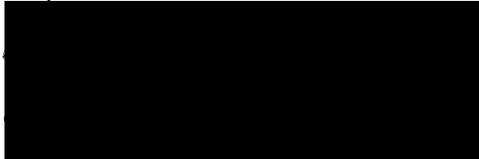


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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass. 3/F  
Washington, D.C. 20536



File: WAC 02 041 50551 Office: CALIFORNIA SERVICE CENTER Date:

AUG 12 2003

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**PUBLIC COPY**

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a charge nurse (RN). The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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.

Eligibility in this matter turns both on the petitioner's ability to pay the wage offered as of the petition's priority date. The petition's priority date in this instance is the date of the filing of the I-140, November 13, 2001.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of either the notification or the posting of the filing of the ETA 750. The I-140 also omitted certain items.

In a request dated April 1, 2002 (RFE), the director required additional evidence to establish the notification and posting of the filing of the ETA 750. See 20 C.F.R. § 656.20(g)(3). The director requested annual reports, federal tax returns, or audited financial statements to establish the petitioner's ability to pay the proffered wage, as well as the completion of the I-140.

The petitioner responded with two (2) undated letters averring that it had employed the beneficiary since June 12, 2001 at about \$52,000 per year (employment letters). The petitioner, also, included copies of the beneficiary's transcript and degree of bachelor of science in nursing (degree).

The director noted that the record contained no allegation that the beneficiary held an advanced degree under § 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). Further, the director observed that the position covered by the blanket labor certification does not require an individual holding an advanced degree or the equivalent, that is, a baccalaureate degree and five years of progressive experience in the specialty. Consequently, the director determined that the beneficiary was ineligible for classification in that position. The director determined, also, that the petitioner had offered no probative evidence of the ability to pay the proffered wage and denied the petition on June 14, 2002.

On appeal, the petitioner submits differing, new examples of an I-140 (substitute petition) and of an ETA 750 (substitute ETA 750) and explains:

Also cited in the denial was the inappropriate 'Petition Type'. Upon review of the documentation with [the beneficiary] we have concluded that the wrong box was checked. Box (d.) had been checked erroneously, the proper box would be (e.) The [substitute petition] included in this appeal has the correct box checked and we apologize for the clerical error.

The petitioner alleges on appeal that § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), applies. The petitioner, thus, concedes that the beneficiary did not qualify under the terms of the I-140, based on § 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A).

The attempt to qualify under the substitute petition on appeal cannot succeed because no fee was paid for it, and it was not accepted for processing under 8 C.F.R. § 103.2(a) and (b). See 8 C.F.R. § 204.5(a)(1)-(3). Only an unfavorable decision on a petition may be appealed, and this record does not evidence the

filing, processing, or decision of a petition pursuant to § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). The AAO, consequently, has no jurisdiction of the substitute petition and ETA 750. 8 C.F.R. § 103.3(a)(1)(i), (ii), and (iii)(A).

The petitioner has not established that the beneficiary met the petitioner's qualifications for the position as stated in the ETA 750 as of the petition's priority date. The petition cannot be approved.

In addition to the foregoing, the petitioner and the Bureau (formerly the Service or INS) have treated the ability to pay the proffered wage at the priority date as an issue in these proceedings.

The petitioner on appeal stated that the correction of the error in the classification of the petition and the sore need for the beneficiary satisfied the ability to pay the proffered wage. The ability to pay is moot since the petitioner concedes that the beneficiary did not qualify under the I-140 and ETA 750 in these proceedings.

The decision noted that the petitioner did not offer prescribed evidence to document the claimed wage payments to the beneficiary.

8 C.F.R. § 103.2 (b) states in part:

*Evidence and processing - (1) General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

The petitioner's employment letters made self-serving declarations of wage payments to the beneficiary in response to the RFE, but they create a presumption of ineligibility. The petitioner failed to show that the primary evidence for the payments is unavailable.

8 C.F.R. § 103.2 (b) states to the point:

*Evidence and processing -*

*(2) Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist

or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

On appeal, the petitioner offers the 2001 Annual Report, corporate newsletter, and an internet reference from Kindred Health Care (Kindred). The director's RFE mandated annual reports, federal tax returns, or audited financial statements to establish the petitioner's ability to pay the proffered wage. See 8 C.F.R. § 204.5(g) (2).

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The RFE, further, required the completion of the I-140. The petitioner's response of 150 employees was incomprehensible alongside gross annual income of \$52,000 and net annual income of \$31,200. The petitioner did not provide its financial statements or statement from a financial officer to explain the confusion, in response to the RFE or on appeal.

*Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

After a review of the federal tax returns, substitute petition and substitute ETA 750, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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

**ORDER:** The appeal is dismissed.