



U.S. Citizenship
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File: [Redacted] Office: VERMONT SERVICE CENTER Date: **JUL 18 2006**
EAC 04 252 51998

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:



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 Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a health care staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that the petitioner has had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, that a proper job offer posting was made, and that the beneficiary had a license to practice as a registered nurse or proof of the beneficiary's passage of the CGFNS examination or NCLEX examination. The director denied the petition accordingly. On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 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.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service has determined that there are not sufficient U. S. 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 U. S. workers similarly employed.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140 must be "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." 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). In the instant case, the priority date is August 31, 2004.

The regulations set forth in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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 Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The regulation at 20 C.F.R. § 656.20 (2004)¹ states, in pertinent part,

(c) Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

(1) The employer has enough funds available to pay the wage or salary offered the alien;

(2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work

The prevailing wage rate is defined by the regulation at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by [20 C.F.R. §]656.21(b)(3), shall be determined as follows:

. . . .

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) the average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages;

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the Department of Labor regulations as in effect prior to the PERM amendments.

b) For purposes of this section, except as provided in paragraphs (c) and (d), “similarly employed” shall mean “having substantially comparable jobs in the occupational category in the area of intended employment”

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.²

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:

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 submitted Part B of the Application for Alien Employment Certification, ETA-750,³ with the I-140 Immigrant Petition on August 31, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a registered nurse is \$20 per hour, 40 hours per week, with a listed overtime rate of \$30.00 per hour, which equates to an annual salary of \$41,600 based on a 40 hour schedule at the basic pay rate. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 2003; gross annual income: none listed; net annual income: none listed; and current number of employees: 4.

The director issued a Request for Additional Evidence (“RFE”) on January 25, 2005, with a response due date of April 22, 2005, requesting that the petitioner submit an original completed Form ETA 750, Part A, job offer, as well as a copy of the letter from the employer to the bargaining representative, or notice that the job offer was posted at the employment location. The director also requested evidence of the petitioner’s ability to pay the proffered wage from the priority date of August 31, 2004 and evidence of the beneficiary’s qualifications to include documentation that the beneficiary had passed the CGFNS examination or the NCLEX-RN examination. On December 29, 2005, the director denied the petition stating that the petitioner had not established its continuing ability to pay the proffered wage of \$41,600 from the priority date of August 31, 2004, that the petitioner had not complied with the regulation at 20 C.F.R. § 656.20(g)(1)(ii) regarding posting the notice of filing, and that the petitioner had not established that the beneficiary qualified for an occupation listed in Schedule A, Group I (20 C.F.R. § 656).

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 OWL requires that the city, state, and county of the employment location be known in order to identify the prevailing wage rate.

³ The petitioner initially submitted only Form ETA 750B completed by the beneficiary, and not the required ETA 750A “job offer portion” as required.

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 appeal.⁴

Relevant evidence submitted on appeal includes counsel's letter; a letter dated March 29, 2006, from [REDACTED], [REDACTED] Certified Public Accountants, that includes a balance sheet for the petitioner as of December 31, 2005 with the accompanying statements of income and expenses for the year; a notice of job availability posted from April 20, 2005 through May 4, 2005; and a webpage print-out from the Vermont Secretary of State showing the beneficiary's license status as a registered nurse as being active (expiration date of March 31, 2007). Other relevant evidence in the record includes the employee agreement between the petitioner and the beneficiary, dated August 1, 2004; a webpage print-out from the Vermont Secretary of State showing the beneficiary's license status as a registered nurse as being active (expiration date of March 31, 2005); documentation relating to the beneficiary's education and experience; a letter dated April 29, 2004, from [REDACTED], Vice President, North Fork Bank, 404 Fifth Avenue, New York, NY 10018; a letter dated August 23, 2004, from [REDACTED] and [REDACTED], of LEX Management, Inc., 5314 – 18th Avenue, Brooklyn, NY 11204; a letter, dated August 26, 2004 from the petitioner's managing partner; an undated letter from [REDACTED], Executive Vice President and Chief Financial Officer of Beth Israel Medical Center; a letter dated April 19, 2005 from the petitioner's president; an undated and unsigned posting notice; a copy of a vendor fee for service agreement, dated December 22, 2004 between the petitioner and Professional Placement Resources, LLC (PPR); a letter, dated April 20, 2005, from PPR; and copies of PPR's consolidated financial statements for the years ended December 31, 2002 and 2003.

The petitioner's compiled profit and loss statement for the year ended December 31, 2005 reflects income of \$26,043 and a net loss of -\$35,060.⁵

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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ It is noted that the petitioner's balance sheet for the year ended December 31, 2005 does not separate out current assets from total assets or current liabilities from total liabilities. In addition, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's balance sheet with the accompanying statements of income and expenses for the year ending December 31, 2005 when determining the petitioner's continuing ability to the proffered wage of \$41,600 from the priority date of August 31, 2004.

The notice of job availability submitted on appeal shows that the notice was posted from April 20, 2005 through May 4, 2005 (after the petition was filed with CIS on August 31, 2004). The notice also lists PPR as the employer, rather than the petitioner, and states that the notice was posted for ten consecutive business days at Central Vermont Medical Center of Barre, 130 Fisher Road, Berlin, Vermont 05602.

The petitioner is obliged to demonstrate that it posted the notice of the proffered position in accordance with the regulations and that the Form ETA 750, if approved, would be valid for employment of the alien at the specific site. The purpose of the notice requirement 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 U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. While the posting notice appears to have been posted at the appropriate place of employment, it was posted by PPR as the employer, not the petitioner. Therefore, this office finds that this posting is not in compliance with regulatory provisions requiring that the notice of the job opportunity be posted by the petitioner at the specific site of employment. In addition, the notice of filing was posted after the petition was filed with CIS on August 31, 2004. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant case, the AAO finds that the petitioner has failed to meet the posting requirements, and, therefore, has failed to meet the filing requirements for the Schedule A position.

The employee agreement, dated August 1, 2004, between the petitioner and the beneficiary states:

Compensation and benefits: You shall be compensated at the rate of \$40,000 U.S.D. per year or if prevailing state wages are higher you will be paid that wage less expenses mentioned in item (3) but never less than the base salary of \$40,000 U.S.D. Compensation, subject to all applicable taxes and withholdings, will be paid on the fifteenth and thirtieth of each month for your services during the prior month. You and your immediate family will be entitled to receive health and dental benefits at a reduced rate of 30% of the total cost. You shall be entitled to customary legal holidays recognized by the company and after completing one year of employment, allotted ten days per year of vacation.

Termination: Company will give nurse 4 weeks notice if Nurse's employment is going to be terminated. If Nurse is not happy with the place of assignment the company will try to find another place of employment. In the event that you breach this agreement or if your employment is terminated voluntarily prior to the completion of one year of employment you are to reimburse the company for all costs and expenses (example-legal fees) incurred in connection with your application for green card status. Nurse will also be liable to pay the company liquidate damages and not as penalty a further sum of five thousand dollars USD (\$5,000). You acknowledge that liquidated damages in such amount is reasonable under the circumstances in light of the fact that significant damages and expenses will be suffered or incurred by the company and in recognition of the difficulty and further expenses of proving the exact amount thereof.

Relocation Expenses: Company will reimburse you for the following related expenses:

- a. One way air transportation or related ground transportation (.24/mile) or car hire costs for you via the most direct route between your place of residence and your place of assignment.

- b. Actual expenses for lodging and meals while you are securing initial living accommodations (not to exceed three days or number of days deemed reasonable).

Non-competition and Non-solicitation. During the period until two (2) years following the termination of your employment for whatever reason (which time period shall be extended by the length of time during which you are in violation of the paragraph) you shall not directly or indirectly solicit the business of (or otherwise deal in a manner adverse to the company with) any customer of the company for which or for whose benefit you provided services during your employment. You shall not directly or indirectly solicit the services of (or otherwise deal in a matter adverse to the company with) any employee of the company or induce such employee to terminate his or her employment. Your [sic] further agree that the company shall be entitled to injunctive relief as well as damages for any violation by you of paragraph 5 or 6 of this agreement (which shall survive the termination of this agreement and your employment).

Residency Sponsorship. You acknowledge that the company will withdraw any sponsorship of your residency or presence in the United States pursuant of the Immigrant Visa or otherwise, in the event of any termination of your employment with the company or breach of this agreement.

Period of Agreement. This agreement is for a period of three (3) years. It will be automatically renewed for one (1) year at a time thereafter unless the cancellations written notice is given four (4) weeks prior to the end of the agreement period by both parties. Based on performance the salary will be reviewed annually, except the first review will be in 6 months time.

The letter dated April 29, 2004 from [REDACTED] of North Fork Bank provides a statement relating to the financial relationship between [REDACTED] and [REDACTED] and [REDACTED]. The letter states that the cash flow of the businesses owned by these two men averages to the high 6 to low 7 figures.

The letter dated August 23, 2004 from [REDACTED] and [REDACTED] of LEX Management, Inc. states that the two men are investors in the petitioner and that they can assure that the petitioner will not have any problems meeting the payroll of the nurses or other health care professionals into the U.S. However, the petitioner has not submitted any evidence to corroborate [REDACTED]'s and [REDACTED]'s contention. In addition, the Form ETA 750 submitted by the petitioner and the petitioner's letterhead indicate that the petitioner is a corporation. Therefore, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, the AAO will not consider the assets of [REDACTED] and [REDACTED] when determining the petitioner's ability to pay the proffered wage of \$41,600 from the priority date of August 31, 2004 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The letter dated August 26, 2004 from the petitioner's owner states:

Please note that [the petitioner] is a new company established in the year 2003 and does not have a financial statement yet.

However, to show you that we are backed by strong partners, we enclose a letter from the North Fork Bank,⁶ and [a] letter from our partners, and it will show you that there is substantial cash flow, and therefore will have no problem meeting the payroll of the nurses. As one of our partner companies, NY Payroll, will handle the payroll, and pay the nurses. As this process takes about one year we do not know if our client hospitals will take our nurses as permanent employees or on contract basis.

Most of the hospitals today are choosing to take the nurses as their permanent employees, so the nurses in most likely cases will be employed by the hospital and paid by the hospital. The group we are working with in New York is Continuum Health care and they are substantial. Attached is a letter in regards to Continuum's financial position. As of today they have a shortage of 210 nurses.

The undated letter from [redacted] of Beth Israel Medical Center states that Beth Israel Medical Center is a 1,368 bed hospital serving the New York metropolitan area; that it was established in 1890; that it is a not-for-profit corporation; that it has an annual operating budget of \$924,500,000 with over 7,000 employees; and that it has the ability to pay the salaries of the full-time registered nurses who have commenced employment or have been offered employment pursuant to immigrant visa petitions. This letter does not in any way relate to the petitioner's ability to pay the proffered wage from the priority date of August 31, 2004.

The letter dated April 19, 2005 from the petitioner's president states:

In an effort to accomplish its mission most effectively, [the petitioner] has teamed with Professional Placement Resources, LLC ("PPR"), a nurse staffing company located in Jacksonville Beach, Florida. Together, [the petitioner] and PPR intend to place qualified foreign nationals in appropriate nursing positions with client hospitals across the United States. To memorialize their working relationship, [the petitioner] and PPR have entered into a Vendor Fee For Service Agreement ("Agreement"), dated December 22, 2004, which outlines the provision of qualified nursing and healthcare personnel. As set forth in the Agreement, PPR has agreed to place certain qualified nursing candidates at a contracted

⁶ The petitioner's reliance on the bank statement of its investors is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. Third, as the petitioner is a corporation, the assets of its investors or shareholders may not be considered when determining the petitioner's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

worksite and compensate them at or above the applicable prevailing wages. Specifically, PPR has accepted the responsibility of compensating the beneficiary in connection with his placement at a client hospital. Pursuant to their Agreement, PPR will place the beneficiary at a contracted client hospital at a base rate of not less than \$20.00 per hour for a 40-hour workweek, or \$41,600 per year.

This annual salary exceeds the prevailing wage based on the beneficiary's intended place of employment at Central Vermont Medical Center, on Fisher Road, Berlin, Vermont.

In further accordance with the Agreement, PPR will provide the beneficiary overtime compensation at a rate of 1.5 times his [sic] hourly rate for all hours worked in excess of 40 hours in any workweek. Based on its demonstrably strong financial history and widely established operations, PPR is readily able to compensate the beneficiary according to prevailing wage requirements. A copy of the Vendor Fee for Service Agreement between [the petitioner] and PPR is attached as Exhibit "A".

The letter, dated April 20, 2005, from PPR corroborates the information supplied by the petitioner's president in his letter, dated April 19, 2005, and further states:

Joining [the petitioner] in its effort to ameliorate the crisis created by the U.S. nursing shortage, PPR is ready, willing and contractually obligated to pay the appropriate wage to the beneficiary in exchange for the beneficiary's performance of services identified in the Form I-140 petition. As a result, PPR fully supports [the petitioner's] request for the CIS's approval of its Form I-140 Immigrant Petition for Alien Worker.

PPR's consolidated financial statements for the years ended December 31, 2002 and 2003 reflect net incomes of \$325,718 and \$452,082, respectively. The 2002 and 2003 consolidated financial statements for PPR also reflect net current assets of \$1,599,969 and \$2,153,259, respectively.⁷

On appeal, counsel contends that the "unfavorable decision" should be reversed "based on evidence that the petitioner has satisfied its burden of establishing eligibility for the benefits sought."

Counsel is mistaken. 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, August 31, 2004, 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).

The petitioner failed to submit any Federal Tax Returns, annual reports, or audited financial statements in compliance with 8 CFR § 204.5(g)(2). Instead, the petitioner confirmed its job offer to the beneficiary in a separate letter, which addressed the ability to pay issue. However, the letter provides that "[the petitioner] has teamed with Professional Placement Resources, LLC ("PPR"), a nurse staffing company, located in Jacksonville Beach, Florida. Together, [the petitioner] and PPR intend to place qualified foreign nationals in appropriate nursing positions with client hospitals across the United States. To memorialize their working relationship, [the petitioner] and PPR have entered into a Vendor Fee For Service Agreement . . . which

⁷ As PPR is not the petitioner of the instant visa petition, its 2002 and 2003 consolidated financial statements will not be considered when determining the petitioner's ability to pay the proffered wage of \$41,600.

outlines the provision of qualified nursing and healthcare personnel . . . PPR has agreed to place certain qualified nursing candidates at a contracted worksite and compensate them at or above the applicable prevailing wages. Specifically, PPR has accepted the responsibility of compensating the Beneficiary in connection with his [sic] placement at a client hospital.”⁸ In support, the petitioner has attached the Vendor Fee Agreement. Since the petitioner is HealthStaff International, HealthStaff International must provide evidence of its ability to pay the beneficiary the proffered wage. HealthStaff has failed to do so.

As other evidence of ability to pay, the petitioner provided several letters. One letter provided was from [redacted], which confirms the “financial relationship between [redacted] and Mr. [redacted] and [redacted] [partners of HealthStaff International]. They are reliable and ambitious entrepreneurs that have had a banking relationship with us for many years.” [redacted] and [redacted] signed a second letter, on Lex Management Inc. letterhead, which provided that “this is to assure you that [the petitioner] will not have any problems meeting the payroll of the nurses or other Health care professionals that are brought into the U.S.” The petitioner also provided a letter from the Executive Vice President and the Chief Financial Officer of Beth Israel Medical Center, a facility in the New York area, and part of Continuum Health Services, which the petitioner works with. This letter is not connected to the beneficiary’s work location in Vermont, and does not reference the petitioner at all. The letters provided are all insufficient to demonstrate the petitioner’s ability to pay. The letters do not meet the regulatory evidence requirement, which requires that the petitioner send either federal tax returns, audited financial statements or annual reports. Further, two letters provided do not reference the petitioner, and the third letter makes a “blanket statement” that the petitioner can pay without attaching any evidence in support of this claim.

The petitioner has filed 14 other I-140 immigrant petitions with a 2004 priority date, and would need to demonstrate its ability to pay the other petitioned-for beneficiaries as well. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Furthermore, the AAO also notes that some of the contracts between the petitioner and end-users indicate that the end-users may themselves hire nurses referred by the petitioner and pay a referral fee. The regulation at 20 C.F.R. § 656.3 states:

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.

⁸ There is no evidence of an agreement between the beneficiary and PPR in the record of proceeding.

Petitions for alien workers to be contracted to end-users were considered in *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). In *Smith*, 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.

Matter of Artee, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of employees contracted to an end-user. 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 who were to be temporarily 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.

These precedent cases, considered together, establish that an agency that refers workers may qualify the employer of those workers within the meaning of 20 C.F.R. § 656.3. To do so, however, it must be the beneficiary’s actual employer, rather than referring potential employees to other employers for a fee. Workers whom the petitioner anticipates referring, rather than employing, are not eligible for the instant visa

category. In the instant case, the petitioner clearly acknowledges that it will not be employing the beneficiary, but would, in fact, refer her as a candidate to PPR who would pay the beneficiary the proffered wage and would place her at a potential hospital. Therefore, the petitioner cannot be considered to be the employer of the beneficiary.⁹

The final issue in these proceedings is whether or not the beneficiary is eligible to practice as a registered nurse in the state of Vermont. In the instant case, counsel submitted a webpage print-out from the Vermont Secretary of State showing the beneficiary's license status as a registered nurse as being active (expiration date of March 31, 2007). The AAO received counsel's brief on April 26, 2006, before the beneficiary's license expired. Therefore, since the beneficiary's license to practice as a registered nurse was valid at the time the appeal was filed, the AAO finds that the beneficiary met the requirements of 20 C.F.R. § 656.22(c)(2).¹⁰

Based on the foregoing, the petitioner has failed to establish that it met the filing requirements for posting its notice of filing the application for alien employment certification, and further, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. In addition, the petitioner has failed to establish that it is or will be the beneficiary's employer.

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

ORDER: The appeal is dismissed.

⁹The AAO notes that a review of public records for the NYS Department of State, Division of Corporations, at http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.SELECT_ENTITY (accessed on July 17, 2008) reveals that no business entities were found under the name of HealthStaff International.

¹⁰ The AAO notes that the petitioner had submitted a prior webpage print-out from the Vermont Secretary of State showing the beneficiary's license status as a registered nurse as being active (expiration date of March 31, 2005) which was issued on July 20, 2004, before the filing date of the visa petition of August 31, 2004. Therefore, the beneficiary's license to practice as a registered nurse in the State of Vermont was valid at the time of filing.