

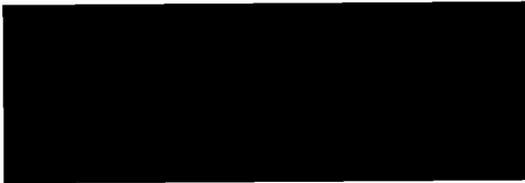
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 04 246 51977 Office: VERMONT SERVICE CENTER Date: APR 25 2006

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:



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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a healthcare staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a completed Form ETA 750, Application for Alien Employment Certification accompanied the petition. The acting 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 denied the petition accordingly.

On appeal, counsel 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)(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 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form I-140 petition was submitted to Citizenship and Immigration Services (CIS). Here, the petition was filed with CIS on August 23, 2004. The proffered wage as stated on the Form ETA 750 is \$16 per hour, which equals \$33,280 per year.

On the petition, the petitioner stated that it was established on October 10, 2000 and that it employs 40 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The petition states that the beneficiary would work “in Western New York.” The Form ETA 750 indicates that the beneficiary would work in Amherst, New York.

In support of the petition, counsel submitted a copy of the petitioner’s 2003 Form 1065 U.S. Return of Partnership Income, a copy of its New York State Report of Wages for the second quarter of 2004, a copy of a Statement of Deposits and Filings for the first quarter of 2004 issued to the petitioner by its payroll service.

The petitioner's Statement of Deposits and Filings for the first quarter of 2004 shows that the petitioner paid total wages of \$90,521.44 to its 31 employees during that quarter.<sup>1</sup>

The petitioner's second quarter 2004 wage report shows that the petitioner paid total wages of \$77,630.08 during that year to 33 employees<sup>2</sup> but that it did not employ the beneficiary.

The income tax return submitted shows that the petitioner is a limited liability company, that it was established on October 10, 2000, and that it reports taxes pursuant to the calendar year and cash basis accounting. During 2003 the petitioner declared a loss of \$16,179 as its ordinary income. At the end of that year the petitioner declared current assets of \$14,331 and current liabilities of \$5,000, which yields net current assets of \$9,331.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 30, 2004, denied the petition.

On appeal, counsel submits (1) a letter dated October 8, 2004 from the petitioner's accountant, (2) copies of monthly statements pertinent to the petitioner's bank account, (3) copies of the petitioner's Quarterly State Report of Wages for the first and third quarters of 2004, (4) a letter dated October 7, 2004 from a commercial lender, (5) Consolidated Cash Receipts reports for October 10, 2004 and showing the petitioner's gross receipts broken down by client, (6) Consolidated Receivables Reports showing amounts the petitioner's clients owed to it on October 10, 2004, (7) a Billings Report showing the amounts the petitioner billed its clients from April 1, 2004 to June 30, 2004, (8) a copy, dated March 17, 2004, of an extension of the petitioner's space lease, (9) printouts of web content showing positions open for nurses in the Buffalo, New York area, and (10) a brief.

The petitioner's wage report for the first quarter of 2004 confirms that it paid \$90,521.44 to 31 employees as was previously indicated on the petitioner's Statement of Deposits and Filings for the same quarter, but do not show that it employed the beneficiary.

The petitioner's wage report for the third quarter of 2004 shows that it paid \$81,174.81 to 41 employees during that quarter,<sup>3</sup> but do not show that it employed the beneficiary during that quarter.

The petitioner's accountant's October 8, 2004 letter notes that the petitioner reports taxes pursuant to cash convention and that, therefore, its tax returns do not reflect the amounts of its accounts receivable. The accountant states that at the end of 2003 the petitioner had approximately \$90,000 of accounts receivable and

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<sup>1</sup> This equals mean wages of \$2,920.05 per employee during that quarter, which equals \$11,680.19 annualized.

<sup>2</sup> The petitioner paid mean wages per employee of \$2,352.43 during that quarter, which equals \$9,409.71 annualized.

<sup>3</sup> The petitioner paid mean wages per employee of \$1,979.87 during that quarter, which equals \$7,919.49 annualized.

further states that, therefore, if the petitioner had reported pursuant to accrual convention it would have had an additional \$90,000 in income.<sup>4</sup>

The October 7, 2004 letter from a commercial lender states that the petitioner has a \$95,000 line of credit. That letter does not state the outstanding balance on that credit line.

The cash receipts report, the receivable report, and the billing report provided show gross receipts, gross receivables, and total invoices rather than net income. Gross receipts, gross receivables, and billing totals are not an index of ability to pay the proffered wage for reasons detailed below.

Further, cash receipts reports and receivables reports generated for internal use and not subjected to an audit are not acceptable evidence of a petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that reliable evidence of a petitioner's ability to pay the proffered wage must include copies of annual reports, federal tax returns, or audited financial statements. The reports provided are merely the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The propositions that the web content printouts were submitted to support are unknown to this office.

In his brief counsel argues that if the petitioner's tax return had been prepared pursuant to accrual its 2003 ordinary income would have been \$74,000<sup>5</sup> and would, therefore, have demonstrated the petitioner's ability to pay the proffered wage. Counsel argues that the petitioner's bank balances also show its ability to pay the proffered wage. Counsel argues that hiring the beneficiary will contribute to the petitioner's revenue an amount greater than the proffered wage.

Counsel cites non-precedent decisions of this office that permitted petitioners to add their depreciation deductions back into its ordinary income. Counsel argues that, by extension of those decisions, the petitioner should be permitted to add its receivables to its income. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. For reasons detailed below this office does not accept the proposition that depreciation should be added back into income, and will not consider extending that reasoning.

Finally, counsel states that the petitioner's gross revenue was much greater during 2004 than during 2003, and argues that this, too, shows that the petitioner is able to pay the proffered wage. Counsel purports to subtract the petitioner's expenses from its revenue to show the amount available to it to pay additional wages. By including another calculation, counsel implies that the petitioner's gross profit should be considered a fund available to pay wages.

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<sup>4</sup> As will be discussed below, the accountant's conclusion does not follow from the facts alleged.

<sup>5</sup> Again, this conclusion does not follow from the asserted fact that the petitioner had \$90,000 in receivables at the end of 2004.

The assertions of counsel are not evidence *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980), and do not constitute an audited financial statement. The evidence provided in support of counsel's estimates is unreliable, and this office is not convinced that the expenses cited by counsel are exhaustive.

The calculation of gross profit is merely an interim calculation, before the subtraction of non-operating expenses, in arriving at net income. Because not all of the petitioner's expenses have been subtracted from it, it is not disposable income, and is not an index of the petitioner's ability to pay additional wages.

**The accountant's argument is unconvincing.** Initially, this office notes that no reliable evidence was submitted to verify the existence of the \$90,000 in receivables at the end of 2003. Further, conversion of the petitioner's cash basis tax return to an accrual return would require more adjustment, both additions and subtractions, than merely adding accounts receivable to income. One obvious example that the accountant did not include in his calculations is subtraction from income of revenue received for services rendered during previous years. Another is subtraction of accounts payable.

Further, that the petitioner's returns were prepared on a cash basis rather than an accrual basis does not, contrary to the accountant's assertion, make them poor indices of the funds available to the petitioner with which to pay wages. Although preparation of tax returns pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to a petitioner during a given year as are returns prepared pursuant to accrual.

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. The petitioner must show the ability 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 part of the calculation of the funds available to pay the proffered wage.

Counsel's assertion that the beneficiary would add to the petitioner's profits is not evidence<sup>6</sup> and is unconvincing. Although precedent<sup>7</sup> urges this office to consider the amount of income the beneficiary will generate, it does not require this office to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary<sup>8</sup> would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no reliable evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

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<sup>6</sup> Again, *See INS v. Phinpathya*, *supra* and *Matter of Ramirez-Sanchez*, *supra*

<sup>7</sup> *c.f. Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). Although that case is not binding on this office even in cases within the same district *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993), this office is cognizant of the reasoning of that case and, insofar as it may be contrary to the reasoning of the instant case, rejects it.

<sup>8</sup> In addition to the usual expenses, employing the beneficiary might require payment of the substantial cost of transporting her here from India, for instance.

Counsel asserts that no shortage of assignments for qualified nurses exists. Counsel's assertions not evidence and the evidence does not indicate that the petitioner's present staff is fully employed. The petitioner's staff earned mean income of \$2,920.05, \$2352.43, and \$1,979.87 during the first, second, and third quarters of 2004, respectively. Those figures show an annualized mean income of \$9,669.80. This figure is difficult to reconcile with counsel's statement that no shortage of temporary nursing assignments exists. Further, even if counsel had demonstrated that the petitioner has full employment waiting for the beneficiary that fact would not demonstrate the petitioner's ability to pay the proffered wage absent reliable evidence of the expenses the petitioner would incur to generate that additional revenue.

This office does not include the petitioner's depreciation deduction in the calculation of its ability to pay the proffered wage. A depreciation deduction, the systematic allocation of the cost or other basis of a tangible long-term asset, does not require or represent a specific cash expenditure during the year claimed. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. No alternative allocation of those costs was suggested.<sup>9</sup> To merely add the petitioner's depreciation deduction back to its income would be to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.<sup>10</sup>

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<sup>9</sup> Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

<sup>10</sup> A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient

Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.

The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles. Merely adding the petitioner's accounts receivable to its net profit is unlikely to result in an accurate calculation of the petitioner's net income pursuant to accrual, does not constitute an audit, and does not accord with generally acceptable accounting principles.

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. 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).

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period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Showing that its gross profit exceeded or greatly exceeded the proffered wage 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before all expenses were paid rather than net income.

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 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, 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 net of 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<sup>11</sup> 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 \$33,280 per year. The priority date is August 23, 2004. No reliable evidence pertinent to the petitioner's finances during 2004 or subsequent years was submitted.<sup>12</sup> Although evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, it is the best index available within the confines of the regulations. Information from the petitioner's 2003 tax return will be considered.

The petitioner declared a loss during 2003. The petitioner cannot show the ability to pay any portion of the proffered wage out of its ordinary income during that year. At the end of that year the petitioner had net current assets of \$9,331. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage and the petition was correctly denied on that basis.

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<sup>11</sup> The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

<sup>12</sup> On the date the petition was submitted the petitioner's 2004 tax return was unavailable.

Additional issues exist in this case that were not addressed in the decision of denial.

The record contains a contract stating that the beneficiary “will work at health care facilities in Buffalo, New York or elsewhere in the [United States] as needed.” The Form ETA 750, however, states that the beneficiary would work in Amherst, New York and is presumptively invalid for employment elsewhere.

The beneficiary’s contract also states that the petitioner might employ the beneficiary on a *per diem* basis and that the beneficiary’s wages will be computed based on “actual hours worked.” Further in a letter dated August 20, 2004 counsel stated that the petitioner “provides registered nurses . . . on a *per diem* and permanent basis.”

The assertion of counsel and the beneficiary’s contract imply that the petitioner might not employ the beneficiary full-time. Further, the average wages the petitioner paid to its employees during 2004 do not, as was noted above, appear to indicate full employment of its existing staff.

The petitioner is not permitted, under the instant visa category, to maintain a pool of workers whose pay is conditional upon their placement with a health care provider. 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, or any employment, is unavailable.

Yet further, a note attached to the Form ETA 750 labor certification states that it was posted at the petitioner’s offices, at [REDACTED] in Amherst, New York, from July 9 to July 21, 2004. The record contains no other indication of a posting of the proffered position.

The nature of the petitioner’s business makes obvious that its office is not the actual location at which the beneficiary would work. Rather, the beneficiary would work at a hospital or nursing facility. This raises the issue of whether the notice of the proffered position was posted in accordance with the regulations

The regulation at 20 C.F.R. § 656.20(g)(1) states,

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 regulation at 20 C.F.R. § 656.20(g)(3) states,

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) state that applicants should report to the employer, not to the local Employment Service office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 656.20(g)(8) states that if an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay and shall also include the requirements of paragraphs (g)(3) (ii) and (iii) of this section.

As there is no bargaining representative and the position was posted at the petitioner's office, which is not the location of intended employment, there is no indication that it was posted in accordance with the provisions of 20 C.F.R. § 656.20(g)(1).

Further, use of the Form ETA 750 as a posting notice of the proffered position is not in accord with the regulatory requirements. The ETA 750 does not make clear that the position is open to U.S. workers. It does not explicitly state to whom such workers should apply. It does not state that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor. This posting was not, therefore, in accordance with the provisions of 20 C.F.R. § 656.20(g)(3).

The acting director should have considered all of these additional issues. Because they were not included in the decision of denial, however, and the petitioner has not been accorded the opportunity to address them, today's decision does not rely on those issues, even in part, as bases for dismissal. If the petitioner seeks to overcome today's decision in a motion, however, it should address these additional issues.

As was noted above the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied. 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.