



U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 013 53797 Office: NEBRASKA SERVICE CENTER

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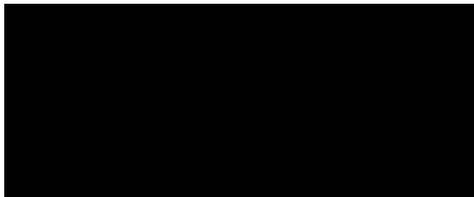
DEC 01 2009

IN RE: Petitioner:
Beneficiary:



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

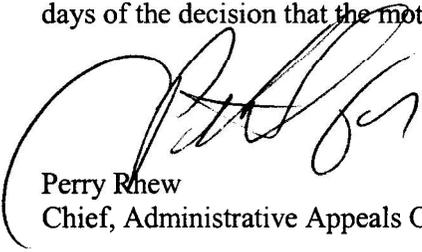
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is a healthcare agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements. The director additionally noted that the record did not contain any documentary evidence establishing that the petitioner is the actual intending U.S. employer. The director denied the petition on October 19, 2006.

On appeal, the petitioner submits additional evidence in order to show that it complied with the regulatory requirements.¹

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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of 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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

¹ 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.

[U.S. Citizenship and Immigration Services (USCIS)].” 8 C.F.R. § 204.5(d). Here, the priority date is October 17, 2006. The proffered wage is \$23.26 per hour, which amounts to \$48,380.80 as set forth in Part G of the ETA Form 9089.

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. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL 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. Therefore these regulations apply to this case because the filing date is October 17, 2006.

The regulation at 20 C.F.R. § 656.10(a)(3) provides that an employer seeking a labor certification for a position under Schedule A must apply in accordance with this section and § 656.15.

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 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:

(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. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(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 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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). 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. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

* * *

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

- (i) State 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.

(4) If an application is filed under § 656.17, the notice must contain the information required for advertisements by § 656.17(f), must state the rate of pay (which must equal or exceed the prevailing wage entered by the SWA on the prevailing wage request form), and must contain the information required by paragraph (d)(3) of this section.

* * *

(6) If an application is filed under the Schedule A procedures at § 656.15, or the procedures for shepherders at § 656.16, the notice must contain a description of the job and rate of pay, and must meet the requirements of this section.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

- (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with sec. 656.40 and sec. 656.41.

- (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in sec. 656.10(d).

It is noted that the comments to the final rule implementing Perm stated:

Employers can use a wage range in the required notice. It is longstanding DOL policy that the employer may offer a wage range as long as the bottom of the range is no less than the prevailing wage. See page 14 of *Technical Assistance Guide No. 656 Labor Certifications (TAG)*. However, the prevailing wage, which provides that floor for the wage range, must be the prevailing wage at the time the recruitment was conducted for the application for which the employer is seeking certification, not the prevailing wage when the alien beneficiary was initially hired. . . . (Original Emphasis).

Because the ETA Form 9089 includes the offered wage, the employer must include in the notice the wage offered to the alien beneficiary at the time the application is filed. Alternatively, the employer may include a salary range in the notice, as long as the bottom of the range is no less than the prevailing wage rate.

69 Fed. Reg. 77336, 77338 (Dec. 27, 2004).

DOL's frequently asked questions and answers, which may be found online at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (Accessed November 2009), also provide in relevant part under the section "Notice of Filing:"

8. I have multiple positions available for the same occupation and job classifications and at the same rate of pay. May I post a Notice of Filing for the same occupation and job classifications with a single posting?

Yes, an employer can satisfy Notice of Filing requirements with respect to several positions in each of these job classifications with a single Notice of Filing posting, as long as the single posting complies with Department of Labor's regulation for each application (e.g. contains the appropriate prevailing wage information and the Notice of Filing must be posted for 10 consecutive business days during the 30 to 180 day time window prior to filing the application). For instance, separate notices would have to be posted for an attending nurse and a supervisory nurse (e. g. nurses containing different job duties).

Note: At the time of filing the labor certification, the prevailing wage information must not have changed, the job opportunity must remain the

same and all other Department of Labor regulatory requirements must be followed.

9. Where must I post a Notice of Filing for a permanent labor certification for roving employees?

If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media—whether electronic or print—in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage will be derived from the area of the staffing agencies headquarters. . . .

In this matter, Part H, 1 of the ETA Form 9089 states that the primary worksite (where the work is to be performed) is to be at the petitioner's headquarters or main office at [REDACTED]. The accompanying prevailing wage determination by the state workforce agency (SWA) indicates that this location was used in order to set the prevailing wage at [REDACTED] per hour. The proffered wage as set forth on Part G of the ETA Form 9089 is also stated to be [REDACTED] per hour and does not state a range of the certified wage. Additionally, Form I-140 states that the beneficiary will work at the same address as "Part 1 [of the form]" in [REDACTED]. Neither the ETA Form 9089, PWD, or Form I-140 indicate that the beneficiary will work at or be assigned to any other location.

With the initial filing, the petitioner submitted a copy of the notice of posting for one or more aliens for the position of registered nurse with certification of posting from the petitioner's vice-president. The date(s) of posting was stated to be from May 5, 2006 to May 19, 2006. The posting contained the following:

[REDACTED]

The employer will pay or exceed the prevailing wage, as determined by the U.S. Department of Labor.

LOCATION OF EMPLOYMENT: [REDACTED]

[REDACTED]

At the bottom of the Notice of Filing the petitioner listed sixteen businesses and their locations where the notice was posted including the petitioner's main office in [REDACTED]

The director denied the petition on October 19, 2006, determining that the petitioner had listed a wage range in which the low end of the range was less than the prevailing wage given on the Form ETA 9089 and prevailing wage determination. The director concluded that proper notice was not given and precluded the approval of the petition.

The director additionally questioned whether the petitioner was the intending actual U.S. employer of the beneficiary. He noted that the petitioner's cover letter had indicated that the petitioner concentrated "their overall staffing efforts (including recruitment) on specific industry disciplines and provide both temporary personnel and candidates for full-time hire in 12 core disciplines." The director observed that the petitioner's Internet website reflected that the petitioner operated an International Program where the petitioner facilitated recruitment and placement of nurses seeking residence and employment in the United States. The director noted that the website stated that [REDACTED] can provide sponsorship for a Green Card, place a Nurse directly with a hospital Sponsor, or provide sponsorship to the Nurse and then transfer to hospital sponsor." The director concluded that the record failed to demonstrate that the petitioner was the actual intending U.S. employer offering a permanent, full-time job to the beneficiary under any of the hiring scenarios advertised by the petitioner.

On appeal, the petitioner, through counsel, submits a copy of the posting notice provided to the underlying record and further provides copies of three additional notices that counsel states were posted in three separate locations where the notices were posted during the same dates of May 5 to May 19, 2006. Counsel asserts that the employer's summary notice includes the range of all prevailing wages for all of the anticipated locations or clients their healthcare facilities. He notes that the additional postings also contain both the petitioner's headquarters wage as well as the local prevailing wage, and that the petitioner should not be penalized by providing additional information on the notice. The petitioner's contentions are not persuasive. At the outset, we note that the three additional local job postings cannot be considered credible evidence of a notice(s), pursuant to regulatory guidelines, as the respective attestations stating that the posting was accomplished as listed, each pre-date the ending date that the posting was claimed to be removed.² Therefore the attestation cannot be viewed as credible. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Despite claiming on Part H, 1. that the location of the physical jobsite where the work is to be performed is at the petitioner's headquarters in New York, subsequent documentation in the record reflects that this is a case where elements of both of the circumstances described in the federal

²Additionally, the postings fail to comply with 20 C.F.R. § 656.10(d)(6) that requires the posting to contain an adequate description of the job. The postings fail to address the educational requirement on the ETA Form 9089 as well as state the required licensing.

register comments and DOL's FAQs are present, in that 1) the petitioner has multiple job openings for the same job and 2) the petitioner does not know at the time of posting where the jobsites will be located. Following a review of the provisions above, and the statements in the ETA Form 9089, it remains that for purposes of the posting of the notice of filing, the prevailing wage to be used is that derived from the petitioner's headquarters and as stated on the SWA PWD, as well as represented on the ETA Form 9089 as the offered wage. No wage range should be stated on the notice if it is not present on the ETA Form 9089. Because these are all jobs in which the Schedule A's worksite is not known, then the rate of pay for the purpose of the notice of filing would be derived from the staffing agency's headquarters location and the job should be posted at all of the individual clients' locations.

In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position failed to comply with regulatory requirements. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, the petition is not approvable. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, as noted in the AAO's request for evidence issued on July 30, 2009, the petitioner did not address the issue of whether it is the actual U.S. employer as raised in the director's denial. The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The regulation at 20 C.F.R. § 656.3 further states, in part:

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position

descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

In *Matter of Smith*, 12 I&N Dec. 772, (Dist. Dir. 1968), the petitioner, a s [REDACTED], provided a continuous supply of secretaries to third-party clients. The district director determined that the [REDACTED] rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; 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* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment 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 was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance 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.*

As noted by the director, the AAO stated in its request for evidence that the petitioner appeared to offer both temporary and direct placement. In order to determine whether the petitioner is the actual intended U.S. employer offering direct full-time permanent employment to the beneficiary the AAO requested:

A.

- 1) A copy of any executed employment contract(s) with the beneficiary.
- 2) A list of all healthcare facilities where you have placed foreign workers that you have sponsored from October 1, 2006 to the present.
- 3) A copy of each executed contract or agreement with all clients where this beneficiary or any other individual foreign worker has been or would have been placed since October 1, 2006 to the present.
- 4) Copies of each quarterly state wage or unemployment report filed with the state of New York, the state of Florida and the state of Arizona since the third and fourth quarter of 2006, and all quarters of 2007 and 2008. The reports must identify the employees by name and wages paid during that quarter. Please identify any foreign workers that you have sponsored listed on these reports.

- (5) Your organization has filed over 300 I-140s in the last few years. Over 250 have been filed since 2004. For 2006, 2007, and 2008, identify all foreign workers you have sponsored, USCIS receipt numbers, status of petition; their position; start date; rate of wages; commencement date; whether still employed; if not employed, date and nature of termination.
- 6) If not addressed in the above documents, please detail who will directly pay the beneficiary's salary; who will provide such benefits as group insurance; who will make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance; who will withhold federal and state income taxes; and whether you retain the authority to assign the beneficiary to multiple outsourcing projects.

The AAO further requested evidence related to the petitioner's continuing financial ability to pay the proffered wage in view of the fact that it had filed hundreds of I-140s.³ The petitioner was afforded twelve weeks to respond to the request for evidence.

In response, the petitioner, through counsel, misstates the director's denial of the I-140 as pertaining to the petitioner's failure to establish its ability to pay the proffered wage.⁴ Counsel contends that

³ The AAO's request for evidence related to the petitioner's ability to pay the proffered wage stated:
B.

2) The number of petitions filed additionally raises a question whether you have the ability to pay the proffered wages for all of the petitions. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. A petitioner's filing of a labor certification application (in Schedule A, the filing of the I-140) establishes a priority date. Therefore, the petitioner must establish that each job offer was realistic as of the respective 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). Please establish your ability to pay the proposed wage offer in this case in view of the other petitions that you have filed. Please include copies of federal income tax returns, audited financial statements or annual reports for 2005, 2006, 2007, 2008 and 2009 with your response.

the AAO is now requesting evidence of the petitioner's ability to pay the proffered wage. No mention is made of the six requests for evidence made by the AAO relating to its status as the intended U.S. employer. However, it is noted that counsel states that "[I]n December 2007, [redacted] purchased substantial assets of [redacted]. Since that time the petitioner has used the [redacted]. [redacted] remains in good standing with the State of Texas." Counsel explains that the Asset Purchase Agreement was between the petitioner [redacted] [redacted] was a division of [redacted] and was acquired by [redacted]. Counsel further states that the asset and purchase agreement indicates [redacted] as the seller and Advantis as the buyer however the agreement subsequently states that [redacted] will assign the assets to [redacted], a wholly owned subsidiary. As to the ability to pay the proffered wage, counsel asserts that because [redacted] and a third entity called [redacted] are considered affiliates under Texas state franchise taxation provisions, then each is liable for the debts and obligations of the other. He further asserts that because the petitioner's most recent federal quarterly report (Form 941) shows 168 employees and annualized wages of nearly four million dollars based on the wages reported for the first quarter, then it has the ability to pay the proffered wage.

It is noted that counsel has submitted a copy of four pages of an asset purchase agreement because he thought it was the most pertinent. However, there is no signature page, no exhibits and no mention of the beneficiary in the pages submitted. The inclusion of discussion of nurses includes provisions related to the payment of earn-out amounts based on the "deployment of one-hundred eighty four nurses in the international pipeline" (paragraph 2.4) and for the Buyer to use reasonable commercial efforts to place all nurses in the pipeline in full-time employment. *Id.*⁵ Counsel further submitted copies of six Texas franchise tax reports that relate to [redacted] [redacted] which are all Texas entities. None of the tax reports contain any information relevant to the petitioner, [redacted]. The state tax identification numbers are all different for each of these entities and the only FEIN number indicated on the federal quarterly tax return submitted to the record belongs to [redacted] which is different from the petitioner's FEIN as listed on page 1 of the I-140.

The response to the request for evidence failed to provide the information requested by the AAO relevant to the petitioner's status as the actual intended U.S. employer offering a full-time permanent job to the beneficiary in the U.S. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has failed to demonstrate that it was the actual U.S. employer directly offering a full-time permanent job to the beneficiary. Because it failed to demonstrate that status, such a status cannot be conveyed by the sale of part of its company to another entity.⁶ Moreover, the issue of the ability to pay the

⁴ As discussed above and contained in the record, the director's denial omitted any mention of the petitioner's ability to pay the proffered wage.

⁵ This paragraph references an "Exhibit F," which included the names of nurses "whose employment processing had begun." This exhibit was not attached.

⁶ A successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is

proffered wage to the beneficiary is moot if the employment offer is not *bona fide* to begin with, notwithstanding assertions related to the affiliate status of other entities with respect to payment of state taxes. It is noted that neither the regulation at 8 C.F.R. 204.5(c) nor pertinent DOL regulations provide for co-employers with different FEIN numbers to sponsor an alien for a labor certification or on the immigrant visa 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 at 1002 n. 9.

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.

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ORDER: The appeal is dismissed.

doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).