U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

FILE: WAC 05 112 50100 Office: CALIFORNIA SERVICE CENTER Date: AUG 15 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition and a subsequent motion to reconsider were denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner seeks to employ the beneficiary[1] permanently 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.[2] The director determined that the evidence submitted does not demonstrate that the beneficiary would be employed in a permanent, full-time position, that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, as petitioner has filed petitions for three other beneficiaries, the petitioner has not established its ability to pay the proffered wage to each of the potential beneficiaries. Therefore, the director denied the petition accordingly.

According to the petitioner on the Form I-140, it has been in operations since 2000, employs four personnel and its gross annual revenues were approximately $250,000.00.

On appeal, counsel submits a brief.

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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as professional worker or skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states:

---

[1] The beneficiary's first name is spelled Bindu on her birth certificate and passport but Bindhu in the I-140 petition.

[2] In this case, the Form I-140 petition was filed on March 14, 2005. It has been over two years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable *at the time the alien begins work*" (emphasis added).

> An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the Citizenship and Immigration Services (CIS) issued a memo instructing the Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

The beneficiary's intended place of employment according to counsel and an employment contract between the petitioner and the beneficiary is with the [redacted] **located at** [redacted] Marysville, California,[3] not at the petitioner's business location in Irvine California as is stated on part 6 of the petition and Item 7 of the Application for Alien Employment Certification. According to regulation, 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 U.S. Citizenship and Immigration Services office.

The Application for Alien Employment Certification shall include evidence that the petitioner provided notice of filing the Application for Alien Employment Certification according to 20 C.F.R. § 656.20(g)(1)(ii).

> (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* [emphasis added]. 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).

Therefore, the beneficiary's place of employment according to the petitioner is with the [redacted] ocated at [redacted], Marysville, California, not at the petitioner's business location in

[3] *See* an agreement between the petitioner and [redacted] dated July 1, 2005, and a "Temporary Staffing agreement" between the petitioner and the [redacted] ted July 2005 found in the record of proceeding.

Irvine California as stated in the Application for Alien Employment Certification. There is no evidence that notice of the filing of the Application for Alien Employment Certification was provided at the hospital in Marysville, California.

In this case, the Form I-140 petition was filed on March 14, 2005. Accompanying the petition were, *inter alia*, copies of the following documents: a labor certification application (U. S. Department of Labor Form ETA 750 A/B); and, a "Posting Notice" stating that for the job "registered nurse" the employer is requiring a two year diploma in nursing, a California State license to practice the profession of nursing or eligibility for such license, for a salary between $24.00-$30.00 per hour[4] based upon a 36 to 40 hour work week.[5]

The director issued a request for evidence on May 31, 2005. In response counsel submitted the following documents: an explanatory letter from counsel dated August 18, 2005; a letter from the California State Board of Registered Nursing dated April 29, 2004 stating that the beneficiary has passed the NCLEX-RN examination "and that you [i.e. the beneficiary] have met all other licensing requirements except for submitting a valid U.S. Social Security Number;" the petitioner's U.S. federal income tax returns Form 1120S for 2002 and 2004; a "Notice of Filing Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I" for the position "registered nurse" at the rate of pay of $24.00 with a notation it was posted July 11, 2005 and then removed July 22, 2005; an agreement between the petitioner and [redacted], dated July 1, 2005; a "Temporary Staffing agreement" between the petitioner and the Fremont-Rideout Health Group dated July 2005; a "Contract of Employment" between the petitioner and the beneficiary dated January 8, 2005; the beneficiary's birth certificate; the beneficiary's "Pre-Degree Examination' certification from Mahatma Gandhi University (no country of origin noted on the certificate); the beneficiary's "Certificate of General Nursing and Midwifery" from the Kerala Nurses and Midwives Council noted received after the "prescribed course" in general nursing and midwifery between January 1993 and February 1996; the beneficiary's marriage certificate; a biographic page from the beneficiary's passport; and copies of web pages from the petitioner's website <http://www.accentnetworks.tv> accessed June 27, 2003.

Accompanying the appeal, counsel submits a legal brief. Counsel asserts that the petitioner is a California search and recruitment company that has entered into an agreement with "Rideout Memorial Hospital to provide registered nurses for "permanent placement"[6] or under a contract of lease – the so called "temporary

---

[4] It has been approximately two years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[5] The wage rate: $24.00 per hour (36 hour week equates to $44,928.00 yearly; 40 hour week equates to $49,920.00 yearly); $30.00 per hour (36 hour week equates to $56,160.00 yearly; 40 hour week equates to $62,240.00 yearly). The posting and removal dates were left blank in the Notice, therefore this Notice is a nullity as there is no evidence that the Notice was ever posted. There is also a second different posting notice in the record of proceeding. The petitioner submitted a "Notice of Filing Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I" for the position "registered nurse" at the rate of pay of $24.00 with a notation it was posted July 11, 2005 and then removed July 22, 2005. As the Notice was filed after the priority date (i.e. March 14, 2005), this second Notice is also a nullity under the regulations. *See* 20 C.F.R. § 656.20(g)(3) and §656.22 (b)(2).

[6] Under "permanent placement," counsel asserts, "permanent placement requires the petitioner to locate suitable candidates for the Hospital and the Hospital then becomes the employer."

placement." According to counsel, the beneficiary was recruited under "temporary placement" in which the petitioner is the employer but that the employment contract between the beneficiary and the petitioner is for full time employment.

Counsel cites the cases of *Matter of Ord*, 18 I&N 285 (BIA 1982), and *Matter of Smith*, 12 I&N 772 (BIA 1968) in support of his assertion.[7]

Ability to pay the proffered wage

As already stated, the director found that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, as petitioner has filed petitions for three other beneficiaries, the petitioner has not established its ability to pay the proffered wage to each of the potential beneficiaries.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

---

[7] In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

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 to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[8]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 21, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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 has not established that it employed and paid the beneficiary the full proffered wage from the priority 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). Counsel asserts that the petitioner's gross revenues are evidence of its ability to pay the proffered wage. Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

---

[8] The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- In 2002, the Form 1120 stated net income[9] of $68,880.00.
- In 2004, the Form 1120 stated net income of $23,613.00.

Since the proffered wage is $24.00 per hour (a 40 hour week equates to $49,920.00 yearly) the petitioner did not have the ability to pay the beneficiary the proffered wage from an examination of its net income for year 2004.[10]

If the net income the petitioner demonstrates it had available during the 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.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2004 were $17,101.00.

Therefore, for tax year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition, the petitioner has stated by counsel's letter dated August 18, 2005, that it previously filed Immigrant Petitions for Alien Worker (Form I-140) for five other workers.[12] CIS electronic database records

---

[9] **IRS Form 1120S, Line 21 that states the petitioner's ordinary business income or loss.** Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005).

[10] No tax information was submitted for year 2003.

[11] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[12] CIS file identification numbers: WAC 05 083 50150; WAC 05 174 53237; WAC 05 070 53970;

show that the petitioner filed I-140 petitions on behalf of three other beneficiaries. Although the evidence in the instant case has not indicated financial resources of the petitioner greater than the beneficiary's proffered wage for year 2004, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

Counsel cites the case precedents of *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986), and *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985) concerning the ability to pay the proffered wage. CIS also relies on these cases for the reasons stated above. Counsel also cites the case precedent of *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) for the proposition that in determining the ability to pay the proffered wage the "viability" of the business is an important factor that and also counsel contends that the beneficiary's services will increase the income and business prospects of the petitioner.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

We find that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition,[13] and, as the petitioner has filed petitions

---

WAC 03 182 50586; LIN 02 143 50947.

[13] Since it has been over a year since the appeal was taken, the 2005 tax returns of the petitioner should have been available as evidence of the petitioner's ability to pay the proffered wage.

for three other beneficiaries, the petitioner has not established its ability to pay the proffered wage to each of the potential beneficiaries.

"Employment" means permanent full-time work by an employee for an employer

The director determined that the evidence submitted does not demonstrate that the beneficiary would be employed in a permanent, full-time position. According to the regulation at 20 C.F.R. § 656.3,[14] "Employment" means permanent full-time work by an employee for an employer.

As already stated, according to counsel, the beneficiary was recruited under "temporary placement" in which the petitioner is the employer but that the employment contract between the beneficiary and the petitioner is for full time employment.

Upon appeal, counsel has submitted additional evidence that includes the following documents: an explanatory letter dated September 27, 2005; a "Contract of Employment' between the petitioner and the beneficiary dated January 8, 2005; a "Temporary Staffing Agreement" between the petitioner and the Fremont-Rideout Health Group dated July 2005; and, an agreement between the petitioner and [redacted] dated July 1, 2005 to provide search and recruitment services.

As already stated, counsel asserts that it is a search and recruitment company located in Irvine, California that has entered into an agreement with "Rideout Memorial Hospital to provide registered nurses for "permanent placement"[15] or under a contract of lease – the so called "temporary placement." The designation of "temporary staffing" to identify what the petitioner asserts is an arrangement that is full time permanent employment by the beneficiary for the petitioner may be considered a misleading description since the employment is, according to the petitioner, of a permanent not temporary nature.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director

---

[14] The regulation at 20 C.F.R. § 656.3 states in pertinent part:

> "Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.
>
> * * *
>
> "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. For purposes of this definition an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

[15] Under "permanent placement," counsel asserts, "permanent placement requires the petitioner to locate suitable candidates for the Hospital and the Hospital then becomes the employer."

looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

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 to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

Counsel has submitted a "Temporary Staffing Agreement" between the petitioner and the Fremont-Rideout Health Group dated July 2005. According to the agreement, the beneficiary will be placed at the hospital and the hospital will pay the petitioner for the beneficiary's services. A provision of the agreement (Section C. 5.) states "Accent shall reassign or dismiss any employee [i.e. the beneficiary], at client's written request, for cause ...." According to Section F. 3. both the petitioner and the beneficiary provide services to the hospital as an independent contractor.

Counsel has submitted a "Contract of Employment" between the petitioner and the beneficiary dated January 8, 2005. Although the petitioner is referred to as an employer who will employ the beneficiary as a registered nurse "at various medical worksite locations in the USA", there is no agreement by the petitioner to pay the beneficiary in that contract.

According to counsel, the beneficiary was recruited under "temporary placement" in which the petitioner is the employer but that the employment contract between the beneficiary and the petitioner is for full time employment for three years without provision for renewal. We find that by the employment agreement there is no agreement for permanent employment. By the evidence submitted, the petitioner is planning to outsource the beneficiary to a third party without retaining control over the beneficiary's employment.

Beyond the decision of the director, the petitioner has identified itself as a hospital in the Application for Alien Employment Certification and the I-140 petition. According to a "Contract of Employment" dated January 8, 2005, its tax returns and company documentation submitted, the petitioner represents itself as a California search and recruitment company not a hospital. 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. 582, 591 (BIA 1988).

The posting and removal dates were left blank in the Notice, submitted with the petitioner, therefore this Notice is a nullity as there is no evidence that the Notice was ever posted. There is also a second different posting notice in the record of proceeding. The petitioner submitted a "Notice of Filing Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I" for the position "registered nurse" at the rate of pay of $24.00[16] with a notation it was posted July 11, 2005 and then removed July 22, 2005. As the Notice was filed after the priority date (i.e. March 14, 2005), this second Notice is also a nullity under the regulations. *See* 20 C.F.R. § 656.20(g)(3) and §656.22 (b)(2). These deficiencies present an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the

[16] If this matter is pursued, the hourly rate of $24.00 stated in the notice should be examined to determine if that rate is at least 95% of the prevailing wage for the occupation of registered nurse in that location.

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).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. We find that the evidence submitted does not demonstrate that the beneficiary would be employed in a permanent, full-time position by the petitioner based upon the evidence submitted as found in the record of proceeding.

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 remains denied.