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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 28 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

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

The petitioner is a healthcare provider staffing services corporation. The petitioner currently employs ten employees and has a net annual income of $278,194.00. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director denied the petition after determining that at the time of the petition's filing, supporting documentation failed to clearly indicate that arrangements were in existence for the beneficiary to work permanently in the United States as a registered nurse. The director also determined that the petitioner failed to establish its ability to pay the proffered wage to the beneficiary because its ordinary income would not pay the salaries of seventy nurses being concurrently sponsored on separate visa petitions.

On appeal, counsel submits a brief and copies of evidence formerly submitted into the record of proceeding as well as new evidence, namely, affidavits by the petitioner and its third party client, a contract from 1999 between the petitioner and its third party client, the petitioner's bank statements, and an article about a nursing shortage in Texas. Counsel states, in part, that the position is permanent and full-time as evidenced by contracts between the petitioner and the beneficiary; contracts between the petitioner and its third party clients; and occupational demand as a result of a nursing shortage. Counsel further asserts that the petitioner has the ability to pay the proffered wages as evidenced by its annual and quarterly tax returns; promissory notes executed by the petitioner's Vice President in connection with lines of credit; wages paid to current employees; the petitioner's bank statements; and the petitioner's expectations of future financial profit based on contracts with third party clients.

Section 203(b)(3) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on August 14, 2000. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for which the Director of the United States Employment Service has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. The Application for Alien Employment Certification shall include:

> Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
>
> Evidence that notice of filing the Application for Alien Employment Certification was provided

to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

I. **Although the petitioner proved it would be the beneficiary's actual employer, the petitioner has failed to establish that permanent employment was prearranged at the time of filing the immigrant visa petition**.

The first issues to be discussed in this case are (1) whether the petitioner is the beneficiary's actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is not of a temporary or seasonal nature. In connection with these determinations, CIS examines the evidence of arrangements made for the beneficiary to work permanently in the United States as a registered nurse at the time of filing the immigrant visa petition.

In its initial petition, the petitioner described the proffered position as a registered nurse providing professional nursing care at "various unanticipated healthcare facilities throughout the United States." The petitioner's support letter states that its business involves the recruitment and placement of healthcare professionals and that a job description of a professional registered nurse position involves: "Travel to job sites for assigned periods of time to perform professional nursing care to patients in hospitals or institutions as per physicians' orders." Additionally, position requirements on Form ETA 750A Application for Alien Employment Certification indicate that relocation is required and "[a]ssignments are usually 13 weeks in duration."

Subsequent to the filing of the I-140 visa petition, the director requested evidence of the petitioner's ability to pay the proffered wages, which will be discussed below, as well as evidence that the petitioner would be the beneficiary's actual employer and that arrangements are in existence for the beneficiary to work in the United States.

In response to the director's request for evidence concerning the scope of the beneficiary's proposed employment, the petitioner stated that the beneficiary would be assigned to the Gulf Coast Medical Center in Texas and submitted a copy of the contract between the petitioner and the Gulf Coast Medical Center ("Gulf Coast Contract"). The Gulf Coast Contract was executed by the Gulf Coast Medical Center on August 17, 2000 and by the petitioner on September 5, 2000. Its provisions obligate the Gulf Coast Medical Center to "fully anticipate," but not guarantee, that 15 to 20 nurses will be provided by the petitioner to the Gulf Coast Medical Center upon each nurse being granted a visa, passing the NCLEX (nurse licensure) examination, and having a full license to practice nursing in the state of Texas. There is no exhibit or addendum to the Gulf Coast Contract specifying the beneficiary as a professional to be placed at the Gulf Coast Medical Center or delineating any terms, conditions, or timeframes specific to the beneficiary. The petitioner's response stated in a letter that it is the beneficiary's employer and maintains all hiring and firing authority, that it controls the beneficiary's employment so that transfers are not made within multiple third party client sites without its knowledge, and that a performance appraisal system is in place.

In response to the director's request for additional evidence concerning the petitioner's ability to pay the proffered wages for multiple pending visa petitions for similar nurse positions, the petitioner submitted the following: (1) quarterly forms 941 for 1999, 2000 and 2001; (2) Statement of Funding Sources and Contracts in Force, an independent accounting firm's review of the petitioner's contracts and sources of funding; (3) copies of seven additional contracts with healthcare companies and facilities where the petitioner's registered nurses will be temporarily employed; (4) copies of previous contracts the petitioner has entered into with additional healthcare facilities for provision of healthcare workers; (5) a list of names of all healthcare workers the petitioner has employed; (6) a list of currently employed healthcare workers with corresponding list of the healthcare facilities where they are working and copies of some of their credentials; and (7) copies of W-2 statements for the petitioner's current healthcare workers.

The director denied the third preference immigrant visa petition and stated the following:

> The petitioner has indicated that the beneficiary is currently assigned to Gulf Coast Medical Center. The I-140 petition did not specify where the beneficiary would work. The contract between Gulf Coast Medical Center and [the petitioner] was not signed until after the petition was filed. Although the contract between San Jacinto Memorial Hospital and [the petitioner] was dated prior to filing of the petition, the petitioner has clearly indicated that the beneficiary will work at another location. The evidence submitted does not clearly indicate that arrangements were in existence for this beneficiary to actually work in the United States as a registered nurse pursuant to this immigrant visa petition at the time the petition was filed. The petitioner must establish eligibility at the time of filing the petition.

On appeal, counsel states, in part, that the petitioner is the actual employer and the position is permanent and full-time, as evidenced by contracts between the petitioner and the beneficiary, contracts between the petitioner and its third party clients, and occupational demand as a result of a nursing shortage.

A. **The petitioner is the actual employer and the proffered employment is permanent and not temporary or seasonal**.

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

> *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.

The contract between the petitioner and the beneficiary reflect that the proposed employment is for a fixed duration of 24 months. Fixed-term contracts 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. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of

an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

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

The petitioner has established that it is the beneficiary's actual employer and has a recurring demand for continuous outsourcing of its permanent healthcare workers. Its employment agreement with the beneficiary unequivocally states that it is the beneficiary's employer. The petitioner provides benefits, has the authority to hire and fire the beneficiary, and at all times controls the beneficiary's full-time temporary work assignments. The petitioner indicated on Form I-140 that the position is a full-time, permanent position for a registered nurse and that the beneficiary will be employed 40 hours a week. The petitioner has provided evidence that it has met its past contractual obligations to place healthcare workers, primarily therapists, at healthcare facilities on demand. The petitioner has also demonstrated that there is ample demand for its supply of qualified registered nurses in Texas. Thus, the petitioner has established that the position offered is a permanent full-time position and that the petitioner is the actual employer for the beneficiary.

B. **The petitioner has not established that it offered permanent employment prior to filing the visa petition.**

While the petitioner has established that the petitioner is the actual employer offering permanent full-time employment to the beneficiary, the petitioner failed to arrange permanent employment for the beneficiary *prior to filing the visa petition*. The director correctly identified a critical issue in this case, namely, the identification of a specific contract covering the parameters of the beneficiary's employment, such as which third party client would be the location where the beneficiary would be employed. The petitioner must establish eligibility at the time of the visa petition's filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner's contract with the Gulf Coast Medical Center fails to specify employment for the beneficiary and was executed after the filing of the visa petition. On appeal, counsel submits sworn and notarized affidavits, dated June 2001, from the petitioner and the Gulf Coast Medical Center. The Gulf Coast Medical Center's affidavit states that "[p]rior to the execution of the[Gulf Coast Contract], the parties had entered into negotiations regarding the specific terms of the contract. As of August 1, 2000, arrangements were in existence for the alien nurse. [The beneficiary] to actually work in the United States as a registered nurse [sic]." The petitioner's affidavit states the following:

> Prior to the execution of the [Gulf Coast Contract], the parties had entered into

> negotiations regarding the specific terms of the contract. Also, prior to the execution of the contract specific to [the beneficiary], [the petitioner] had entered into a contract with Gulf Coast Medical Center, Wharton, Texas, to place Registered Nurses for employment. This contract was dated June 7, 1999. As of August 1, 2000, arrangements were in existence for the alien nurse, [the beneficiary] [sic] to actually work in the United States as a registered nurse.

It is impossible for the beneficiary's employment to have been pre-arranged since no contract existed to delineate the scope of the proffered employment for this specific beneficiary prior to filing the visa petition.[1] The affidavits fail to cure the problem because they to not specify what the actual agreed terms were prior to executing the contract. Both the petitioner and the Gulf Coast Medical Center state that there has been a long relationship between the parties and that there were arrangements in existence for the beneficiary. However, neither party delineates in their affidavits or contracts the specific agreed-upon terms to assign the beneficiary to the Gulf Coast Medical Center.[2]

Additionally, the multiple contracts with other healthcare facilities for 5 to 15 registered nurses each are all executed after the filing of the visa petition, and thus, do not provide conclusive evidence that the petitioner arranged permanent employment for the beneficiary prior to filing the visa petition. Finally, the contract between the petitioner and San Jacinto Methodist Hospital ("San Jacinto Contract"), and the 1999 contract between the petitioner and the Gulf Coast Medical Center (the "1999 Gulf Coast Contract"), specify registered nurses and are executed prior to the petition's filing date; however, the contracts do not specify that the beneficiary will work at either facility. Thus, the San Jacinto Contract and the 1999 Gulf Coast Contract also fail to provide conclusive evidence that the petitioner arranged permanent employment for the beneficiary prior to filing the visa petition.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent date. *Matter of Katigbak, supra*, at 49. Thus, the petitioner has failed to establish that it offered pre-arranged, permanent, full-time employment prior to filing the visa petition.

II. **<u>The petitioner has failed to establish the ability to pay the proffered wages</u>**.

The second issue to be discussed in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary. The regulations at 8 C.F.R. § 204.5(g)(2) state the following in part:

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

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[1] The contract between the petitioner and the beneficiary indicates that the beneficiary will not work at the petitioner's worksite even if there are no outsourcing opportunities at third party client worksites.

[2] The affidavits provide no specific detail. Thus, hypothetically, the parties could have agreed for the beneficiary to be assigned to another party in California. Because the details are ambiguous, unequivocal assertions may not be made concerning the scope of the employment relationship between the petitioner, the Gulf Coast Medical Center, and the beneficiary prior to the execution of the Gulf Coast Contract and filing of the visa petition. An additional problem is the failure by either party to clearly relate the specific beneficiary to the Gulf Coast Contract, which adds to the ambiguity.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which for visa petitions filed under section 203(b)(3)(A)(i) of the Act, is the date the Form I-140 Immigrant Petition for Alien Worker is filed with CIS. 8 C.F.R. § 204.5(d). Here, the petition's priority date is August 14, 2000. The beneficiary's salary as stated on the labor certification and Form I-140 is $14.00 per hour ($21.00 per hour of overtime), which equates to $29,120.00 per annum, based exclusively on the basic rate of pay.

With its initial petition, the petitioner provided copies of two promissory notes that were executed between the petitioner and its Vice President, stating that it could draw on those notes to meet its obligations. The petitioner also submitted copies of its Internal Revenue Service (IRS) Form 1120S for 1999, which showed an ordinary income of $278,194.00. In response to the director's requests for evidence, as also briefly discussed above, the petitioner provided quarterly federal tax returns on Forms 941 for 1999, 2000, and 2001; copies of Form W-2 statements of wages paid to current employees; copies of its contracts with health care facilities; and Statement of Funding Sources and Contracts in Force, an independent accounting firm's review (not audit) of the petitioner's contracts and sources of funding.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director stated the following:

> The petitioner submitted a copy of its 1999 tax return which shows that its ordinary income was $278,194. Although each case is adjudicated on its own merits, [CIS] cannot ignore the fact that the petitioner has filed more than seventy petitions. Several petitions have been approved. The tax return does not establish that the petitioner has the ability to pay the proffered wage to more than ten nurses as of the priority date.

In his decision, the director disregarded the petitioner's promissory note signed by the petitioner's Vice President and President, which had been submitted to indicate that personal funds were available if the petitioner could not meet its payroll requirements. The director cited *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986) and *K.C.P. Food Co. Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), for his reliance upon regulatory-sanctioned federal tax returns or audited financial statements, and not on additional evidence, to determine the petitioner's ability to pay the proffered wage. The director made no mention of the petitioner's Statement of Funding Sources and Contract in Force with an independent accountants' report dated March 2001 in his decision.

On appeal, counsel states, in part, that the petitioner has the ability to pay the proffered wage based, in part, upon its reasonable expectations of future financial profit and lines of credit.

A. **The petitioner must prove the ability to pay the salaries to all of the beneficiaries of its pending visa petitions**.

CIS uses a multiple-pronged analysis in evaluating whether the petitioner has the ability to pay the proffered wage. First, CIS checks to see whether the petitioner has employed the beneficiary and paid the proffered wage in the past. If this is not the case, CIS will look to the petitioner's net income, line 21 ("ordinary income") of the Form 1120S. Finally, if the petitioner does not have sufficient net income, CIS will review whether the petitioner had sufficient net current assets to pay the proffered wage. In accordance with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may also consider the totality of the petitioner's business activities and economic circumstances.

To determine the petitioner's ability to pay, CIS examines the petitioner' net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal

income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 621 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 726 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

The petitioner's priority date falls on August 14, 2000. The petitioner submitted the corporate tax return for the 1999 calendar year.[3] The petitioner's IRS Form 1120S for calendar year 1999 presents an ordinary income of $278,194.00.

CIS cannot consider the petitioner's ability to pay a single beneficiary by itself when the petitioner has filed multiple immigrant visa petitions. The records of CIS reveal that the petitioner filed immigrant visa petitions for more than 70 aliens in the course of one year, 33 of which have been approved. At the time of filing, the petitioner claimed that it employed ten individuals. Accordingly, the filed petitions would account for a significant increase in the petitioner's workforce. If 70 or more alien nurses were to be paid at the same rate as the current beneficiary, the proposed hires would account for more than $2,038,400.00 additional in payroll liabilities.

The director properly noted the additional petitions that had been filed at the service center. However, rather than approving some petitions, the proper course of action would have been to hold all of the petitions until the petitioner established the ability to pay all of the proposed salaries or selected the number of nurse petitions that it wished to pursue. The petitioner has not established its ability to pay the proffered wage of $29,120.00 per annum for the beneficiary in addition to the 70 additional alien beneficiaries out of its ordinary income.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

A review of the petitioner's 1999 income tax return demonstrates that the petitioner had current assets at the end of 1999 in the amount of $25,848.00 and current liabilities in the amount of $6,653.00. Accordingly, the petitioner had net current assets in the amount of $19,195.00 at the end of 1999, which constitutes insufficient ability to pay the proffered wage of $29,120.00.

B. **The petitioner failed to establish a reasonable expectation of future profits enabling it to pay the proffered wage**.

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[3] The petitioner stated in response to the director's request for evidence that only the 1999 tax return was available since it had sought an extension on filing the 2000 tax return.

[4] A petitioner's "current assets" consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner's balance sheets, current assets include, but are not limited to the following: cash, accounts receivable, inventories, pre-paid expenses, certain marketable securities, loans and promissory notes, and other identified current assets. A petitioner's "current liabilities" are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner's accounts payable, payroll taxes due, certain loans and promissory notes that are payable in less than one year, and any other identified current liabilities.

CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, in determining the petitioner's ability to pay the proffered wage. The regulations provide for the consideration of factors other than the petitioner's federal income tax return, audited financial statements, or annual reports in certain circumstances. Under 8 C.F.R. § 204.5(g), the regulations state the following, in part: "In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS]."

CIS precedent decisions also allow for consideration of factors other than the petitioner's federal income tax return, audited financial statements, or annual reports in certain circumstances. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's reasonable expectation of resuming successful business operations was well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. The decision also noted that the beneficiary would contribute to the petitioner's business income through increasing the quality and quantity of products available through its Asian clothing line.

Counsel references *Sonegawa* in her appellate brief as analogous to the petitioner's situation. She states that the petitioner has been in business since 1995 (the 1999 tax returns indicate incorporation in January 1996) and its executed contracts will produce approximately 102 vacant positions for nurses, which if filled, will significantly expand the petitioner's business. The Statement of Funding Sources and Contracts in Force (the "Statement") evaluates the petitioner's funding sources and contracts in force as of March 31, 2001. An analysis of the petitioner's additional evidence follows to determine if the petitioner's totality of circumstances enables it to pay the proffered wages.

1. **The petitioner's bank statements and wages paid to other employees are not persuasive evidence of the ability to pay the proffered wage**.

The petitioner's bank statements are insufficient evidence to demonstrate its ability to pay the proffered wages. Even though the petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, the petitioner has not shown that the funds in the bank account somehow represent additional funds beyond those shown on the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Likewise, the petitioner's W-2 forms for its other employees reflect wages paid and expenses reflected on tax returns and are not persuasive evidence of the petitioner's ability to pay additional prospective salaries to additional employees.

2. **The petitioner's lines of credit are not persuasive evidence of the petitioner's ability to pay the proffered wages**.

The petitioner's Statement of Funding Sources and Contracts in Force (the "Statement") referenced three loan agreements (promissory notes) entered into between the petitioner and an individual and shareholder of [the petitioner], for which the sufficiency of the lender's liquid capital was verified. The loans left a potential for borrowing a minimum of $119,227.00 from June 30, 2000 to March 31, 2001 with a maximum amount available of $542,049.00 in June 2000, and $228,255.00 available in March 31, 2001.

Counsel for the petitioner references the petitioner's credit lines as proof of its ability to pay and cites a federal district court decision, *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a piano teacher. Here, counsel is asserting that CIS should treat its line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, 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. *Matter of Katigbak, supra*, at 49. Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a current asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In determining a petitioner's ability to pay, a line of credit may be properly considered as a factor in evaluating the totality of the circumstances concerning a petitioner's financial performance in determining its ability to pay. *See Sonegawa, supra*. As in *Matter of Sonegawa*, the AAO may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not established its ability to pay, considering the totality of circumstances. The petitioner has been in business since 1996 (four years as of the date of filing the petition). The petitioner seeks to double its labor force by filing more than seventy petitions within one year. The petitioner did not indicate that its ability to pay has been influenced by any uncharacteristic expenditures or losses. Additionally, the petitioner's 1999 1120S Schedule L indicates that its utilized line of credit was listed as a liability, which would reduce the petitioner's net assets and ability to pay the proffered wages.

3. **The petitioner's contracts in force demonstrate a reasonable expectation of future profit, however, fail to provide evidence of net revenue after expenses**.

The petitioner's Statement of Funding Sources and Contracts in Force (the "Statement") evaluates the petitioner's contracts in force and states the following:

> Contracts in force allow [the petitioner] to place sponsored nurses into healthcare facilities. Fees earned from these contracts are paid to [the petitioner] and are used to meet payroll obligations of sponsored nurses as well as provided additional cash for future nurses to be sponsored and overhead expenses of [the petitioner].
>
> [The petitioner] currently has signed contracts with 6 healthcare providers for up to 113 nurses. These contracts are on an hourly basis with rates that range from $16.84 per hour to $28.00 per hour. The contracts at $16.84 per hour also require an advance payment of $5,000 by the healthcare provider. Only 11 of these contract positions are currently filled, leaving 102 positions available for additional nurses. As each of these positions are [sic] filled, the resulting cash flow will support additional nurse positions.
>
> . . .
>
> Since June 2000, [the petitioner] has at all times had funds available in excess of $119,227 to pay additional wages and taxes for nurses sponsored for [third preference immigrant] visas. Further, [the petitioner] currently has signed contracts for up to 102 nurses. As these openings are filled by sponsored nurses, [the petitioner] will be able to bill the healthcare provider at the contractually agreed rates and recover the salary and benefits paid per nurse as well as provide sufficient additional cash flow to place and fund additional nurses.

Thus, independent accountants have reviewed (not audited) the petitioner's reasonable expectation of future income and unequivocally determined that its executed employment contracts with third-party clients enable the petitioner to pay prospective wages to its employees as they commence employment with the petitioner and produce income for the petitioner. At least one federal court has held that examining a company's financial records alone is unrealistic because it fails to account for income a new employee may generate. *See Masonry Masters, Inc. v. Thornburgh*, 875 F. 2d 898 (D.C. Cir. 1989).[5]

The petitioner states that it pays each nurse between $14.00 and $21.00 per hour worked, and in turn the petitioner receives from its healthcare clients between $24.00 and $30.30 per hour worked for each nurse. In essence, the petitioner is claiming that each nurse generates approximately $10.00 per hour worked. Yet the

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[5] As noted above, the AAO may consider the reasoning of this decision; however, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-, supra*, at 715.

petitioner also states that it will provide "fringe benefits."[6]

The seventy nurses the petitioner intends to sponsor for permanent employment visas will generate income for its business. The petitioner has produced concrete, non-speculative evidence of an expanding business and a reasonable expectation of increasing profits through executed contracts. The petitioner's clients are contractually obligated to pay amounts that will cover each nurse's salary. Even if CIS chose to accept the petitioner's contracts as evidence of projected income, however, the petitioner has failed to demonstrate an accurate estimation of net income for each hour worked. The petitioner has failed to demonstrate that the projected nurse-generated income would be sufficient to cover the salary of the nurse and all concomitant expenses of the business.

III. **The petitioner failed to submit a posting notice that complies with regulatory requirements**.

Beyond the decision of the director, the record does not contain evidence that the petitioner fully complied with regulatory requirements governing the posting notice. Under 20 C.F.R. § 656.20, the regulations require the following:

> In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:
>
> 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.
>
> If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days. The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

The record contains a notice in compliance with the content requirements delineated in 20 C.F.R. § 656.20(g)(3), however, there is no documentation concerning where the notice was posted, which does not conform to the regulatory requirements under 20 C.F.R. § 656.20.[7] Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. As previously noted, the employment contracts that were submitted for the record were executed after the filing of the petition. Because the petitioner failed to identify the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that

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[6] No other information has been provided about the benefits the petitioner will provide to the nurses, such as purchase of worker's compensation, professional liability, and health insurance, housing, transportation, legal fees, education/licensure fees, etc.

[7] There is questionable compliance with the content requirements delineated in 20 C.F.R. § 656.20(g)(3) because the notice fails to refer applicants to a specific state workforce agency, such as the Texas state workforce agency, which would have jurisdiction over employment in the state of Texas.

the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.[8] The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s). Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wages, this issue need not be discussed further.

To summarize, the AAO finds the evidence inadequate to establish eligibility for an immigrant visa under section 203(b)(3)(A)(i) of the Act and corresponding regulations and case law for failure to designate the hospital or facility where the beneficiary would work through an executed contract dated prior to filing the visa petition, failure to establish the ability to pay the proffered wages through evidence of sufficient net current and future income, and failure to comply with the posting notice requirements.

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

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed. The petition is denied.

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[8] *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).