U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: JUN 27 2012 Office: TEXAS SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. The petitioner subsequently filed a motion to reconsider. The director denied the motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Texas Service Center.

The petitioner is a healthcare staffing company. It seeks to employ the beneficiary permanently in the United States as a staff registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

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 who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the United States Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."[1] The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [United States Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). The priority date in this case is September 27, 2007.

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced

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

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. § 656.10(d). Also, according to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing.

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 20 C.F.R. §656.10(c)(3), states the employer must show it has enough funds available to pay the wage or salary offered the alien. 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The director denied the instant petition for failure to demonstrate that the beneficiary possessed a CGFNS certificate and nursing license in her home country on or before the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). However, upon review of the record, the AAO has determined that the beneficiary was issued a nursing license from the state of New York on April 11, 2007, which remains valid through December 2012. Therefore, the beneficiary met the requirements of 20 C.F.R. § 656.5(a)(2), because she holds a permanent, full and unrestricted license to practice professional nursing in the state of intended employment prior to the priority date.

However, the AAO will remand the case to the director to resolve other issues not addressed in the director's decision. The issues not addressed in the initial decision by the director were: 1) whether the petitioner met the requirements of the posting notice; 2) whether the job offer is permanent and full-time; 3) if an actual job offer exists; and 4) the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the regulation at 20 C.F.R. § 656.10(d)(3) requires the following:

> The notice of the filing of an Application for Permanent Employment Certification must:
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> (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.

The posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii), as it provided the incorrect address of the appropriate Certifying Officer.[2] For employment in New York in 2007, the proper address of the appropriate Certifying Officer[3] is:

United States Department of Labor
Atlanta National Processing Center
Harris Tower
233 Peachtree Street, N.E., Suite 410
Atlanta, Georgia 30303

The posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.20(d)(3)(iv).

Additionally, there is no evidence that the petitioner published the notice internally using in-house media. The regulation at 20 C.F.R. § 656.10(d) provides:

> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of 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 in-house media, whether electronic or print, that were used to distribute*

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[2] The posting notice included the New York State Department of Labor, Alien Employment Certification Office, P.O. Box 703, New York, NY 10014-0703.
[3] *See* http://www. http://www.foreignlaborcert.doleta.gov/perm.cfm (accessed June 11, 2012).

> *notice of the application in accordance with the procedures used for similar positions within the employer's organization.*

(Emphasis added).

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL's FAQ response "Round 10" provides that "the regulations require that the employer 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." *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (accessed June 11, 2012). The FAQ response further provides that:

> The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification . . . it is not required to mirror, word for word, the physical posting... . In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer.

DOL's FAQ response notes that the posting contemplates internal notification of the petitioner's employees rather than external notification to the public at large. Further, the posting requirement relates to the employer's "*normal procedures used for the recruitment of similar positions in the employer's organization.*" The petitioner failed to state whether it normally posts internal notifications and, if so, whether and when the notice was posted.

Also, beyond the decision of the director, the petitioner has not demonstrated that the proffered job is a permanent and full-time offer of employment.

The Temporary Staffing Agreement (Agreement) entered into by the petitioner and , the primary worksite, was not entered into until July 16, 2008, nearly ten months after the priority date. Additionally, while the agreement states on page 2 #1 that the deployment shall be on a "temporary basis," paragraph 12 states that the Agreement will be valid for one year and will be "automatically renewed at the end of the original term (and each subsequent year thereafter)." Therefore, it is unclear as to whether the job offer is permanent, and if so, whether the petitioner had a permanent offer of employment for the beneficiary as of the priority date.

The petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. In determining whether the petitioner will be the beneficiary's

actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The petitioner describes itself as healthcare staffing company. It is unclear that the petitioning entity pays any employee salaries, that it employs nurses directly, or that it would be the beneficiary's actual employer.

According to the Agreement, the petitioner merely recruits, places, and supplies healthcare professionals and workers to different hospitals, nursing homes, and other healthcare facilities. The beneficiary is a nurse, and the petitioner is not a healthcare facility. Therefore, the extent of control which the petitioner would be able to exercise over details of the beneficiary's work appears to be minimal. The beneficiary's daily duties do not appear to be under the direction of the petitioner, but rather under the direction of would be providing the instrumentalities, tools, and the place of work for the beneficiary.

Further, nursing and heath care are not part of the regular business of the petitioner. The petitioner's regular business is recruiting, placing, and supplying personnel to healthcare facilities.

Finally, the Form 1099-Misc issued by the petitioner to the beneficiary in 2007, Box 7 shows "nonemployee compensation." The beneficiary was responsible for paying self-employment taxes, as the petitioner did not withhold any payroll taxes. The petitioner has also shown that it is not the actual employer based on the fact that the beneficiary's name is not listed as an employee on the 2007 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return-Attachment submitted by the petitioner. Based on the foregoing, it does not appear that the petitioner is the actual employer.

Therefore, the evidence in the record does not establish that the petitioner will actually employ the beneficiary.

Finally, with regard to the petitioner's 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in July 2007.

In the initial filing, the petitioner submitted an unaudited 2006 financial statement. In response to the director's Intent to Deny, the petitioner submitted an unaudited 2007 financial statement; bank statements from December 31, 2006 through July 31, 2007; portions of the petitioner's 2007 Form 941; and, the petitioner's 2007 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return-Attachment.

Counsel's reliance on the balances in the petitioner's bank account 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, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

The financial statements submitted are unaudited. Counsel's reliance on unaudited financial records is also misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner failed to establish it had the ability to pay the proffered wage from the priority date.

Finally, the petitioner has acknowledged that it has filed and received approvals for fifty (50) Immigrant Petition for Alien Worker (Form I-140), and two I-129 Petition for Nonimmigrant Worker. Therefore, the petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the beneficiary's priority date until the beneficiary obtains permanent

residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. No evidence was submitted to establish that the petitioner has the ability to pay the proffered wage for each of the I-140 and H-1B beneficiaries.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.