



U.S. Citizenship
and Immigration
Services

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B6



File:

SRC-05-221-51976

Office: TEXAS SERVICE CENTER Date:

JUN 26 2007

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, Chief
Administrative Appeals Office

AMERICORP

DISCUSSION: The Director, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a physical therapy provider, and seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3).

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b). *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) 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.

Based on 8 C.F.R. § 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.”¹ The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Permanent Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, a petitioner must file with the petition, a letter of statement signed by an authorized state physical therapy licensing official in the state of intended employment, which provides that the beneficiary is qualified to take the state’s written licensing examination for physical therapists.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (“PERM”), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, Form ETA-750,² with the I-140 Immigrant Petition with the I-140 Immigrant Petition on August 8, 2005, which is the priority date. In response to the director's Request for Evidence ("RFE"), counsel provided two original Forms ETA 9089, as required after March 28, 2005 for filing under the new PERM regulations. The required wage as stated on Form ETA 9089 for the position of physical therapist is \$54,891 per year, 40 hours per week.³ On the I-140 petition filed, the petitioner listed the following information: established: 1994; gross annual income: \$2,203,882.45; net annual income: \$92,332.86; and current number of employees: 37.

On January 6, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to submit: Form ETA-9089 in duplicate properly signed by the petitioner and the beneficiary; prevailing wage determination issued by the relevant State Workforce Agency ("SWA"); copies of any and all in-house media postings used for the position or similar postings; and one of the following: a full unrestricted license to practice nursing, CGFNS certificate, or evidence that the beneficiary passed the National Council Licensure Examination for Registered Nurses ("NCLEX-RN").⁴ The petitioner responded. On March 6, 2006, the director denied the petition on the basis that the prevailing wage as determined by the SWA for the position was \$54,891 per year, and the petitioner listed a proffered wage of \$52,000 per year. Accordingly, the proffered wage was insufficient to meet the SWA determined wage and the director denied the petition. The petitioner appealed and the matter is now before the AAO.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

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

² The petitioner initially and improperly submitted Form ETA 750, which had been replaced with the Application for Permanent Employment Certification, ETA 9089, effective March 28, 2005.

³ The petitioner initially listed the prevailing wage as \$52,000 per year on the Form ETA 750 submitted. The issue related to the proper wage will be addressed below.

⁴ We note that these are requirements under 20 C.F.R. § 656.10 for aliens who will be permanently employed as professional nurses. Passage of NCLEX-RN is not required for physical therapists. Instead physical therapists must demonstrate based on 20 C.F.R. § 656.15 that the beneficiary is qualified to take the state's written licensing examination for physical therapists in the state where the beneficiary will be employed.

⁵ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In connection with a Schedule A filing, a petitioner is required to obtain a prevailing wage determination from the relevant SWA in compliance with 20 CFR § 656.40 prior to filing. The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 CFR § 656.15(b)(i).

In response to the RFE request for the petitioner to demonstrate that it obtained a SWA wage determination, the petitioner provided the prevailing wage determination, which showed that it only submitted the request to the SWA on January 24, 2006, after filing the petition and after receipt of the RFE. The prevailing wage request listed that the position required a bachelor's degree and two years of experience.⁶ The position description submitted did not include the additional one-year of training listed on Form ETA 9089, and on the Form ETA 750 initially submitted for filing. Based on the position description submitted, and the education and training level listed, the SWA assigned the position a "level one"⁷ wage, and dated the determination, January 31, 2006.

On Form ETA 9089, which the petitioner submitted also in response to the RFE, the petitioner listed the prevailing wage on Form ETA 9089 as \$54,891. The petitioner then listed the offered wage as \$1,000 per week, which would be equivalent to \$52,000 per year, an amount below the proffered wage. The director denied the petition as the proffered wage was below the prevailing wage required.

On appeal, the petitioner provides a revised employment agreement executed between the petitioner and the beneficiary. The revised employment agreement lists that the petitioner will pay the beneficiary \$55,000, an amount above the prevailing wage, and asks that the petition now be approved.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Despite the offer to increase the wage, the petitioner's wage change after filing the petition would not be acceptable. As part of the filing requirements for a Schedule A position, a petitioner must post the position in accordance with 20 C.F.R. § 656.10(d).⁸ Fundamental to these provisions is the need to ensure that there are

⁶ We note that the prevailing wage request copy in the record of proceeding is difficult to read as it appears to be a copy of a faxed document.

⁷ The DOL Online Wage Library previously assigned two levels of wages. As part of the Consolidated Appropriations Act of 2005 passed by Congress and signed into law on December 8, 2004, Section 423 amends Section 212(p) of the INA to require that the employer offer 100% of the prevailing wage determined and disallows the prior 95% of pay rule. Further, the amendment provided that where the Secretary of Labor uses or makes available to employers a governmental survey to determine the prevailing wage, the salary shall provide at least four levels of wages commensurate with experience, education, and level of supervision.

⁸ 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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).

(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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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 . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

...

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) 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;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

...

(6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

The posting notice submitted listed the wage as \$1,000 per week, or below the determined prevailing wage. The posting would not have alerted any potential applicants to the proper wage, or the wage that the petitioner is now willing to offer, \$55,000. Accordingly, the posting submitted with the petition would not have been properly posted pursuant to 20 CFR § 656.10(d), if the petitioner now altered the wage. The petitioner cannot now go back and increase the wage to make the petition conform, as the posting has been completed at a lower wage. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

We do note however that the wage determination obtained from the SWA was dated 2006, and DOL would have published wage increases in January 2006. The petition, however, was filed in August 2005, so that the wage source used should reflect 2005 wages, if we accept the initially deficient filing made on Form ETA 750 as establishing the priority date.

The petitioner also submitted a copy of a prior wage issued for the beneficiary's position, which was dated October 18, 2005.⁹ The prevailing wage was assigned a level one wage, and listed as \$48,443. The petitioner also submitted a copy of the DOL "Online Wage" four level wage print out dated October 28, 2005. *See* <http://www.flcdatabcenter.com/OesPrintResults.aspx?area=220002&code=29-1123&year=5&source=1>, historical data accessed as of June 5, 2007. The print out lists the level one wage as \$48,443. This wage would encompass the amount listed as the wage on Form ETA 9089, \$52,000 per year, and also the amount listed on the posting.

We note, however, that on the prevailing wage request, the petitioner listed a Bachelor's degree and two prior years of experience, but not the one year training requirement. The additional training requirement might result in the SWA assessment of a higher level wage.¹⁰ Prevailing wage assessments are a determination within the purview of the local SWA. As the description listed on the wage form submitted does not fully list the position's requirements, we find that the petitioner has not properly submitted a SWA determination based on the position's requirements. *See* 20 CFR § 656.15(b)(i). Further, the petitioner failed to file the petition with the required SWA wage determination. *See* 20 CFR § 656.40. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, although not raised in the director's decision, we find that the petitioner has failed to establish that the beneficiary meets the qualifications as listed on Form ETA 9089. Further, the petitioner has failed to demonstrate its ability to pay the proffered wage. 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*, 229 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 evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of*

⁹ We note that the wage was also obtained after filing the I-140 petition, likely in connection with a filing related to the beneficiary's nonimmigrant status. As the wage was obtained after filing, the petitioner failed to comply with 20 CFR § 656.40.

¹⁰ DOL issued guidance on May 9, 2005 regarding calculation of wages under the four-tier system, where different point levels are assessed to the position description based on education and training required, compared to what is normally required for the occupation. *See* http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf accessed as of June 13, 2007.

Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 9089, the "job offer" position description provides: "Evaluate and treat patient accordingly. Provide patient or caregiver instructions on how to undergo designed treatment, interpret performance and tests and measurements. Participation in clinical staff meetings. Provide treatment programs/exercises and modalities for individual person/patient."

The petitioner listed educational requirements in Section H as: a Bachelor's or foreign equivalent in Physical Therapy, and listed that the position required 12 months of physical therapist training, and 24 months of prior work experience as a physical therapist. The petitioner listed other specific skills for the position in Section H, question 14 as: "must pass federal licensing examinations; possession of [Louisiana] LA PT license; [and] maintain continuing education requirements."

The petitioner provided evidence that the beneficiary had the required Bachelor's degree in Physical Therapy, and provided transcripts for coursework, and additional certificates for post-graduate training courses and seminars. The petitioner also submitted evidence that the beneficiary was certified by the Foreign Credentialing Commission on Physical Therapy, Inc. ("FCCPT"), and had received a temporary permit as a physical therapist from the Louisiana State Board of Physical Therapy Examiners as required.

On the Form ETA 9089, signed on January 17, 2006, the beneficiary listed her prior work experience as: (1) the petitioner, from February 1, 2005 to present, physical therapist; (2) Private Practitioner, Quezon City, Philippines, self-employed physical therapist, January 2003 to September 2004, "variable hours;" and (3) Philippine Medical Association, Quezon City, Philippines, staff physical therapist, September 2002 to September 2004, 24 hours per week.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information

Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following:

Certification from [REDACTED] Clinical Supervisor, Philippine Medical Association Indigency Center, dated September 30, 2004;
Position title: Physical Therapy Staff;
Dates of employment: "connected to us as a physical therapy staff from September 24, 2002 to September 30, 2004."
Description of duties: "performs duties excellently . . . competent in planning and implementing various PT programs."

On the beneficiary's resume, she listed her experience as follows: (1) employment with the petitioner, February 2005 to present as a physical therapist; (2) Private Physical Therapy Practitioner, January 2003 to September 2004; and (3) Philippine Medical Association, Staff Physical Therapist II, September 2002 to September 2003, 24 hours per week, and built private practice (part-time) to patients.

We note that the years provided for the beneficiary's experience with the Philippine Medical Association vary between the Form 9089, the beneficiary's resume, and the certification provided. The Form ETA 9089 and certification list that she worked for the Philippine Medical Association for two years, while her resume lists that she was employed there one year. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, both the ETA 9089 and the beneficiary's resume indicate that her employment was less than full-time, for approximately 24 hours per week. Even if the beneficiary were employed with the Philippine Medical Association from September 2002 to September 2004 [which is unclear from the conflicting documentation], based on the reduced hours, her experience would not equate to two full years of experience as a physical therapist. The experience obtained with the petitioner would not be considered, since the beneficiary was employed in the same position for which the petitioner seeks certification and must be obtained before the priority date. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The beneficiary also listed that she was a "Private Physical Therapy Practitioner" from January 2003 to September 2004, but that her hours were "variable." The petitioner did not provide any documentation to demonstrate how many hours the beneficiary worked as a private physical therapist. The evidence submitted is insufficient to show that the beneficiary has the required two years of prior experience as a physical therapist.

Further, the ETA 9089 job offer requires that the individual have one year of training in physical therapy. The petitioner did not document that the beneficiary met this requirement. While we note that the petitioner provided the beneficiary's transcripts, which do list that the beneficiary had 30 credit hours in a clinical internship over the course of two semesters, two semesters and 30 credit hours would not represent one year of full-time training. The additional training certificates provided cover one to two day seminars, which are also insufficient combined to exhibit the one full year of training. The petitioner did not provide any documentation to specifically evidence that the beneficiary met this requirement. Accordingly, based on the

foregoing, the petitioner failed to document that the beneficiary met the position's experience and training requirements as listed on Form 9089.

Additionally, although not raised in the director's decision, the petitioner failed to document its ability to pay the proffered wage.

The regulation 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 establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Regarding the petitioner's ability to pay, first, CIS will 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. The beneficiary lists that she has been employed with the petitioner since February 2005. The petitioner submitted two paystubs, which show that the petitioner paid the beneficiary at a rate of \$1,000 per week, and that it had paid the beneficiary \$21,333.36 year to date as of June 25, 2005.

While the documentation submitted would exhibit the petitioner's partial payment of the proffered wage,¹¹ the petitioner did not provide any regulatory prescribed evidence in the form of federal tax returns, audited

¹¹ Additionally, we note that the petitioner would need to demonstrate its ability to pay the beneficiary the proffered wage, as opposed to other entities where the beneficiary might provide services. The petitioner submitted three letters from outside rehabilitation facilities for use of the beneficiary's services. It would appear that the petitioner leases or contracts its employees out to other rehabilitation centers. The petitioner is required to be the beneficiary's "actual employer." In determining the actual employer, the regulation at 20 C.F.R. § 656.3 provides:

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.

In *Matter of Smith*, 12 I&N Dec. 772 (1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its

financial statements, or annual reports to demonstrate its ability to pay the full proffered wage on an annual basis. *See* 8 C.F.R. § 204.5(g)(2). Accordingly, the record is deficient to determine the petitioner's ability to pay the proffered wage.

Based on the foregoing, the petitioner failed to properly obtain the correct wage prior to filing. Further, the petitioner did not demonstrate that the beneficiary met the position's requirements. The petitioner also failed to demonstrate its ability to pay the proffered wage. Accordingly, 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.

clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* At 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord*, the Regional Commission determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc. The staffing service rather than the end-user is the actual employer. *Id.*

In the present case, the petitioner provided paystubs to show that it is the entity, which pays the beneficiary's salary. The submission of W-2 or 1099 Forms would complete the record of proceeding if this matter is pursued.