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FILE: WAC 04 057 52925 Office: CALIFORNIA SERVICE CENTER Date: **NOV 13 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

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

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing staffing agency. It seeks to sponsor the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that at the time of the petition's filing, the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date; failed to establish it had posted the job notice properly; and failed to offer the beneficiary permanent, full-time employment.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 21, 2005 denial, the three issues in this case are whether the petitioner established that it had the ability to pay the proffered wage as of the date it filed the I-140 petition; that it had properly posted notice of filing an application for permanent employment certification pursuant to Department of Labor regulations at 20 C.F. R. §§ 656.(g)(i) and (g)(8), in effect at the time of the initial filing of the I-140 petition; and that the petitioner had established it would provide permanent full-time employment to the beneficiary. The AAO will address these three issues and then will address an issue not identified by the director, namely, whether the petitioner would be paying the prevailing wage to the beneficiary, pursuant to DOL regulatory guidance.

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 December 23, 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.¹

¹ A guidance memorandum from Thomas E. Cook titled "Adjudication of Form I-140 Petitions for Schedule A Nurses," dated December 20, 2002 considered the approval of I-140 petitions when the nurse could not obtain a permanent state nursing license because he or she did not have a social security number. If the petitioner met all requirements for Schedule A classification under the ETA 750, the 2002 memorandum instructed directors of service centers, the AAO, and other CIS officials to consider successful NCLEX-RN results favorably, in lieu of having either passed the CGFNS exam or currently having a license to practice

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.² 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 first issue the AAO will discuss in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states the following in part:

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

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is December 23, 2003. The beneficiary's salary as stated on the labor certification is \$25.20 per hour, which equates to \$52,416 per annum.³

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴.

nursing in that state. Since they satisfy § 212(r)(2) of the Act, 8 U.S.C. § 1182(r)(2), *a fortiori*, they fulfill terms of 20 C.F.R. § 656.22 (c)(2) for the alternative of approval of the I-140, based on successful examination results. The guidance memorandum expanded the list of criteria available for proving eligibility at the I-140 stage. Thus, in the instant petition, if the beneficiary had passed the NCLEX-RN satisfactorily, this would have been a third way to establish her credentials. The record reflects that the beneficiary possesses CGFNS certificate dated February 2, 2001.

² Thus, the priority date for the Schedule A ETA 750 is the date of receipt of the I-140 petition by CIS. See 8 C.F.R. § 204.5(d).

³ The AAO calculates this wage by multiplying the daily wage of \$25.20 by 2080 annual work hours.

⁴ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, the petitioner submits a letter, a posting notice for a Registered Nurse with original signature dated April 6, 2005, and a copy of a clinical registry agreement between San Diego Hospital Association, identified as SHARP in the agreement, and the petitioner, identified as Platinum, a registry. This document was signed and dated on October September 27, 2003 by [REDACTED] the petitioner's director, and on October 3, 2003 by [REDACTED] Vice President Workforce Support Services, SHARP. The record also contains the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on November 2, 2001, to have 50 employees, a gross annual income of \$560,742 and a net annual income of \$19,136. On the Form ETA 750B, signed by the beneficiary on November 8, 2004, the beneficiary did not claim to have worked for the petitioner.

On the I-290B form submitted on appeal, [REDACTED] states that the petitioner is appealing the director's decision because it forgot to submit a client contract with its previous response to the director's NOID, and also wanted to provide a better explanation for why it thinks denying the petition on the petitioner's inability to pay the proffered wage is wrong. In his letter submitted to the record on appeal, [REDACTED] states that the petitioner agrees to pay the beneficiary the current prevailing wage of \$25.20 and to also adjust the wage if necessary to meet the prevailing wage. [REDACTED] also states that the petitioner had a gross income of \$560,000 in 2002; \$685,000 in tax year 2003, and \$498,079 in 2004. [REDACTED] states that the petitioner is a nurse registry and that its revenue is solely based on the number of staff that it can provide to clients. [REDACTED] states that based on the petitioner's previous history, a nurse adds revenue of roughly \$100,000 year to the petitioner, if working for the petitioner on a permanent and fulltime basis. With the annual salary of \$47,000 a year, [REDACTED] asserts that the director's determination that the petitioner is unable to pay the proffered wage is not on par with reality, and does not take into consideration that most of the petitioner's client facilities offer incentive pay, or double time, whenever they desperately need staff.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003 or subsequently. Therefore it has to establish its ability to pay the entire proffered wage in priority year 2003 and through 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's

federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

Although the petitioner submitted its tax return for tax year 2002, this date is prior to the December 2003 priority date. Thus the petitioner's financial information in tax year 2002 is not dispositive in these proceedings. The AAO will only examine the petitioner's tax returns for tax years 2003 and 2004. These documents demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$52,416 per year from the priority date:

- In 2003, the Form 1120S stated a net income⁵ of \$15,991.⁶
- In 2004, the Form 1120S stated a net income⁷ of \$82,941.

⁵Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions noted on line 8 of its Schedule K, for tax year 2003, the petitioner's net income is found on line 23 of Schedule K.

⁶ In his decision, the director utilized line 21 of the petitioner's 2003 tax return to calculate the petitioner's net income.

Therefore, for the priority year 2003, the petitioner did not have sufficient net income to pay the proffered wage. In tax year 2004, the petitioner did have sufficient net income to pay the proffered wage; however, 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). Furthermore the director in his decision noted that another I-140 petition (WAC 03 253 55278) had been approved in 2003, and thus the petitioner would have to establish its ability to pay the wages of both beneficiaries in the 2003 priority date and through 2004. Thus the petitioner has not established its ability to pay the proffered wage based on the beneficiary's wages, or its net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2003 were \$13,506.

For tax year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of \$52,416. Thus from the date the Form ETA 750 was accepted for processing by CIS, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2003 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The director's decision to deny the petition based on the petitioner's lack of ability to pay the proffered wage shall stand.

The AAO will now examine the director's second issue identified in his decision, namely, whether the petitioner fully complied with regulatory requirements governing the posting notice.

Under 20 C.F.R. § 656.20, the regulations require the following:

⁷With regard to tax year 2004, the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K. Therefore the petitioner's 2004 net income is found on line 21 of its tax return.

⁸According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.
- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record is not clear as to whether the petitioner filed a posting notice with the instant petition. In a request for further evidence dated November 15, 2004, the director requested that the petitioner provide evidence that a notice of filing the Form ETA 750 was provided to the petitioner's bargaining representatives or the petitioner's employees. The petitioner appears to have submitted a response to this RFE, although the petitioner's letter of response is dated December 18, 2003. The posting notice submitted with this letter does not identify where the nursing position is available, but notes the petitioner's owners' names and corporate office address at the bottom of the notice when indicating the employment and location of interview. The notice also indicates that it was posted from July 15, 2003 to present, with no ending date. Pursuant to 20 C.F.R. § 656.20(g)(3), the petitioner did not state that the notice was being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity, or state that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional DOL certifying officer.

In a subsequent Notice of Intent to Deny (NOID) the petition dated February 4, 2005, the director provided the petitioner with the opportunity to submit new evidence of posting that conformed with 20 C.F.R. § 656.22 and 20 C.F.R. § 656.20(g) as of the date of the response to the director's NOID.⁹ The director also provided a sample posting notice for reference by the petitioner. The petitioner responded to the director's request by providing another posting notice that complied with the provisions of 20 C.F.R. § 656.20(g)(3), in part, but still did not provide any specific work location for the beneficiary.

The second posting notice submitted to the record in response to the director's NOID stated that notices were posted on nurses' stations, bulletin or information boards, and cafeteria areas for the following facilities: SHARP Chula Vista, Grossmont, Memorial, Coronado, Rees-Stealy, and Mary Birch Hospital for Women. The notice also provided the corporate office's address when listing the places where the notice was posted. The second

⁹ In his NOID and subsequent denial, the director referred to guidance provided in memorandum dated December 22, 2004 from Fujie O. Ohata, Director, Service Center Operations, Titled "Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations," in providing the petitioner this opportunity to repost the notice. The AAO notes that this guidance has been rescinded and is no longer operative.

notice indicated posting dates of February 6, 2005 to February 17, 2005. In an accompanying cover letter, the petitioner's director stated that it had 23 employees, four fulltime employees with the rest of the staff part-time workers. The petitioner noted that its permanent, fulltime employees have proven more reliable and the petitioner is interested in hiring additional fulltime permanent employees. [REDACTED] also submitted a letter dated February 21, 2005 with identical wording as his previous letter dated December 2003 with regard to the petitioner having no bargaining representative, and stating that the job notice had been posted correctly.

As previously stated, the director in his denial, stated that since the petitioner had not submitted contracts with any client health care facilities where the beneficiary could work, the petitioner had not established whether the beneficiary would actually work, and also could not establish that the notice of filing was made at the beneficiary's physical place of employment. The director then determined, the petitioner could not establish that the posting notice was done in accordance with 20 C.F.R. 656.20(g)(ii).

It is noted that the initial posting notice does not clearly specify where it was posted, although the petitioner's corporate office address is noted at the bottom of the notice. While the second posting notice contains more procedural information pursuant to 20 C.F.R. § 656.20 (g)(3), it is still deficient. Under 20 C.F.R. § 656.20, as correctly noted by the director, the notice must be posted at the facility or location of the beneficiary's employment. On the Form ETA 750, Part A, the petitioner indicated that the beneficiary will work at San Diego area hospitals and health care facilities, but did not identify an actual workplace. The petitioner on its second job posting notice did specify locations such as cafeterias within various hospitals where it claims it posted the notice, but provided no greater specificity as to where the beneficiary would be working.

The petitioner needs to prove it posted the notice where the beneficiary would work. 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, the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. Thus, the director's decision that the petitioner failed to follow the regulatory criteria for posting the notice is correct, and will be affirmed.

The AAO will now examine the third issue raised by the director in his denial, namely, that the petitioner had failed to establish that the beneficiary would be employed in a permanent, full-time position. The AAO notes that on appeal the petitioner submits a clinical registry agreement with an accompanying Staffing Services attachment signed by both the petitioner and a health consortium identified as SHARP. Both of these documents make clear that the petitioner is the employer of the beneficiary, as opposed to any specific hospital or health care facilities. The agreement signed by SHARP and the petitioner initially states that Sharp "desires to provide quality patient care services to its patients by engaging [the petitioner] as a provider of quality temporary staffing services." The agreements also states at Section 1.13, "[the petitioner] shall have full responsibility for payment of all compensation to [the petitioner's] personnel." These two documents establish that the petitioner is the beneficiary's actual employer, although the record does not contain any evidence of a contract between the petitioner and the beneficiary that fulltime permanent employment will be offered to the beneficiary.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the

beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

In the instant petition, the petitioner has provided no documentary evidence, such as a contract between the beneficiary and a health care facility or hospital, or a contract between the petitioner and the beneficiary to support its assertion that the beneficiary will be provided fulltime permanent employment. Furthermore the evidence submitted on appeal suggests that the petitioner is a agency that provides temporary staffing services, rather than permanent, fulltime employment.

In his NOID dated February 4, 2005, the director requested evidence of a copy of its contract or an addendum between the petitioner and the prospective employee. In response the petitioner stated it was a nursing registry with four fulltime employees, and part time independent contractors. To date, there is no evidence of any contract between the petitioner and the beneficiary, although the petitioner submits a copy of a staffing agreement between it and SHARP. Without more persuasive evidence as to the beneficiary's workplace, the petitioner has not

established that it has arranged for full time employment for the beneficiary, in accordance with the terms of the Form ETA 750. Thus the third issue addressed by the director in his decision shall also stand.

Beyond the decision of the director, the AAO raises two additional issues with regard to the instant petition. 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).

First, the AAO raises the issue with regard to whether the beneficiary is offering the beneficiary the prevailing wage. On appeal the petitioner states that the prevailing wage for the beneficiary is \$25.20 per hour. The regulation at 20 C.F.R. § 656.20(c) requires the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.¹⁰ Although the director did not mention this issue in his decision, CIS has the authority to review the petitioner's proffered wage for compliance with 20 C.F.R. § 656.20 and, thus, with DOL's prevailing wage rates. *See* 20 C.F.R. § 656.22(e). DOL maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL), www.flcdatacenter.com. OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.¹¹ The prevailing wage rates are broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), "DOL Issues Guidance on Determining OES Wage Levels" and Training and Employment Guidance Letter (TEGL) No. 5-02 (DOL) provide guidance on appropriate skill level categorization. The occupation and corresponding job description in this case indicate that it is a Level 1 position because the proffered position of nurse will be under supervision of a charge nurse and performing nursing duties delineated by the DOL's *Occupational Outlook Handbook*. OWL reports that for 2003, the year of the petition's priority date, the prevailing wage rate for a Level 1 nursing position in San Diego County, was \$20.61 per hour, which is lower than the proffered wage of \$25.20 per hour. However, while the proffered wage from the petitioner meets the prevailing wage rate, the petitioner still must identify all worksites and counties included in the proffered position for the AAO to fully analyze the issue. For this additional reason, the petition may not be approved.

Second, the AAO raises the issue of whether the beneficiary, based on her work experience listed on the Form ETA 750, Part B, is qualified to perform the duties of the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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 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).

¹⁰ *See Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d at 1043, *aff'd*. 345 F.3d at 683; *see also Dor v. INS*, 891 F.2d at 1002 n. 9.

¹¹ The city, state, and county of the employment location must be known in order to identify the prevailing wage rate.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

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|-----|-------------------------|---------------------|
| 14. | Education | |
| | Grade School | 6 |
| | High School | 4 |
| | College | 4 |
| | College Degree Required | Bachelor of Science |
| | Major Field of Study | Nursing |

The applicant must also have 1 year of experience as a registered nurse, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she had worked for the Philippine National Police Regional Hospital, Cebu City, the Philippines from June 1998 to March 1999 as a volunteer nurse, and that she had worked at Chong Hua Hospital, Cebu City, the Philippines, as a nurse trainee, nurse reliever, from April 1999 to June 1999. The beneficiary also indicated that she worked at Cebu Puericulture Center and Maternity House, Cebu City, the Philippines, from April 2002 to July 2002, and at Visayas Community Medical Center, Cebu City, the Philippines, from July 2002 to November 2002 as a volunteer nurse. The accompanying documentation for the work experiences identified by the beneficiary as volunteer positions does not establish that the beneficiary's previous work experience was paid professional work. For example, the documentation from the Visayas Medical Center indicates the beneficiary attended a training program there. Thus, the AAO cannot determine if the beneficiary had the one year of professional, fulltime work experience as a registered nurse stipulated on the Form ETA 750, Part B, at the time the I-140 petition was filed. If the petitioner pursues this matter further, clarification of the beneficiary's previous work experience as a registered nurse should be provided

In view of the foregoing, the previous decision of the director will be affirmed. While the director did not correctly calculate the petitioner's net income for tax year 2003, his decision to deny the petition is affirmed, based on both the petitioner's inability to pay the proffered wage in 2003, on the existence of multiple beneficiaries in tax year 2003, on the posting of a deficient job notice, on the question of the beneficiary's previous work experience, as well as lack of evidence to establish that the petitioner offers the beneficiary fulltime permanent employment as a registered nurse.

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

ORDER: The appeal is dismissed.