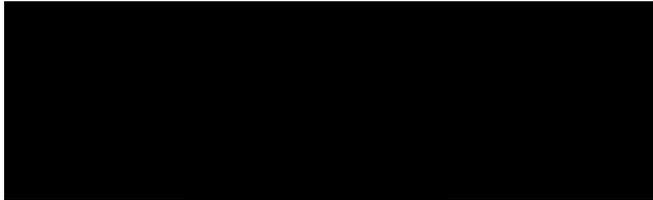


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FILE:

WAC 03 223 51610

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 23 2005

IN RE:

Petitioner:

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. 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 filed the posting notice for the proffered position as prescribed by 20 C.F.R. § 656.20(g) and (g) (8). Thus, the director determined that the petitioner had not demonstrated that the position qualified for Schedule A certification, and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

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) 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 July 22, 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).

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

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).

With the petition, the petitioner submitted a document entitled "Notice of Available Positions." This notice was addressed to all employees of [REDACTED] and stated there were 144 vacancies for the position of registered nurse as of June 24, 2003. The document further stated the general and specific duties of the position, along with minimum requirements, special requirements, pay rate, or conditions, and where to apply for the registered nurse position. The pay rate was noted as \$22.17 an hour, or a yearly salary of \$46,113.60. The petitioner also submitted a notice dated July 17, 2003, and signed by [REDACTED], RN, Chief Executive Officer. This notice, entitled "Employer's Certification Re Compliance with Job Posting Notice Requirement," stated the following:

I hereby certify that this notice was posted in a conspicuous place at all of the offices of [REDACTED] for a period of ten (10) consecutive days. The job notice remained clearly visible and unobstructed during the entire period of posting.

On September 23, 2004, the director denied the petition. In his decision, the director stated that the petitioner had not submitted evidence that the job posting was posted in accordance with 20 C.F.R. § 656.20(g)(1), and that the petitioner had indicated in the certification that the notice was posted at the petitioner's administrative offices. The director further stated that Citizenship and Immigration Services (CIS) interprets the reference at 20 C.F.R. 656.20(g)(1)(ii) to mean the place of physical employment. The director further noted that in the instant petition, the place of physical employment would be the healthcare facilities where the beneficiary would perform services as a registered nurse. The director then determined that the record indicated that the notice of filing had not been posted at the correct location. The director also stated that the notice had to be

posted at least ten consecutive days prior to filing with the appropriate information contained in the notice, and that any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

On appeal, [REDACTED] lists eight reasons why the petitioner is not required to post its job notice at the hospital where the beneficiary will be employed. The reasons are summarized as follows:

1. Prior to September 23, 2004, the placement of the petitioner's job posting at its place of business was never questioned, and the petitioner has received more than six hundred twenty-five approvals on I-140 positions filed on behalf of registered nurses. The CIS requirement to file the posting notice started on September 23, 2004; however, the instant petition was filed on July 29, 2003.
2. The beneficiary was hired as an employee of [REDACTED] on August 31, 2004, and the petitioner is her employer. [REDACTED] also notes that the employer's proffered wage of \$22.17 exceeded the prevailing wage of \$21.31 for 2003 for Orange County, the beneficiary's specific geographical location in the job posting.
3. Although the beneficiary has worked at [REDACTED] Irvine, California [REDACTED] she is not an employee of [REDACTED] but rather works there on a contractual basis.
4. The petitioner makes sure that all its employees are well aware of job openings. All the nursing staff is required to report for work in person or via telephone each work day or week so that they can be then assigned to a specific client hospital.
5. The petitioner posts the job posting in all of its places of business so that any qualified applicant for the job opportunity could be directed directly the petitioner, as the employer, or to the petitioner's employment interviewer.
6. The petitioner does not own the hospital facilities where its nursing staff is assigned. The petitioner has no right to post notices nor does the petitioner have access to hospital bulletin boards. [REDACTED] added that the petitioner was in no position to post job notices at the client's hospital facilities, which could be a serious violation of the petitioner's staffing contract with the client hospital because there is a conflict of interest. [REDACTED] states that the petitioner may only post such notices at the sole discretion of each client hospital.
7. [REDACTED] states that although 20 C.F.R. 656.22 states that the job notice must be posted at the "facility or location of employment", the Board of Alien Labor Certification Appeals (BALCA) states that "the employer must document that it has posted a notice of the job opportunity at its place of business." [REDACTED] submits a copy of a page of the BALCA Deskbook in support of this interpretation.

8. [REDACTED] refers to *In the Matter of Bison Turf/Fun Co. Inc.* 90 INA 280, a BALCA decision and states that the BALCA in this decision confirmed that the job notice must be posted at the employer's place of business.

[REDACTED] then states that in order to comply with the CIS requirement in the future, the petitioner has negotiated with its client hospitals and they have agreed to post the petitioner's job notices at their premises as of the date of [REDACTED] letter, and in the future. [REDACTED] asserts that even though the petitioner posted the job notice at its business premises for the required number of days, and the regulations do not require the petitioner to post the notice at its client hospitals, the petitioner is willing to comply with the new CIS requirement in its next filings. [REDACTED] then requested that the instant petition be approved.

[REDACTED] also submits the beneficiary's payroll summary for the period of August 31, 2004 to October 18, 2004. The first page of the summary indicates the beneficiary's total gross pay for this period is \$5,720.27. [REDACTED] also submits an excerpt from the Department of Labor (DOL) OnLine Wage Library (OWL) that indicates the wage for a Level One registered nurse in Orange County is \$21.31 an hour, while the wage for a Level Two registered nurse would be \$28.44 an hour. [REDACTED] so submits a copy of a one-year contract between the petitioner and [REDACTED], a Delaware corporation¹ from January 1, 2004 to December 31, 2004. Finally, as stated previously, [REDACTED] submits a page from the BALCA Deskbook that discusses DOL regulatory requirements for a posting notice. This latter document refers to the BALCA decision *Bison Turf/Fun Co. Inc.* 90-INA-280 (April 19, 1991) and the discussion in this decision as to why the posting requirement cannot be avoided based on use of a wider means of publication.

The record contains no indication that the petitioner's nurses are represented by collective bargaining. The Form ETA 750 states, at Item 7, Address Where Alien Will Work, "see Exhibit 2 (Petitioner's Notice of Available Positions). Exhibit two is the posting of the proffered position. That posting states that the "RN will report to Employer at its address at Orange County for daily or weekly assignments at various hospitals or facilities." The certification attached to that posting states that it was posted at the petitioner's offices for a period of ten consecutive days. The certification does not state the dates during which the notice was posted. The certification itself, however, is dated March 6, 2003.

The beneficiary will not be employed at the petitioner's offices but at some other location. The posting was not, then, posted at the place of employment as required by 20 C.F.R. § 656.20(g)(1). The petitioner has indicated that the beneficiary will work at "various hospitals and facilities," without identifying an exact location or locations with greater specificity. The petitioner needs to show it posted the notice where the beneficiary would work, and make it clear where that location will actually be. 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). 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

[REDACTED] is one of 32 participating hospitals in the Tenet California hospital group.

employed will not be adversely affected by the employment of aliens in Schedule A occupations.² In the instant petition, it is noted those "similarly employed" would be nurses in the client hospitals.

With regard to the assertions of the petitioner's president, none of the eight reasons listed as reasons why the petitioner does not have to post its job notices at the beneficiary's actual place of employment, are persuasive. The fact that the petitioner's posting notice was not questioned until September 2004 does not support a positive finding as to the posting of the notice for the instant petition. The fact that the petitioner is the actual employer of the beneficiary is not in question; however, this fact would not negate the petitioner's responsibility to post the job notice at the actual place of employment so as to provide the U.S. workers that are "similarly employed" with an opportunity to comment on the posting. The fact that the petitioner has posted job notices in its administrative offices does not establish that the petitioner fulfilled the regulatory criteria for posting notices identified at 20 C.F.R. § 656.20(g)(1). The BALCA excerpt submitted by the petitioner that refers to *Bison Turf/Fun Co., Inc.* also does not appear relevant to the proceedings. The two mentions of *Bison Turf/Fun Co.* in the BALCA excerpt refer to posting requirements that cannot be avoided based on either company policy or the use of a wider means of publicizing available job openings. In addition, the petitioner does not state how the Department of Labor's (DOL) BALCA precedent decision would be binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Furthermore, as correctly noted by the director, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director's decision shall stand, and the petition will be denied.

Beyond the decision of the director, the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and onward. 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). In the instant petition, the petitioner has not established that it has the ability to pay the proffered wage. 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

² 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).

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 July 29, 2003. The proffered wage as stated on the Form ETA 750 is \$22.17 per hour, which equals \$46,113.60 per year.

On the petition, the petitioner stated that it was established on January 30, 1996 and that it employs 531 workers. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a letter, dated July 21, 2003, from [REDACTED] its president and CEO. That letter stated that the petitioner has the ability to pay the proffered wage, stating that it has eight branch offices, and that for the period ending December 31, 2002, the petitioner had a gross annual income of \$25.3 million in contrast to a gross annual income of \$19.5 million in 2001, and \$17.8 million in 2000. Mr. Sterling stated that the petitioner realized a net income of \$584,366 in 2002.

Another letter, dated July 4, 2003 from [REDACTED] Financial Officer, stated that the petitioner has experienced tremendous growth in the business and provided a comparison of the petitioner's gross revenue and net income in the years 1998 to May 2003. The comparison showed a 30 percent increase in gross revenues from 2001 to 2002, and an increase in net income from -\$4 million dollars to \$6 million dollars in 2002. [REDACTED] also stated that the petitioner has a projected gross revenue by the end of 2003, of \$30.7 million based on the historical average growth rate of 21 per cent. [REDACTED] then stated that the petitioner has a \$3.5 million revolving line of credit from the [REDACTED] that the petitioner can use in case client hospitals fail to pay in a timely manner. [REDACTED] concluded by stating based on the petitioner's previous and continuing growth, she had great confidence that the petitioner has more than sufficient capability and financial resources to pay the proffered wage for all the beneficiaries of the petitioner.

The petitioner also provided a computer copy of its 2002 Form 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of \$584,366 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current assets were \$3,952,387, its current liabilities were \$4,059,784, and the petitioner's net current assets were -\$107,784. The petitioner also submitted a Form 941 for the first quarter of 2003 that indicated the petitioner had 626 employees and paid total wages of \$5,031,328.66 in that quarter.

The petitioner's chief financial officer asserts that its credit line permits the petitioner to continue paying wages notwithstanding delays and interruptions in its receipts. On that matter, the petitioner is correct. The chief financial officer also asserts that the credit line in itself demonstrates the ability to pay the proffered wage. This office does not agree with this contention.

The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients. That does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage on a

more permanent basis. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. Although the credit line permits the petitioner to withstand delays and interruptions, the petitioner must show the ability, over a longer period, to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

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 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. Although counsel states on appeal that the beneficiary began working for the petitioner in August of 2004, the petitioner submitted no evidence of such employment. Furthermore, the Form ETA 750 signed by the beneficiary indicates that as of the July 2003 priority date, the petitioner did not employ the beneficiary. In the instant case the petitioner did not establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the priority date 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, 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).

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 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.

As stated previously, the petitioner submitted its 2002 federal income tax return to the record. Since the Schedule A petition was filed in 2003, the petitioner's financial resources in 2002 are not dispositive. However, since the 2002 return is the only reliable documentary evidence contained in the record pertinent to petitioner's ability to pay the proffered wage, it shall be accorded some evidentiary value.

The petitioner declared ordinary income of \$584,366 during 2002. Thus, the petitioner's net income for 2002 is sufficient to cover many proffered wages; however, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. Thus, in 2002 alone, the petitioner has to establish that it has sufficient financial resources to pay the beneficiaries of 93 petitions. Assuming the other beneficiaries of other petitions filed in 2002 would earn a salary approximate to the one proffered to the beneficiary in the instant petition, namely \$46,113.60, the petitioner would need a net income of \$4,288,564.80 in 2002 to pay the salaries of 93 registered nurses. Thus, the petitioner's net income in 2002 was insufficient to pay the proffered wages of all the beneficiaries for

whom the petitioner filed I-140 petitions in 2002.

The petitioner's net income, however, 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 the 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, those expected to be 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 net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

As previously stated, the corresponding Schedule L shows that at the end of 2002 the petitioner's current assets were \$3,952,387, its current liabilities were \$4,059,784, and the petitioner's net current assets were -\$107,784. Upon review of the record, the petitioner has shown considerable growth in recent years. No reason exists to assume that the petitioner will cease to grow. The petitioner's assertion, however, is that it will enjoy vast growth and continue to be profitable. In view of the fact that the petitioner is seeking approval of a large number of petitions, the petitioner must demonstrate the truth of that assertion in order to prevail. Assuming that the petitioner's business will flourish so markedly that it will be able to continue to add large numbers of aliens to its payroll and remain profitable is speculation.

The petitioner's 2002 ordinary income, although substantial, is insufficient to show the ability to pay the proffered wages of such a large number of beneficiaries. The petitioner has submitted no other reliable evidence pertinent to its ability to pay the proffered wage. The petitioner has not demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

With regard to 2003, the priority year for the instant petition, the petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements. With the petition, however, the petitioner submitted the letters from its president and its financial officer stating that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states that such a letter may suffice to demonstrate the petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) states that CIS may require additional evidence in appropriate cases. However, as previously noted, CIS computer records show that the petitioner filed 93 Form I-140 petitions during 2002, 140 such petitions during 2003, and another 57 petitions during 2004. The instant case appears to be an appropriate instance to require evidence to support the statements of the president and the financial officer, primarily because the petitioner has filed multiple alien worker petitions.

The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1). The petitioner also failed to demonstrate that it has the ability to pay the wages proffered to the beneficiaries for whom it petitioned in 2003. For all of these reasons the petition may not be approved.

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

ORDER: The appeal is dismissed.