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

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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-04-009-52137 Office: VERMONT SERVICE CENTER Date: SEP 02 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:

SELF-REPRESENTED

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

The petitioner is a healthcare staffing agency. The petitioner states it has a gross annual income of $5.1 million on its visa petition. 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 the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner submits a letter 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 October 10, 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).

The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date. However, upon review, the AAO has identified additional reasons why the petition may not be approved which will be discussed below. 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).

I. **The petitioner failed to establish 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's name is [redacted] and is located at [redacted] Indianapolis, IN [redacted] The petitioner indicated on both the Form ETA 750A and the visa petition that the alien would work at Select [redacted] – Philadelphia, at [redacted] Philadelphia, PA [redacted] A Nurse Staffing Agreement is in the record of proceeding, which was submitted with the initial petition. In the Nurse Staffing Agreement, the petitioner is defined as the "Contractor" and Select Medical Corporation is defined as the "Hospital." In Section 2-4 of the Nurse Staffing Agreement, the obligations to provide employee benefits, withholding of taxes applicable to employees, federal and state wage-hour obligations, social security, worker's compensation, unemployment, insurance, and other governmental contributions, taxes, and insurance are assigned to the Contractor/the petitioner. Also in the record of proceeding is an Employment Contract between the petitioner and the beneficiary. The Employment Contract specifies that the petitioner is responsible for compensation, incentives, and benefits provided to the beneficiary, who will be hired as "a full time [e]mployee to work in [the petitioner's] [c]lient [f]acilities as a [n]urse for a period of not less than **TWO (2) YEARS**." (Emphasis in original). The petitioner is specifically obligated to pay for the beneficiary's CIS processing fees, attorneys' fees, transportation and relocation costs, housing for three months upon entry into the United States, NCLEX review and test expenses, and CGFNS, TOEFL, TWE, TSE, or IELTS review and examination fees. In addition the petitioner would pay for the beneficiary's health care benefits, investment savings plan, and vacation time.

In response to the director's request for evidence, which did not reference the issue of whether or not the petitioner is the actual employer in this case, the petitioner submitted a letter stating that the petitioner "secures long-term contracts with [third party client] medical facilities and in turn provides medical personnel to them under these contracts. The medical personnel are actual employees of [the petitioner] and [the petitioner] bills the medical facilities for their services." The petitioner explained that it bills its third party clients for the work performed by its foreign nurses who indirectly pay their wages. It submitted copies of time cards with a client agreement reflecting employees' reported hours that the petitioner apparently submitted to Select Specialty as well as invoices for the same.

On appeal, the petitioner submits a letter stating that they recruit and sponsor qualified foreign trained nurses on behalf of third party client facilities. The petitioner states that the foreign nurses it recruits, "[a]s a permanent placement they will be absorbed by Select Specialty Hospitals particularly in their Pennsylvania hospital facilities.

Therefore they will be in their payroll and not with [the petitioner]. As a publicly traded company, [redacted] is able to pay the offered wage for these permanently placed nurses. [The petitioner] is compensated with the amount agreed upon by both parties." The petitioner submits an Immigration Services Agreement between the petitioner and Select Specialty Hospital reflecting that the petitioner recruits foreign nurses "for employment at [Select Specialty Hospital]." The Immigration Services Agreement reflects that [redacted] Hospital pays the petitioner a one-time recruitment fee for providing it with foreign nurses. The petitioner also submits a contract between itself and Valley Health System/Universal Health Services that also reflects that the petitioner recruits foreign nurses and places them with [redacted] for a fee and according to sections 12, 17, and 24 of that contract, Valley Health System/Universal Health Services would be the employer of the nurses.

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 problem in this case arises with the petitioner's statements and evidentiary submission on appeal. In direct contradiction of prior statements and evidentiary submissions, the petitioner changed its position and states that the beneficiary would be on third-party client payrolls and the Immigration Services Agreement corroborates that Select Specialty Hospital would be the actual employer of foreign nurses recruited to the United States by the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also states: "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." Because of the inconsistencies and changed positions, the record of proceeding does not clearly establish that the petitioner would be the beneficiary's actual employer directly overseeing the beneficiary's permanent employment, providing wage compensation and benefits and a permanent offer of employment.

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 October 10, 2002. The beneficiary's salary as stated on the labor certification (ETA 750A) is $25.00 per hour ($37.50 for overtime), which equates to $52,000 per annum, based exclusively on the basic rate of pay. The petitioner indicated it would pay the beneficiary $1000 per week on the visa petition that corresponds to the representation on the ETA 750A. On an accompanying posting notice, the petitioner indicates that it would pay $22-26 per hour for the proffered position. The Employment Contract between the petitioner and the beneficiary reflects a pay rate of $25 per hour. In response to the director's request for evidence, the petitioner stated that "[e]ach beneficiary is paid $49,920 annually plus tax related expenses and the client is billed roughly $84,000 annually." An Immigration Services Agreement submitted on appeal reflects that each beneficiary would be paid $12 per hour until licensed to practice nursing.

In support of the petition, the petitioner submitted its reviewed but unaudited financial statements for the periods ending December 31, 2001 and 2000.

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 November 4, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's unaudited financial statements reflected a net annual income of $110,940 and negative net current assets, which, considering the numerous petitions the petitioner filed with CIS, did not establish its ability to pay the proffered wage. The director also requested proof of wages actually paid by the petitioner to the beneficiary.

In response, the petitioner submitted its reviewed but unaudited balance sheets for the periods ending December 31, 2002 and 2001. The petitioner also explained that it pays its nurses through contracts with their third party clients and submits time sheets, invoices, and client checks as evidence of payments received towards the petitioner paying its nurses' wages. The petitioner asserts that it has multi-year contracts with third-party medical facility clients, and as an example, provides a flowchart reflecting that a third party client requires:

> 250 nurses to be phased in over 12 months and continuing for a three year term. The combined revenue is $63M with operating expenses in the $45M range. Total profit over the term of the contract is $18M. The cash flow is aided by a dedicated business line of credit recently secured in the amount of $2.5M. The LOC is a revolving line of credit, secured by the accounts receivable and will grow with demand as the 250 foreign nurses are phased in. This initial phase serves only one of several clients interested in signing additional contracts.

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 March 5, 2004, denied the petition. The director said the petitioner complied with its request for annual reports with accompanying reviewed financial statements but that those annual reports reflected negative net current assets and a net income too low to pay the proffered wages of 70 other pending immigrant petitions.

On appeal, the petitioner asserts that it will not pay the proffered wage but that [redacted] which are public companies listed in the New York Stock Exchange, would pay the proffered wage. In addition to contracts between the petitioner and both third party clients, the petitioner submits one page [redacted] annual report along with its "financial highlights" as well as excerpts [redacted] annual report.

At the outset, 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. Thus, the petitioner's unaudited financial statements will not be considered. The director erred by accepting and requesting reviewed financial statements, since reviewed financial statements are, according to the accountant's accompanying reports, representations from management and not pursuant to an independent accountant's audit.

Thus, the record of proceeding does not contain any regulatory-prescribed evidence in support of the petitioner's continuing ability to pay the proffered wage. Additionally, on appeal, as stated above, the petitioner does not appear to be the employer for this petition or its other pending petitions. Neither [redacted] or [redacted] filed the petition in this case. Because a corporation is a

separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Additionally, the petitioner could not amend the petition to include [redacted] the petitioner in this point in these proceedings as it would be a material change to the petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It also appears that a bona fide job offer is not open with the petitioner, but rather with its third party clients. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). That provision applies to Schedule A petitions according to 20 C.F.R. § 656.22(e). The record also contains no evidence that Select Medical Corporation or Valley Health Systems/Universal Healthcare Services qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Even if the petitioner were still considered the employer, however, it failed to establish that it could pay the proffered wage. 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 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.

The petitioner has not demonstrated that it paid any wages to the beneficiary. It failed to provide regulatory-prescribed evidence, such as a corporate tax return, audited financial statements, or an annual report, to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Because of that failure, the AAO cannot evaluate the petitioner's net income or net current assets[2]. Additionally, the petitioner has been provided with notice that if it has filed other petitions, it must be able to demonstrate its continuing ability to pay the proffered wage beginning on the priority date for all pending petitions from all of those established priority dates.

The petitioner provided inconsistent evidence and representations concerning which entity would pay the proffered wage. Initially it stated it would pay the beneficiary nurses directly after receiving compensation from third-party clients, but on appeal, changed that position and stated that the beneficiaries would be employed and paid directly by the third-party clients. As noted above, *Matter of Ho*, 19 I&N Dec. at 591-592 states: "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." Because of this inconsistency, the AAO is not satisfied that the petitioner has clearly designated one single manner of compensation that it will use. Therefore, the AAO will not evaluate the potential revenue generated through third party client contracts.

The petitioner assert that it has a line of credit that 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).

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

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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.

[2] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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).

The petitioner provided no evidence of its line of credit. 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)).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 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.**

Beyond the decision of the director, the posting notice contained in the record of proceeding fails to comply with regulatory requirements[3]. 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 is on the petitioner's letterhead and indicated that it was posted on the "HR Bulletin Board" in Indianapolis, IN. 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

[3] As noted above, 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 at 1043, *aff'd.* 345 F.3d at 683; *see also Dor v. INS*, 891 F.2d at 1002 n. 9(noting that the AAO reviews appeals on a de novo basis).

location of the beneficiary's employment. The petitioner has indicated that the beneficiary will work in a long-term position for [redacted] in Philadelphia, Pennsylvania. 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.[4] Because of the petitioner's failure to comply with the regulatory requirements governing the posting notice, the petition may also not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

[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).