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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-275-50562 Office: CALIFORNIA SERVICE CENTER Date: MAY 23 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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 appeal will be dismissed.

The petitioner is a temporary nursing staffing agency. The petitioner states it has a gross annual income of $1.2 million on its visa petition. It seeks to sponsor the beneficiary in the United States as a 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 the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date; that the proffered position was not a permanent offer of employment; and that the posting notice was deficient.

On appeal, counsel submits a brief and new evidence.

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 on September 9, 2002. 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, 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).

I. **The petitioner established that it is the actual employer and is offering permanent full-time employment**.

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) 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.

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."

The petitioner indicated on both the Form ETA 750A and the visa petition that the place where the alien would work would be in the state of California. The director requested evidence that the petitioner would be providing the beneficiary a specific, permanent and full-time employment offer on December 21, 2002. In response, counsel stated that the beneficiary would be assigned to work at Sunbridge Care and Rehab Center (Sunbridge) and submitted a copy of a contract between the petitioner and Sunbridge, a third-party entity. The contract did not contain an addendum or provision notating that the beneficiary would be assigned a full-time, permanent position at Sunbridge. The contract between the petitioner and Sunbridge contained a provision in paragraph V that Sunbridge could hire nurses from the petitioner either on a full-time or part-time basis. Because of that provision, the director determined in his decision that no specific position would be fill by the beneficiary and noted the lack of a contract between the petitioner and the beneficiary.

On appeal, counsel submits excerpts from the Department of Labor's (DOL) Occupational Outlook Handbook (OOH) and publications from the American Nursing Association to assert that there is a nursing shortage in the United States so the petitioner would always be able to place the beneficiary in a permanent, full-time position with Sunbridge or one of the petitioner's other contracted health care facilities. The petitioner submits a copy of an Employment Contract signed by the beneficiary and the petitioner in May 2002 stating that the employee would be hired and employed as a full-time nurse for 40 hours per week, eligible for paid vacation, compensation paid by the petitioner, medical and dental health care benefits, and annual performance reviews.

Precedent provides guidance concerning the issue of permanent, full-time employment offers. 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 director was correct in his decision that the petitioner had failed to establish through evidentiary submissions that the beneficiary would be employed on a permanent, full-time basis; however, the petitioner has overcome that deficiency through the submission of its employment contract between itself and the beneficiary on appeal. The employment contract submitted on appeal details its offer of permanent, full-time employment and illustrates that the petitioner will control the beneficiary's employment through compensation, provision of benefits, and performance oversight.

II. **The petitioner failed to establish the ability to pay the proffered wages.**

The second 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 September 9, 2002. The beneficiary's salary as stated on the labor certification is $24.00 per hour (time and a half for overtime), which equates to $49,920 per annum, based exclusively on the basic rate of pay.

In support of the petition, the petitioner submitted a letter from Bay View Bank stating that its balance in two checking accounts is $174,023.81 in August 2002, and a letter from its certified public accountant stating that its accounts receivable as of July 2002 is $103,359. The petitioner also submitted a contract with a third-party client, Stanford Medical Center (Stanford) with an attached sheet illustrating its billing rates.

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 December 21, 2002, 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.

In response, the petitioner submitted its 2001 corporate tax return, a reviewed but unaudited financial statement for the period ending December 31, 2001, and its quarterly wage reports for the first three quarters in 2002. The quarterly wage reports do not reflect that any wages were paid to the beneficiary from the petitioner. The petitioner's corporate tax returns reflect that the petitioner's net income was -$41,029 and its net current assets were $188,524 in 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 7, 2003, denied the petition. The director noted that the financial statements submitted in response to his request for evidence were unaudited and that the petitioner's negative net income did not illustrate the petitioner's continuing ability to pay the proffered wage, especially since CIS internal records show that the petitioner had five other petitions pending.

On appeal, counsel asserts that the petitioner can demonstrate its continuing ability to pay the proffered wage beginning on the priority date out of its cash in the bank, accounts receivables, other current assets, line of credit, fixed assets, and by replacing the petitioner's temporary workers with the beneficiary. Counsel also asserts that the petitioner is a new entity but has gross income projections that would exceed $2.4 million for 2003 due to the "worsening shortage of nurses" in the United States. Counsel also asserts that the beneficiary would generate income since their third-party clients pay "the amount of $50.00 per hour that the nurse works, and the petitioner in turn pays the nurse $24.00 per hour, a clear profit of $26.00 per nurse per hour."

On appeal, the petitioner submits a copy of its 2002 corporate tax return showing a net income of $2,074 and net current assets of $146,913; reviewed but unaudited financial statements for the period ending December 31, 2002; a letter from California Business Funding stating that it has issued the petitioner a credit line in the amount of $100,000; additional contracts with third-party clients; and a letter from Stanford that recent California state legislation requires a particular nurse-to-patient ratio that requires them to staff more nurses.

At the outset, the unaudited financial statements that counsel submitted with the petition 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. Thus, the petitioner's unaudited financial statements will not be considered.

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 did not establish that it employed and paid the beneficiary the full proffered wage in 2001or 2002.

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). Contrary to counsel's assertions, 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid any wages to the beneficiary. In 2001, the petitioner had a net income of -$41,029 and its net current assets were $188,524. The petitioner's net current assets are greater than the proffered wage of $49,920. However, if the petitioner has filed five other immigrant petitions, thereby obligating itself to pay five additional proffered wages, which presumably are similar to the proffered wage in the instant case, then the petitioner would have to show it could pay $249,600, which is an amount greater than its net current assets[2]. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income or net current assets in 2001.

Likewise, in 2002, the petitioner had a net income of $2,074 and net current assets of $146,913. The petitioner's net current assets are greater than the proffered wage of $49,920. However, if the petitioner has filed five other immigrant petitions, thereby obligating itself to pay five additional proffered wages, which presumably are similar to the proffered wage in the instant case, then the petitioner would again have to show it could pay $249,600 in that year, which is an amount greater than its net current assets[3]. Thus, the petitioner cannot demonstrate its continuing ability to pay the proffered wage out of its net income or net current assets in 2002.

The petitioner states that it can rely upon the beneficiary's generation of income through its contracts with third-party clients. The petitioner would pay the beneficiary $24.00 per hour worked, and in turn the petitioner would receive from its clients $50.00 per hour worked. In essence, the petitioner is claiming that each nurse it places, including the beneficiary, would generate approximately $26.00 per hour worked. Yet the petitioner's contracts with third-party clients also reflect that the petitioner is responsible for the purchase of worker's compensation, professional liability, health insurance, and state and federal payroll taxes.[4] The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover each nurse's salary. Even if CIS accepted the petitioner's contracts as evidence of projected income, however, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel and the petitioner assert that its line of credit also illustrates its continuing ability to pay the proffered wage beginning on the priority date. However, 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).

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[2] An internal CIS database indicates that the petitioner actually filed a total of 19 petitions that are still pending minus a few that were withdrawn. This creates a substantial payroll liability that the petitioner cannot meet through its net income or net current assets.

[3] *See* note 2, *supra*.

[4] No other information has been provided about the benefits the petitioner will provide to the nurses, such as transportation, legal fees, education/licensure fees, etc.

The petitioner's line of credit will not be considered because the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, 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 an integral part of any business operation, 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).

Finally, counsel asserts that the beneficiary would replace the petitioner's temporary employees. At the outset, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is unlikely that the beneficiary could replace temporary workers generating $600,000 in wages. Additionally, no evidence was provided concerning the identity of the petitioner's temporary employees, the position held by specific temporary employees, and any termination of employment already undertaken. If those employees performed other kinds of work than the specific proffered position on the ETA 750A, then the beneficiary could not have replaced him or her or them. As noted above, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

III. **The petitioner failed to submit a posting notice that complies with regulatory requirements.**

The AAO concurs with the director that the posting notice contained in the record of proceeding fails to comply with regulatory requirements. 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 notice that was submitted with the initial petition that states "The above notice has been posted at the Company's Bulletin Board," on the petitioner's letterhead with an address in Millbrae, California. This notice 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 indicated that the beneficiary will work at Sunbridge in Hayward, California not at its location in Millbrae, California. Since 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.[5] The petitioner further failed to include content that any applicant "could provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor," as required under 20 C.F.R. § 656.20(g)(3)(iii). These are additional reasons why the petition may not be approved.

IV. **The petitioner failed to provided evidence that it is offering a wage that complies with the prevailing wage rate.**

Beyond the decision of the director, the regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.[6] The director did not mention this issue in his decision so the AAO is not confident that it was analyzed. CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with DOL's prevailing wage rates. *See* 20 C.F.R. § 656.22(e). DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdatacenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.[7] The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will be under supervision and does not require additional training or specializations other than nursing duties delineated by the DOL's *Occupational Outlook Handbook* at page 269. Upon accessing OWL to ascertain the prevailing wage rate, the DOL provided notice that the petitioner must produce evidence that it is offering the prevailing wage rate from an alternative source in accordance with 20 C.F.R. § 655.31 or 20 C.F.R. § 656.40. The petitioner never submitted evidence into the record of proceeding concerning its source for determining that the proffered wage of $24.00 per hour is the prevailing wage rate for a Level 1

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[5] *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).

[6] *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).

[7] The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

registered nurse position in Alameda County in California, which is where Hayward, California is located, and the location of Sunbridge, the third-party client worksite the petitioner would place the beneficiary.

V. **The petitioner has not established that the beneficiary is qualified for the proffered position or to be categorized under Schedule A, Group I for a registered nurse position.**

Also beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered position or to be categorized under Schedule A, Group I for a registered nurse position[8]. As stated above, according to 20 C.F.R. § 656.10, 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. With the petition, the petitioner provided a copy of the beneficiary's license to practice professional nursing in New Jersey. The petitioner never indicated the beneficiary would work in New Jersey. In response to the director's request for evidence, the petitioner provided a copy of the beneficiary's license to practice professional nursing in California, however, the license was issued on September 27, 2002, which is after the priority date. Thus, the beneficiary did not hold a current unrestricted license to practice professional nursing in the state of California, the state of the beneficiary's intended employment, in compliance with 20 C.F.R. § 656.10, issued prior to the filing of the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this additional reason, the petition may not be approved.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.

[8] *See* note 4, *supra.*