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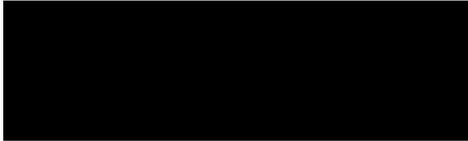
U.S. Department of Homeland Security

Citizenship Services and Immigration Services

B6

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



File: LIN 02 054 52230 Office: Nebraska Service Center

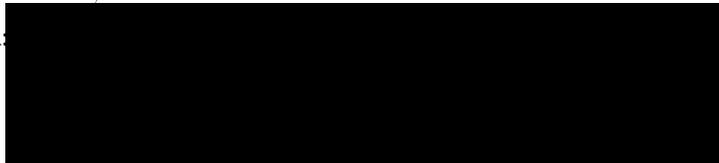
Date: DEC 13 2003

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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 Citizenship and Immigration Services (CIS) 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, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a home health care company. It seeks to employ the beneficiary permanently in the United States as a nurse. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel asserts that the director erred in failing to consider additional factors in the calculation of the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available 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 hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petition asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Therefore, the Form ETA 750 Application for Alien Employment Certification was not submitted to the Department of Labor, and the priority date is December 3, 2001, the date the petition was submitted to CIS. The proffered salary as stated on

the Form ETA 750 is \$15.47 per hour which equals \$32,177.60 annually.

With the petition, counsel submitted no evidence of its ability to pay the proffered wage. Therefore, the Nebraska Service Center, on February 22, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested a list of all of the petitions the petitioner had filed during 2001 and evidence of the petitioner's continuing ability to pay the proffered wages of all of the aliens for which it had petitioned.

In response, the petitioner submitted a list of the alien petitions it filed during 2001. That list shows that the petitioner filed 25 alien petitions during that year, of which 13 had then been approved. That list indicates that the wage proffered to each of those alien beneficiaries is \$16 per hour, or \$33,280 annually. The proffered wages of the thirteen approved beneficiaries totals \$432,640. The proffered wages of all 25 beneficiaries, if all were approved, would total \$832,000. Although the list was undated, it accompanied a letter, dated March 1, 2002, from the petitioner's administrator.

The petitioner also submitted a copy of its 2000 Form 1120S U.S. income tax return for an S corporation. That return shows that during that year the petitioner declared an ordinary income of \$93,906. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. Because the priority date in this matter is December 3, 2001, the petitioner's finances during 2000 are not directly relevant.

Counsel also provided the petitioner's unaudited December 31, 2001 balance sheet, an unaudited Profit and Loss statement for 2001 and a September 30, 2001 employee list. The petitioner's name does not appear on the employee list. Finally, the petitioner submitted a copy of the petitioner's Form UI-3/40 Illinois Employer's Compensation and Wage Report and copies of the petitioner's bank statements.

On May 2, 2002, the Director, Nebraska Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wages of all of the beneficiaries for whom it had petitioned, nor even the 13 whose petitions had already been approved.

On appeal, counsel stated that the petitioner has been paying overtime to its current employees, and that the overtime expense would be eliminated if the petitioner were permitted to hire additional employees. In addition, counsel stated that additional

employees would generate additional income.

Counsel provided no calculation, however, to show that the amount saved by obviating overtime, and the amount of the additional income which would be generated by additional employees, when added to the petitioner's current income, would be sufficient to pay the proffered wages of all of the aliens whom the petitioner seeks to employ, or even the proffered wages of the beneficiaries of those petitions which have been approved.

The petitioner was required to demonstrate its continuing ability to pay the proffered wage beginning on December 3, 2001. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was obliged to demonstrate this ability with either copies of annual reports, federal tax returns, or audited financial statements. The petitioner has submitted no copies of annual reports. The tax return the petitioner submitted did not pertain to any period after the priority date. The financial statements the petitioner submitted were not audited. The petitioner has submitted no competent evidence.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wages of the beneficiaries for whom it has petitioned. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.