(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: NOV 26 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner is a healthcare staffing company.[1] It seeks to employ the beneficiary permanently in the United States as a registered nurse, a Schedule A occupation. A Schedule A occupation is an occupation listed at 20 § C.F.R. 656.5(a) for which the United States Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with United States Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15. For Schedule A petitions, the priority date is the date the completed signed petition (including all initial evidence and the correct fee) is properly filed with USCIS. In this matter, the priority date is November 6, 2008.

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.

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

As set forth in the director's July 1, 2009 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] The petitioner is d/b/a located at The petitioner's federal employer identification number (EIN) listed on Form I-140 is According to the New York State Department of State website, was registered as a foreign business corporation in New York on March 9, 2010, after the priority date of the instant petition. *See* http://appext9.dos.ny.gov/corp_public (accessed October 16, 2012). Further, has not registered any assumed names with the Department of State in the State of New York. *Id.*

> *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.

On March 4, 2009, the director issued a Notice of Intent to Deny (NOID), in which the petitioner was requested to submit evidence of its ability to pay the proffered wage of the instant beneficiary, as well as the wages for all the beneficiaries on whose behalf petitions had been filed.[2] In a response received on March 26, 2009, the petitioner submitted the 2007 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for The director denied the petition on July 1, 2009, noting that the submitted tax return does not pertain to the petitioner.

The record of proceeding does not contain any federal tax returns, audited financial statements, or annual reports for the petitioner from the 2008 priority date or thereafter.[3] It is also not clear if such evidence was available at the time the director received the petitioner's response to the NOID.[4]

The AAO notes the following additional deficiencies in the record that should be considered by the director on remand:

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[2] 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'l Comm'r 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 ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Further, the petitioner is 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.

[3] As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

[4] The 2008 corporate return would have been due on March 16, 2009 for a calendar year tax filer, but it is not clear if the petitioner is a calendar year filer or fiscal year filer, or if it requested an extension from the Internal Revenue Service (IRS) to file its 2008 tax return.

1) ETA Form 9089 at Part H.1. states that the beneficiary would perform her work at [redacted] However, it appears that the corporate offices of [redacted] are located at that address. It does not appear that any nursing services will be performed at that address.
2) The record contains an August 25, 2003 agreement between the State University of New York (SUNY) and [redacted] This agreement for the provision of medical staffing services expired on September 30, 2008, prior to the priority date and filing of the petition. Furthermore, it is not evident how the agreement relates to the petitioner.
3) The posting notice submitted with the petition states that the location of employment is at [redacted] As noted above, it does not appear that there is a healthcare facility at that location. Additionally, the record does not contain a contract between the petitioner and any of the ten health care facilities that are listed on the posting notice under "Locations Where the Notice was Posted."[5] Thus, it is not clear that the petitioner properly posted the notice to its employees at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1).
4) The record does not contain evidence of the petitioner's ability to pay all of the beneficiaries of its immigrant and nonimmigrant petitions.
5) On the petition, the petitioner indicated that it employs 500 workers. The record contains a letter dated April 14, 2008, from [redacted] President of [redacted] Staffing. The letter states that [redacted] Staffing employs approximately 500 employees. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) The record does not establish that [redacted] is a financial officer of the

[5] If the employer knows where the Schedule A employee will be placed, the employer must post the notice at the worksite(s) where the employee will perform the work. 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 the worksite(s) of all of its current clients, and the prevailing wage will be derived from the area of the staffing agencies' headquarters. The employer must also publish the notice in any in-house media that it normally uses for the recruitment of similar positions. If the worksite is unknown and the staffing agency has no clients, the application would be denied because no *bona-fide* job opportunity exists. A denial is consistent with established policy in other foreign labor certification programs where certification is not granted for jobs that do not exist at the time of application. *See* http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile12 (accessed October 16, 2012).

petitioner.[6] Further, based on an examination of the entire record, USCIS does not exercise its discretion to accept the letter from in this case.

6) On appeal, counsel submits a Texas Franchise Tax Affiliate Schedule for 2008, which states that had $0.00 gross receipts subject to throwback in other states, $0.00 gross receipts everywhere (before eliminations), $0.00 gross receipts in Texas (before eliminations) and $0.00 costs of goods sold or compensation (before eliminations). Thus, it is not clear that conducted any business in 2008.

7) The record contains a prevailing wage determination (PWD) issued by the New York State Department of Labor on July 16, 2008. The regulation at 20 C.F.R. § 656.40 requires the petitioner to request a PWD, and the wage obtained is assigned a validity period. The PWD was issued to As indicated above, the petitioner has not established that it is authorized to use the assumed name of and, therefore, it is not clear that the petitioner obtained the PWD submitted with the petition.

8) The record contains an August 20, 2008 employment agreement between and the beneficiary to provide nursing services at an unknown location for an undetermined duration. It is not evident how the agreement relates to the petitioner. The petitioner not established 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). Further, the petitioner has not established that the job offer is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10).

Therefore, the AAO will withdraw the previous decision of the director and remand the case to the director to request and consider evidence establishing (a) the petitioner's ability to pay the proffered wage of all of its pending petitions, including federal tax returns, audited financial statements, or annual reports from 2008 through 2011;[7] (b) where the beneficiary will work; (c) the authority of

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[6] The Texas Comptroller of Accounts website indicates that is the Chief Financial officer of *See* (accessed October 16, 2012).

[7] Such evidence must pertain to On appeal, counsel submits four pages of an Asset Purchase Agreement (Agreement) indicating that on December 9, 2007, purchased certain assets and contracts of a New York corporation. Counsel asserts that the petitioner purchased

to use the assumed name of in the State of New York from 2008 onward; (d) that the petitioner will be the actual employer of the beneficiary and that the job offer is for a permanent and full-time position, including an employment contract between the petitioner and the beneficiary, and contracts between the petitioner and any third-party hospitals and/or other healthcare providers where the beneficiary may work; and (e) that any other deficiencies noted above and/or by the director have been resolved.

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.

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which was a division of However, Exhibit B (detailing the assets sold), Exhibit C (detailing the contracts assigned) and Exhibit D (detailing the assets and contracts not sold or assigned) of the Agreement were not submitted. Therefore, the Agreement does not establish which assets and/or contracts were purchased by the petitioner from Further, according to the Agreement, the petitioner planned to assign all of the purchased assets to a Texas limited liability company wholly-owned by the petitioner. Therefore, even if the Exhibits had been submitted, the petitioner has not established that it still owns any of the assets represented by the Agreement. Further, according to the New York State Division of Corporations online database, www.dos.ny.gov/corps/bus_entity_search.html (last accessed on September 16, 2012), established in 1981, remains an active corporation. Thus, the tax return of does not constitute evidence of the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."