was not available at the time the director issued his request for further evidence.

-$74,725, and as a result the petitioner's net income was insufficient to pay the proffered wage. The director also noted the beneficiary's 2002 compensation of $8,996.88 and stated that this salary was less than the proffered wage. The director also noted the unaudited financial statements submitted by the petitioner, and stated that they were of little evidentiary value.

On appeal, counsel states that Citizenship and Immigration Services (CIS) misconstrued the evidence presented by the petitioner to establish its ability to pay the proffered wage. Counsel states that the beneficiary only worked part time in 2002 and 2003, and that based on the documents submitted to the record the beneficiary was paid $25 an hour in 2002 and her hourly rate was increased to $26 an hour in 2003. Counsel asserts that the hourly rate of $25 is actually higher than the annual rate of $50,000.[2] Counsel submits resubmits the beneficiary's W-2 for 2003, that indicates the beneficiary earned $13,143.51. Counsel submits, for the first time, Form 1099-MISC for 2003 that indicates the beneficiary was paid $27,489.57 in non-employee compensation. Counsel also submits the beneficiary's Year to Date register report of earnings for 2002 and 2003. Counsel states that the 2002 year to date statements show the beneficiary worked part time for 352.24 hours in 2002 for a total gross pay of $8,996.88. Counsel again states that at the hourly rate of $25 an hour, the beneficiary would have earned at least $50,000 if she had worked fulltime in 2002. With regard to 2003, counsel states that the beneficiary worked for 1,342 hours at a rate of $25 an hour which included overtime from January 2003 to August 2003 and was paid $40,633.[3] Counsel states that the year to date register also shows that the beneficiary was paid $25 per hour. Counsel concludes that at the time of the 2003 filing date, the beneficiary was receiving the proffered wage from the petitioner.

Counsel also submits the petitioner's Form 1065 for 2003. Counsel states that this document indicates the petitioner earned an income of $151,140 after deductions. According to counsel, this income established that the petitioner had the ability to pay the beneficiary's wage at the time of filing the instant petition on September 29, 2003. Counsel asserts that the 2002 tax return does reflect an ordinary income loss of $74,525; however, counsel states this was a loss on paper only due to the cash basis accounting method. Counsel states that the petitioner had account receivables of $154,543 at the end of tax year 2002 and received payment in the first quarter of 2003. Counsel asserts that for tax strategy purposes and for accurate reporting of taxable income, the petitioner took a loss in 2002 but deferred the income for 2003 as shown in the 2003 tax return. Counsel also submits a letter from [redacted], Vice President, JPMorgan Chase Bank, New York City, that states the petitioner's average balance was $60,000 in 2002 and $100,000 in 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that the beneficiary worked for the petitioner in 2002 and 2003 at the hourly rate of $25 an hour. It is noted that since the filing date was 2003, the salary provided to the beneficiary in 2002 is not dispositive in these proceedings. In addition, as previously stated, the beneficiary's hourly salary of $25 for a 37 and half hour workweek, even if calculated on part time basis, does not establish that the petitioner paid the beneficiary the proffered wage. The 25-dollar pay rate during a 37.5-hour

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[2] The actual yearly salary for a wage based on $25 an hour for a 37.5 work week, is $48,750. 37.5 work hours a week multiplied by 52 weeks equals 1,950 yearly work hours. 1950 work hours multiplied by $25 equals $48,750.

[3] Counsel combines the wage statement earnings and the non-employee compensation to arrive at the figure of $40, 633. It is not clear how counsel arrives at the total number of hours the beneficiary work in 2003.

workweek would only result in an annual salary of $48,750. Thus, the petitioner did not establish that it paid the beneficiary the full proffered wage as of the 2003 filing date.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Since the filing date for the instant petition is September 29, 2003, the petitioner's federal income tax return for 2002 is not dispositive in these proceedings. With regard to the petitioner's 2003 Form 1065, as correctly noted by counsel, the petitioner has ordinary income of $152,140. This sum is sufficient to pay the difference between the beneficiary's actual salary and compensation of $40,632 and the proffered wage of $50,000, namely $9,368. In addition, CIS computer records do not reflect any additional pending I-140 petitions for the same petitioner. Therefore the petitioner has established that it had the ability to pay the proffered wage as of the filing date.

Beyond the decision of the director, the record does not establish whether the petitioner is the beneficiary's actual employer, and whether the petitioner has offered employment to the beneficiary that is not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition. This issue arises on appeal since the petitioner suggests that the AAO consider the financial resources of third-party clients. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Additionally, 8 C.F.R. § 204.5(c) states the following: "*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

On the Form ETA 750 submitted with the initial petition, the petitioner indicated the beneficiary would work at its principal business location at Fulton Street, New York City. In addition, the petitioner submitted a document entitled "Offer of Permanent Employment" that stated the "facility" agreed to sponsor the beneficiary for permanent residency. The document continued that following a six-month probationary period, should the beneficiary's performance meet the "facility's" expectations, the beneficiary would be considered a regular employee entitled to receive the standard benefits prescribed by law for the duration of the beneficiary's employment. The petitioner does not identify anywhere in this document the facility in which the beneficiary will work. In response to the director's request for further evidence, counsel submitted contracts between itself and nine healthcare or nursing home facilities in the New York City metropolitan area. These facilities are Cabrini Medical Center, Beth Israel Dialysis Center, Nightingale Health Center, St. Rose's Home, St. Barnabas Nursing Home, Cobble Hill Health Center, North General Hospital, Jewish Home and Hospital, and Bishop Henry B. Hucles Episcopal Nursing Home. None of these contracts specifically state who is responsible for providing standard benefits to any employees. Several of the contracts offer the nursing facility the ability to convert the petitioner's recruited staff into permanent employees based on a conversion of between 20 and 25 per cent of the potential employee's annual salary. With regard to the beneficiary in the instant petition, the use of Form 1099-MISC to report the beneficiary's earnings suggest that for the majority of her employment in 2003, she was not regarded as the petitioner's employee. After a review of the record of proceeding in its entirety, it is unclear to which third-party client the petitioner would place the beneficiary, and who exactly is the employer of the beneficiary.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

> The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has been unclear as to the placement of the beneficiary, and to the actual employer of the beneficiary. If one of the entities identified in the various contracts placed in the record is the beneficiary's employer, then one of those entities should have filed the instant visa petition and been the petitioning entity. Without more persuasive evidence, the petitioner has not established that it is the actual employer of the beneficiary.

Furthermore, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd.* 345 F.3d 683; *see also Dor v. INS*, 891 F.2d at 1002 n. 9.

Under 20 C.F.R. § 656.20, the regulations require the following:

> In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> (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.
>
> (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 days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, 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).

The record contains a posting notice however, the notice was posted on the bulletin board at the petitioner's main office, which does 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 beneficiary's employment. The petitioner has not indicated there are three possible locations where the beneficiary will work; however, the record contains documents as to where the beneficiary has worked in 2002 and 2003. The petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner

cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. 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.[4] The petitioner did indicate whether it provided notice to the appropriate bargaining representative(s) and the dates the notice was posted.

Accordingly, although the petitioner has established that it is capable of paying the proffered wage as of the 2003 filing date, the issues of whether the petitioner is the actual employer and whether the posting notice was properly served remain unresolved in the record. In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

[4] *See* the 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).