identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY

[redacted]

FILE: WAC 04 061 50506 Office: CALIFORNIA SERVICE CENTER Date: MAR 30 2007

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the instant preference visa petition. Pursuant to a motion the director reopened the matter and denied the petition again. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and had not established that the notice of the proffered position was posted in accordance with the requirements of 20 C.F.R. § 656.20(g)(1). The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed, makes a specific allegation of error in law or fact, and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 20 C.F.R. § 656.20(g) states, in pertinent part,

> Any notice of the filing of an Application for Alien Employment Certification shall:
>
> (1) 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 regulation at 8 C.F.R. § 204.5(g)(2) states,

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 CFR § 204.5(d). Here, the petition was filed with CIS on December 31, 2003. The proffered wage as stated on the Form ETA 750 is $25 per hour, which equals $52,000 per year.

On the petition, the petitioner stated that it was established on August 7, 1988 and that it employs 400 workers. The petition states that the petitioner's gross annual income is $30,000,000 but does not state the petitioner's net annual income in the space provided. On the Form ETA 750, Part B, signed by the beneficiary on October 23, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary at [redacted]

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, (2) 2005 Form 941 Employer's Quarterly Federal Tax Returns of various corporations,[2] (3) a letter

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

[2] Although the petitioner provided little information about it, the record appears to indicate that the petitioner either owns or operates Burlingame Hacienda at the address the petitioner gave as its own. Evidence pertinent to various other corporations and nursing facilities they operate has been submitted in support of this petition. Those corporations and facilities are Nadhi Incorporated dba Gateway Care and Rehabilitation Center, Nadhan Incorporated dba Windsor House Convalescent Hospital and Creekside Convalescent Mental Health and Rehabilitation Center, Sandhya Incorporated dba Firecrest Convalescent Hospital, Kayal Incorporated dba Baypoint Health Care Center, Thekkek Health Services Incorporated dba Martinez Convalescent Hospital, Paksn Incorporated dba Paksn Incorporated, Sagar Incorporated dba La Mariposa, Aakash Incorporated dba Park Central Care and Rehabilitation Center, Karma Incorporated dba Manteca Care and Rehabilitation Center.

dated November 5, 2003 from the petitioner's vice-president, (4) a letter dated November 5, 2003 from the petitioner's CFO, (5) a letter dated May 28, 2005 from the petitioner's vice-president, (6) a letter dated July 12, 2005 from the petitioner's president, (7) a letter dated August 1, 2005 from the petitioner's vice-president, (8) a list of the various nursing facilities described in this decision, (9) copies of business licenses of various nursing facilities, and (10) the compiled 2004 financial statements of Creekside Convalescent Hospital, a division of Nadhan Incorporated. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.[3]

Pertinent to the posting of the proffered position, the record contains four notices of the proffered position and business licenses of various skilled nursing facilities. The record contains no other evidence pertinent to the posting of the proffered position.

In a letter dated July 14, 2005 counsel stated,

> [redacted] Inting [Not the instant beneficiary's name] will be employed at the CareSystems, Inc./Karma, Inc. dba **Manteca Care and Rehabilitation Center**, located at 410 Eastwood Avenue, Manteca, CA 95336.

[Emphasis in the original.]

Counsel also stated that Karma/Manteca is a wholly-owned subsidiary of the petitioner.

The petitioner's tax return shows that it is a corporation, that it incorporated on October 3, 1988, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from July 1 of the nominal year to June 30 of the following year. During its 2003 fiscal year, which ran from July 1, 2003 to June 30, 2004, the petitioner declared taxable income before net operating loss deductions and special deductions of $95,792. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $48,906 and no current liabilities, which yields net current assets of $48,906.

The petitioner's vice-president's November 5, 2003 letter states, *inter alia*, that the petitioner employs over 400 workers and is able to pay the proffered wage. The November 5, 2003 letter of the petitioner's CFO also states that the petitioner employs 400 workers and has the ability to pay the proffered wage.

The quarterly tax returns show that during the first quarter of 2005 Nadhan Incorporated had 290 employees and paid wages of $1,936,212.49; Aakash Incorporated had 99 employees and paid wages of $721,510.77, Nadhi Incorporated had 100 employees and paid wages of $672,962.13, Karma Incorporated had 145 employees and paid wags of $1,042,391.68, Kayal Incorporated had 114 employees and paid wages of $819,408.98, Sandhya Incorporated had 57 employees and paid wages of $338,893.86, Paksn Incorporated had seven employees and paid wages of $87,721.47, Thekkek Health Services Incorporated had 31 employees and paid wages of $180,565.50, and the petitioner, Care Systems Incorporated, had 13 employees and paid

---

[3] In fact, much of the evidence submitted is irrelevant to the petitioner's ability to pay the proffered wage for reasons that will be explained below.

wages of $66,591.93. Another quarterly return shows that Creekside & Winsor House Convalescent Hospitals paid wages of $2,032,348.18 during the second quarter of 2005.

The petitioner's vice-president's May 28, 2005 letter lists ten convalescent hospitals managed by the petitioner and the number of staff members allegedly employed at those facilities. The letter states that the ten facilities employ between 15 and 218 workers, for a total of 1,003. If the vice-president meant to assert that all of those workers are, ultimately, employees of the petitioner, then why the petition in this matter stated that the petitioner employs 400 workers, rather than over 1,000, is unknown.

The petitioner's president's July 12, 2005 letter states that the petitioner owns and operates the ten named convalescent hospitals. It also states that the petitioner has been paying $200,000 per month for the services of nurses provided by temporary agencies at a marked-up rate, but provided no documentary evidence in support of that assertion.

The petitioner's vice-president's August 1, 2005 letter stated that the petitioner has been relying on temporary agencies to provide nurses for $60 per hour, and that hiring nurses from abroad will save the petitioner approximately $50,000 per month. The vice-president further stated that "[the beneficiary] will be employed at one of our various facilities."

One of the business licenses submitted states that Burlingame Hacienda operates at 1012 El Camino Real in Burlingame, California and is owned by the petitioner, Care Systems, Incorporated.

The other business licenses provided are those of the 11 facilities, ten of which the petitioner's president states the petitioner owns and operates. None of those business licenses show that the petitioner, Care Systems Incorporated, owns those facilities. The list of the various nursing facilities shows the number of workers they employ. That list states, for instance, that Burlingame Hacienda employs 15 workers.

Two of the notices of posting of the job opportunity state that they were posted from November 10, 2003 to November 25, 2003. Although those notices are not identical, they both are presumably submitted to satisfy the posting requirement for the proffered position. One of those notices states that it was posted, "in conspicuous places where it [was] unobstructed and clearly visible to all employees." The other states that it was posted "in an area where it [was] clearly visible to all. Those notices do not state the name of the business, the street address, or the city where they were posted. Why the petitioner would have prepared two different notices on the same date for posting at the location of intended employment is unknown to this office.

An attestation at the bottom of another notice of the proffered position, dated May 25, 2005, states that it was posted from May 1, 2005 to May 15, 2005. That attestation further states, "**SPECIFIC LOCATION(S) POSTED**: See enclosed list of locations." [Emphasis in the original.] A list of ten nursing facilities was submitted with that notice. The petitioner, Care Systems Incorporated, is not one of those facilities and none of those facilities is at [redacted] California, the location where, according to the Form I-140 petition and the Form ETA 750 labor certification, the beneficiary would ostensibly be employed.

[4] The record reflects both [redacted] the address of the petitioner.

Another notice of the proffered position states that it was posted at [redacted] California from June 15, 2005 to June 30, 2005. The final notice of the proffered position, dated July 18, 2005, states that it was posted from July 1, 2005 to July 15, 2005 on a bulletin board at Creekside Convalescent & Mental Health Center in Santa Rosa, California.

The director denied the petition on June 16, 2005. In that decision the director stated, "at least two other petitions have been filed at roughly the same time for registered nurses to work at Burlingame Hacienda."

On August 24, 2005 the director reopened the matter pursuant to a motion and denied the visa petition again. In that decision the director stated, "[CIS] records show that the petitioner's has multiple pending immigrant petitions with the same priority year as this."

On appeal, counsel asserted that the other corporations pertinent to which evidence was submitted also own nursing facilities and are owned by [redacted] Counsel stated that the corporations are separate for limited liability purposes. In a brief submitted to supplement the appeal counsel reiterated various arguments previously interposed.

With the appeal counsel submitted another Form I-140 visa petition for the instant beneficiary, listing Nadhan Incorporated dba Creekside Convalescent & Mental Health Center, in Santa Rosa, California, as the petitioner. In the brief counsel stated that this is the location at which the petitioner would employ the beneficiary.

A petitioner may not make material changes to a petition that has already been filed in an effort to render a deficient petition approvable. *In re Izummi*, 22 I&N Dec. 169, 175. This petition will be adjudicated as submitted. The petitioner in the instant case remains Care Systems Incorporated.

Although counsel and other representatives of the petitioner have attempted to persuade CIS that the petitioner is a holding company[5] and owns the various other nursing facilities named throughout this decision,[6] the evidence does not support those assertions.[7]

---

[5] In his letter of July 14, 2005 counsel stated that Karma/Manteca is a wholly-owned subsidiary of the petitioner. In his August 1, 2005 letter the petitioner's vice-president stated that the petitioner is the holding and management company for ten named nursing facilities.

[6] The petitioner's president stated in his July 12, 2005 letter that the petitioner owns ten convalescent hospitals. The petitioner's vice-president stated in his August 1, 2005 letter that the beneficiary would be employed at one of the petitioner's various facilities.

[7] Corporations own most of the nursing facilities in question. Those corporations might be subsidiaries of the petitioner, although no convincing evidence in the record demonstrates it. One of the business licenses submitted, however, states that the "Winsor (sic) House Conv. Hospital" is owned directly by Prema and Anthony Thekkek, rather than by the petitioner, Care Systems Incorporated, or by Nadhan Incorporated, as other evidence in the record indicates, or by any subsidiary of the petitioner.

Another of the business licenses submitted shows that the petitioner owns and operates Burlingame Hacienda

Counsel asserted that the various facilities owned by [redacted]re separately incorporated for liability reasons. Counsel's statement is manifestly credible and reasonable. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The owners of a corporation are thus shielded from liability. That is the reason that corporations are generally formed.

It is also the reason that the evidence pertinent to other corporations, absent convincing evidence that the petitioner itself, Care Systems Incorporated, owns them, is not relevant to any material issue in this case. As the owners, stockholders, and others are not obliged to pay the petitioner's debts, their income and assets, including other corporations, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter. In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage." The petitioner must show the ability to pay the proffered wage out of its own funds.[8]

The adjudication of the instant petition has been complicated, perhaps inadvertently, by the failure of counsel to simply state which of the various corporations proposes to employ the beneficiary and to pay her the proffered wage,[9] and to avoid altering that statement during the course of these proceedings. If the

---

at [redacted] As a holding company's activities are confined to holding stock in other companies and does not directly engage in management, this is evidence that the petitioner is not a holding company. Further, the petitioner's 2003 tax return states that it paid Line 13, Salaries and wages of $1,004,063 during that fiscal year. During the first quarter of 2005 the petitioner had 13 employees and paid wages of $66,591.93. This is inconsistent with the petitioner being a holding company, which would have no employees and pay no wages.

Finally, on appeal, counsel stated that the other care facilities are owned [redacted] rather than being owned by the petitioner.

[8] This scenario might be altered if the evidence did, in fact, demonstrate that the petitioner owns the various other corporations. In that event their income and assets might be considered to be available to the petitioner. Because the evidence in this case does not convince this office that the petitioner owns any of the other corporate entities named in this case, however, this office need not reach that issue.

[9] The original Form I-140 petition and Form ETA 750 labor certification state that the petitioner in this case is Care Systems Incorporated and that it will employ the beneficiary at [redacted] California. In his July 14, 2005 letter counsel stated that [redacted]Inting would be employed at the Manteca Care and Rehabilitation Center in Manteca, California. The petitioner's vice-president's August 1, 2005 letter stated that the petitioner has been relying on temporary agencies to provide nurses for $60 per hour, and that hiring nurses from abroad will save the petitioner approximately $50,000 per month. The vice-president further stated that "[the beneficiary] will be employed at one of our various facilities." In his August 1, 2005 the petitioner's vice-president stated that the beneficiary would work "at one of our various facilities. The July 18, 2005 posting appears to indicate that the beneficiary would work at Creekside Convalescent and Mental Health Rehabilitation Center in Santa Rosa, California. Another posting appears to indicate that the beneficiary would be employed at [redacted] California. The May 25,

beneficiary would be employed by some entity other than the petitioner, then the instant petition is not approvable because the petitioner does not intend to employ the beneficiary in accordance with the terms of the instant labor certification nor, in fact, at all. The remainder of the analysis of the facts of this case will be based on the assumption that the petitioner, Care Systems Incorporated, proposes and intends to employ the beneficiary.

Counsel's reliance on the unaudited financial statements in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, those compiled financial statements pertain to Creekside Convalescent Hospital, a division of Nadhan Incorporated, rather than the petitioner in this case. For reasons explained in detail above, evidence pertinent to the finances of Nadhan Incorporated and its divisions has not been shown to be relevant to the instant case. The unaudited financial statements will not be considered.

Counsel and other representatives of the petitioner have stated that the petitioner spends $200,000 monthly and that $50,000 of that would be saved if the petitioner were able to replace its contract nurses with employees. No reliable evidence, however, was submitted to support those statements. Especially in view of the fact that the petitioner and counsel blur the distinction between the petitioner and other corporations, this office is not convinced that the amounts asserted, or any part of them, pertain to the petitioner. None of those amounts that the petitioner might save will be included in the analysis pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (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 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by

---

2005 posting of the proffered position appears to indicate that the beneficiary might be employed at any of ten separately-owned care homes. The Form I-140 and Form ETA 750 submitted on appeal, and counsel's statement in the appeal brief, indicate that Nadhan Incorporated dba Creekside Convalescent Mental & Rehabilitation Center would employ the beneficiary in Santa Rosa, California.

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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically[10] shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is $52,000 per year. The priority date is December 31, 2003. 8 C.F.R. § 204.5(g)(2) states that a petitioner that employs 100 or more workers may be excused from the obligation of

[10] The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

demonstrating its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

In the instant case, apparently seeking to take advantage of that provision, the petitioner and counsel have stated, at various times, that the petitioner employs 400 workers and that the petitioner employs **more** than 400 workers. The evidence submitted, however, is insufficient to demonstrate that the petitioner itself, Care Systems Incorporated, employs that many workers. Some of the evidence, in fact, appears to indicate that counsel and the petitioner are counting all of the employees of all of the various corporations named in this decision as employees of the petitioner.

The petitioner's Form 941 quarterly return for the first quarter of 2005 indicates that the petitioner, Care Systems Incorporated, had 13 employees and paid wages of $66,591.93 during that quarter.[11] The table of entities submitted shows that Burlingame Hacienda has 15 employees. Burlingame Hacienda is the nursing facility shown on one of the business licenses of record and is located at the petitioner's address where the petitioner stated, on the Form I-140 and the Form ETA 750, that the beneficiary would be employed.

This office finds that the petitioner does not employ 100 or more workers and, pursuant to 8 C.F.R. § 204.5(g)(2), is obliged to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's 2003 tax return, which covers the fiscal year that ran from July 1, 2003 to June 30, 2004, shows that during that fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of $95,792. That amount is greater than the wage proffered in this case. If the petitioner were obliged to show only the ability to pay the $52,000 annual proffered wage of the instant beneficiary, it would have acquitted that responsibility.

The June 16, 2005 decision of denial, however, stated, "at least two other petitions have been filed at roughly the same time for registered nurses to work at Burlingame Hacienda." Further, the August 24, 2005 decision

---

[11] Those figures raise an additional issue that was not discussed in the decision of denial. That the petitioner paid its 13 employees $66,591.93 during the first quarter of 2005 indicates that it paid them an average of $5,122.46 during that quarter. That amount, extrapolated to an annual wage, equals $20,489.84. Given that the predominant wage for nurses in the petitioner's area is $52,000 annually, this indicates that some of the petitioner's nurses may be underemployed. The record does not make clear whether the petitioner proposes to pay the beneficiary for full-time employment regardless of whether it is able to utilize the beneficiary's services full-time, or anticipates paying only for those hours during which it requires her services.

The petitioner is not permitted, under the instant visa category, to maintain a pool of workers whose pay is contingent upon the need for their services and their placement at a facility. By filing a petition pursuant to the instant visa category the petitioner is stating that it will employ the beneficiary full-time, and the petitioner must guarantee the beneficiary a full-time wage and pay it even if full-time employment is unavailable.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded an opportunity to respond, this office does not rely on that issue in this decision. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

on the motion stated, "[CIS] records show that the petitioner's has multiple pending immigrant petitions with the same priority year as this."

On appeal counsel did not dispute the assertions that the petitioner has, or has had, multiple petitions pending. Counsel argues, instead, that CIS is unable, pursuant to the regulations governing ability to pay the proffered wage, to take notice of the fact that a petitioner has multiple petitions pending.

The regulations require the petitioner to show the ability to pay the proffered wage. If CIS is aware of other pending petitions, CIS must, in order to determine the petitioner's ability to pay the instant beneficiary's wages, take into account any and all other wage obligations that could possibly result from the other pending petitions in order to determine whether the job offer is credible. As an example, a petitioner with $52,000 in net profits cannot show the ability to pay the wages of an infinite number of workers at $52,000 each per annum nor, in fact, more than one. Thus the regulations require CIS to take notice of other pending petitions when evaluating the petitioner's ability to pay the proffered wage.

While details pertinent to the other petitions pending are not of record, this office notes that the decision of denial stated that the petitioner filed at least two other petitions at the same time as this one and the decision on the motion stated that the petitioner filed multiple petitions during the same priority year.

In order to further analyze the petitioner's ability to pay the proffered wage this office must consider the other pending petitions. If the proffered wage in the two other petitions pending is similar to the proffered wage in the instant case, $52,000,[12] the petitioner must demonstrate the ability to pay at least $156,000 during each salient year.

The petitioner failed to demonstrate that it had the ability to pay the aggregate amount of the three proffered wages out of its net profits during its 2003 fiscal year. The petitioner's end-of-fiscal-year 2003 net current assets, $48,906, were also insufficient to meet that obligation. The petitioner has submitted no reliable evidence of any other funds available to it during its 2003 fiscal year with which it could have paid additional wages. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which the petitioner has not overcome on appeal.

The remaining issue in this case is whether the proffered position was posted in accordance with the requirements of 20 C.F.R. § 656.20(g).

The petitioner in this matter is Care Systems Incorporated and the petition states that it would employ the beneficiary at [redacted] California. If this is not so, then, as was explained above, the instant petition may not be approved. This analysis is continuing based on the assumption that the petitioner would employ the beneficiary at that Burlingame, California address.

---

[12] If these assumptions are wrong and prejudice the petitioner's case they may be addressed on motion. If the petitioner attempts to overcome the instant petition on motion, however, it must provide information pertinent to all pending cases before CIS, all recently approved cases, and all denied cases. That information shall include the case numbers and receipt numbers, the beneficiary's names, the amount of the proffered wage, the priority date of the petition, what the last action taken on that case was and when it was taken.

Although the petitioner submitted numerous notices of the proffered position none of those notices appear to have been posted at [redacted], California, the location where the petitioner proposes to employ the beneficiary. The various postings of the proffered position do not, therefore, conform to the requirements of 656.20(g)(1). The visa petition was correctly denied for this additional reason, which has not been overcome on appeal.

The appeal will be dismissed because the petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date and has not shown that the notice of the proffered position was posted in accordance with the requirements of 20 C.F.R. § 656.20(g). This office notes that the dismissal of this appeal is without prejudice toward any further motion, or a new visa petition for the beneficiary, except that counsel is cautioned that any new petition must be filed by the specific entity that proposes to employ the beneficiary, that the location at which that beneficiary would actually work must be identified, and that the notice of the proffered position must be posted in accordance with the requirements of 20 C.F.R. § 656.20(g) at the location of the intended employment. Counsel shall further demonstrate, within the strictures of 8 C.F.R. § 204.5(g)(2), that the petitioner, the particular entity that will employ and pay the beneficiary, has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.