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

PUBLIC COPY

[redacted]

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FILE: EAC 04 009 52176 Office: VERMONT SERVICE CENTER Date: AUG 2 6 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 immigrant visa petition is denied.

The petitioner is a medical staffing service. It seeks to employ the beneficiary 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. The director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner submits a brief and additional 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, 2003. 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).

In its petition, the petitioner stated that it was established in October of 1999, had more than a hundred employees, and had a gross annual income of $5,100,000 and a net annual income of $600,000. In its initial petition, the petitioner submitted a letter of support that stated that Kindred Hospital of San Diego, San Diego, California, wished to employ the beneficiary as a registered nurse. The petitioner also submitted its brochure, documentation on its business incorporation in the state of Indiana, and certificates with regard to assumed business names. The petitioner also submitted a financial statement for December 31, 2000 and December 31, 2001, produced by [redacted] and Company, L.L.P., described in the document as independent accountants in Indianapolis, Indiana. The accounting company stated in its cover letter that the review done

for the petitioner was substantially less in scope than an audit in accordance with generally accepted auditing standards. The submitted financial statements indicated that the petitioner had net income of $15,321 in 2000, and net income in 2001 of $110,940. The petitioner then submitted an employment contract between itself and the beneficiary. This contract states that the petitioner employed the beneficiary and that the beneficiary accepted employment with the petitioner for a period of two years beginning upon start of work, and with an automatic renewal for successive one year terms unless thirty days written notice is given by either party. The contract further stated: "Employee is hereby hired to perform services for employer as staff Nurse under the direct supervision of the department of nursing of Employer and, in the capacity, primarily to provide professional nursing services to such health care facilities or organizations that the Employer shall from time to time designate." [sic]. The petitioner also submitted evidence with regard to the beneficiary's passing the NCLEX-RN examination in August 2003 and her possession of a CGFNS certificate as of July 16, 2002.

The petitioner also submitted a document entitled "Supplemental Nursing Staffing Agreement". This Agreement is dated March 4, 2003 and is between Kindred Hospital, San Diego, and Jasneek Medical Staffing, 3160 Camino del Rio South, San Diego, California.[1] The agreement states that the petitioner refers nursing personnel to Kindred Hospital for temporary staffing, and that the petitioner shall screen all nursing personnel before making referrals to the hospital. The Agreement also states: [Petitioner] and all nursing personnel referred by [the petitioner] shall be independent contractors, and nothing herein shall be construed as creating a partnership, joint venture or employment arrangement". The Agreement also stated that the petitioner shall assume sole and exclusive responsibility for the payment of wages to personnel, be responsible for withholding federal and state income taxes, contributing to federal and Social Security taxes, unemployment insurance, and for maintaining workers' compensation coverage as required by the Labor Code.

Finally the petitioner provided a posting notice for the position. This notice is signed by the petitioner's president and states that the posting notice appeared for ten (10) consecutive business days from August 4, 2003 to August 15, 2003 on the Human Resources Bulletin Board.[2]

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 3, 2003, the director requested additional evidence pertinent to that ability. The director noted that the previewed financial statements previously submitted by the petitioner indicated a net annual income of $110,940, total current assets of $553,143, and total current liabilities of $718,281 for the tax year 2001. The director stated that it did not appear that the petitioner had the ability to pay the proffered wage of $49,920, and that furthermore, it appeared that the petitioner had filed numerous petitions with Citizenship and Immigration Services (CIS). The director requested that the petitioner submit additional evidence that it had the ability to pay the proffered wage as of October 10, 2003, the date the petition was filed, and to the present. The director also requested that the petitioner provide documentation to establish that it had the ability to pay all the other beneficiaries in

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[1] The record is devoid of any information as to the business relationship between the petitioner that is located in Indiana and the San Diego office. None of the assumed business licenses submitted to the record is for the San Diego office.

[2] Since the posting notice is on the petitioner's letterhead, it is presumed that the posting notice was posted on the petitioner's bulletin board in Indiana, rather than a specific hospital bulletin board.

pending I-140 petitions. The director specifically requested that the petitioner submit its 2002 federal income tax return with all schedules and attachments, or alternatively, submit its annual report for 2002, accompanied by audited or reviewed financial statements. Finally the director requested copies of the beneficiary's Form W-2, if the petitioner employed the beneficiary in 2002.

In response, the petitioner submitted a letter that described the petitioner's business operations. The petitioner stated that it secures long-term contracts with medical facilities and in turn provides medical personnel to medical facilities under these contracts. The petitioner stated that the medical personnel are actual employees of the petitioner and the petitioner bills the medical facilities for their services. The petitioner further stated that the beneficiaries are not paid out of the petitioner's existing profits, but rather through the medical facility contracts. The petitioner stated that each beneficiary was paid $49,920 annually and each medical facility was billed roughly $84,000 for each hire on an annual basis. The petitioner submitted examples of a time sheet; invoice and client check as further evidence of the billing and payment practices of foreign nurses. The petitioner also submitted a flow chart to illustrate its cash flow generated by the employment of foreign nurses. The petitioner also stated that its cash flow was aided by a dedicated business line of credit recently secured in eh amount of $2.5 million. The petitioner described the line of credit as a revolving line of credit, secured by its accounts receivable and with growth potential due to the phasing in of 250 foreign nurses based on the current demand for nurses. Finally, the petitioner submitted a financial statement reviewed by its accountants for the year 2002, which indicated a net income of $207,781.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and, on March 5, 2004, denied the petition. The director further stated that CIS computer records indicated that the petitioner had filed approximately 70 I-140 petitions, and that the petitioner would be required to substantiate that it could pay these other beneficiaries' proffered wages based on the petitioner's financial records.. The director noted that a great number of these petitions had been approved, which would verify that the petitioner presently did not have the capability to pay the remaining prospective beneficiaries.

On appeal, the petitioner describes the operations of another of its clients, Select Medical Corporation. The petitioner states that this client has more than 100 facilities nationwide with a net income of $44 million in 2002 alone. The petitioner states that it will provide permanent placement for its foreign nurses based on its contract with Select Medical Corporation. The petitioner further states that as a permanent placement, the beneficiaries will actually be absorbed by Select Specialty Hospital, particularly in their Pennsylvania hospital facilities. As a consequence, the petitioner continues, the beneficiaries will be on the payroll of Select Specialty hospital and not on the petitioner's payroll. The petitioner states that, as a publicly traded company, select Medical Corporation is able to pay the proffered wages for permanently placed nurses. The petitioner also states that Universal Health Services, Valley Health System, another public company traded on the New York Stock Exchange, has contracted the petitioner to recruit and sponsor 100 foreign nurses to be permanently placed in their medical facilities.

The petitioner submits documents it describes as contracts between itself and Select Medical Corporation, and also between itself and Valley Health System/Universal Healthcare Service, Las Vegas, Nevada. The petitioner also submits pages from the annual reports for 2002 for Select Medical Corporation, and Universal Health Services, Inc. Finally, the petitioner submits a letter of authorization dated December 16, 2003, and signed by [redacted] System Director, Human Resources, Valley Health System, Universal Health Services (parent company), to recruit and sponsor on their behalf 100 foreign nurses to obtain their United States resident visas or necessary visas to work legally in the United States.

With regard to the documents submitted by the petitioner on appeal, the document signed by both the petitioner and Valley Health System, Las Vegas, Nevada, is called an Agreement To Provide Services and describes the petitioner as an agent contracted to refer and provide licensed nurses in the state of Nevada, and that the petitioner shall not offer employment or make promises to the referring employees on behalf of Valley Health System. The document signed by both Select Specialty Hospital, Inc, and the petitioner, titled "Immigration Services Agreement" indicates that the petitioner is retained by the company as an independent contractor to provide permanent resident nurses who meet specific education, licensing, and experiences. The agreement states further that the petitioner receives a recruitment fee of $7,000 for requested and hired foreign nurses. The Agreement with Select Specialty Hospital stated that it commences on August 18, 2003 and terminates on August 18, 2003, subject to earlier termination, and that after this initial term, the agreement would automatically renew for successive 1 year terms. Finally, the petitioner asks that CIS reconsider its decision, based on the growing shortage of qualified nurses in the United States.

On appeal, the petitioner states, in contrast to its earlier statements, that it is not the employer of its beneficiaries, but rather the individual hospitals to which the petitioner's nurses are referred, are the actual employers. It submits additional agreements with two large medical health services corporations to further establish this assertion. In the Agreement between Kindred Hospital, submitted with the petition, the petitioner is described as a corporation providing nurses as independent contractors serving as temporary staffing for an individual hospital, billing the hospital, and actually paying the salary to the beneficiary, as well as deducting items such as Social Security, from the beneficiary's paycheck. In contract, in the agreements with the hospital services companies, the petitioner is described as a independent contractor and appears to be solely responsible for recruiting and providing training to foreign nurses to qualify them for hire by individual hospitals on a permanent basis.

The first issue to be discussed in this case is whether the petitioner is the beneficiary's actual employer. This issue arises on appeal since the petitioner suggests that the AAO consider the financial resources of third-party clients, namely, Select Specialty Hospital, Inc., and The Valley Health System. The petitioner states on appeal that based on the contracts with these entities, the petitioner will provide permanent placement for its foreign nurses, and that with specific reference to Pennsylvania hospital facilities, the nurses will be on the payroll of the hospital facilities, and not on the petitioner's payroll. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

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

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

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.

While the two agreements signed by the petitioner and medical health services companies that were submitted on appeal suggest that the petitioner has different business operations with larger medical services companies, nevertheless, these agreements do not change the fact that the petitioner has established that it is the beneficiary's actual employer. First, the petitioner completed and signed the relevant immigration forms, and in its response to the director's request for further evidence, it unequivocally stated that the medical personnel that it places are its employees. The employment contract signed by both the petitioner and the beneficiary on September 23, 2003 identifies the beneficiary as an employee and the petitioner as employer,

and provides for the petitioner's provision of paid vacation, family and medical leave, participation in the petitioner's medical, dental health insurance programs as well as the petitioner's 401K investment and savings program. Furthermore the agreement signed between Kindred Hospital, identified as the place of employment for the beneficiary in the petitioner's cover letter, and the petitioner, outlined the petitioner's duties to include billing, and payment of wages. Furthermore, the petitioner has not cited legal authority for the proposition that a petitioning entity may sponsor an alien for employment with a different and independent third-party entity. Thus, the petitioner has established that it is the actual employer. Accordingly, the financial resources of either health services company, as documented by the submission of pages of their annual report, will not be considered in these proceedings, when determining whether the petitioner is capable of paying the proffered wage as of the 2003 priority date.

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, 2003. The beneficiary's salary as stated on the labor certification is $24.00 per hour ($36.00 per hour of overtime), which equates to $49,920 per annum.

In support of the petition, the petitioner submitted unaudited financial statements for the years 2000, and 2001. The submitted financial statements indicated that the petitioner had net income of $15,321 in 2000, and net income in 2001 of $110,940.

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 3, 2003, the director requested additional evidence pertinent to that ability. The director noted that the previewed financial statements previously submitted by the petitioner indicated a net annual income of $110,940, total current assets of $553,143, and total current liabilities of $718,281 for tax years 2001. The director stated that the it did not appear that the petitioner had the ability to pay the proffered wage of $49,920, and that furthermore, it appeared that the petitioner had filed numerous I-140 skilled worker petitions with Citizenship and Immigration Services (CIS).

The director requested that the petitioner submit additional evidence that it had the ability to pay the proffered wage as of October 10, 2003, the date of filing the instant petition, to the present. The director also requested that the petitioner provide documentation to establish that it had the ability to pay all beneficiaries of its pending I-140 petitions. The director specifically requested that the petitioner submit its 2002 federal income tax return with all schedules and attachments, or annual reports for 2002 accompanied by audited or reviewed financial statements.

In response, the petitioner submitted examples of a time sheet, an invoice and a client paycheck as further evidence of its billing and payment practices for foreign nurses. The petitioner also submitted a flow chart to illustrate its cash flow generated by the employment of foreign nurses. The petitioner also stated that its cash flow was aided by a dedicated business line of credit recently secured in the amount of $2.5 million. The petitioner described the line of credit as a revolving line of credit, secured by its accounts receivable and with growth potential due to the phasing in of 250 foreign nurses based on the current demand for nurses. Finally, the petitioner submitted a reviewed financial statement for the year 2002, which indicated a net income for 2002 of $207,781. The petitioner did not submit its 2002 federal income tax return as requested by the director.

In its response to the director's request for further evidence, the petitioner referred to a growth potential due to the phasing in of 250 foreign nurses. However, the petitioner provides no further detail or documentation has been provided to explain how the beneficiary's employment as a registered nurse will significantly increase profits for a nurse placement service. 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)).

Both the initial petition and the response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Furthermore, although the director in his request for further evidence requested audited or reviewed financial statements, and the petitioner's financial statements appear to have been reviewed by an accounting firm, the regulation clearly indicate that only audited financial statements are viewed as evidentiary documentation in these proceedings. The regulation says nothing with reference to the submission of reviewed financial statements to establish the petitioner's ability to 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 2003 and onward. .

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v.*

Sava, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. As stated previously, the petitioner did not submit its 2002 federal income tax return, or any federal income tax returns for prior to the 2003 filing date. As also noted before, the petitioner submitted its responses to the director's request for further evidence prior to the April 15, 2004 filing date for 2003 federal income tax returns, so it could not have submitted this income tax return. Nevertheless, the petitioner provides no explanation for why it did not submit its 2002 federal income tax return. Thus, the record contains no financial information that can be utilized in the present proceedings to examine the petitioner's ability to pay the proffered wage out of its net income.

In addition, 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.[3] 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. However, as previously noted, the record is devoid of any of the petitioner's federal income tax returns which could be examined to determine whether the petitioner has sufficient net current assets to pay the proffered wage of $49,920. As previously stated by the director, the petitioner also has filed numerous I-140 petitions for nurses. The petitioner then must establish that not only it is capable of paying the beneficiary's proffered wage as of the filing date, but also that it has sufficient financial resources to pay all the other beneficiaries of pending petitions.

In its response to the director's request for further information, the petitioner referred to a revolving line of credit that was available to pay the proffered wages. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment* Terms, 45 (1998).

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

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The petitioner has not demonstrated that it paid any wages to the beneficiary. It has not submitted any evidence of its financial worth, beyond unaudited financial statements submitted by the petitioner with the petition and in response to the director's request for further evidence. It has not provided any regulatory-prescribed evidence concerning its continuing ability to pay the proffered wage such as tax returns, annual reports, or audited financial statements. Therefore, CIS is unable to analyze the petitioner's ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2003 and onward. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and onward.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. 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 in compliance with the content requirements delineated in 20 C.F.R. § 656.20(g)(3), however, this documentation which only states the notice was posted at the "HR Bulletin Board" does not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. The ETA 750 and the petitioner's cover letter indicate that the beneficiary will work at Kindred Hospital of San Diego. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1)[4]. If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.[5] The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wages, these issues need not be discussed further, but are additional reasons why the petition may not be approved.

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

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

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[4] The posting notice states it was posted on the "HR Bulletin Board," but does not indicate if that is at the petitioner's premises or Kindred Hospital premises. Since it provides the contact information of the petitioner, it seems likely, though not unequivocal, that it was posted on the petitioner's premises.

[5] *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).