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

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

File: WAC 02 032 55598 Office: CALIFORNIA SERVICE CENTER

Date: OCT 16 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:

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 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 Unit

DISCUSSION: The employment-based preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded to the director for further action and consideration.

The petitioner is a home health agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the petition. The director also determined that the petitioner had not demonstrated that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10 because it failed to show that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or that she holds a full and unrestricted (permanent) license in the States of intended employment.

In addition, the director denied the petition because the petitioner failed to establish that a genuine full-time job is available to the beneficiary evidenced by a detailed description of work and evidence of contracts between the petitioner and clients where the beneficiary will perform services.

On appeal, counsel submits a brief and additional evidence.

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.

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 ability to pay the wage offered as of the petition's priority date, which in a Schedule A case is the date the petition is filed with CIS. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is October 29, 2001. The beneficiary's salary as stated on the labor certification is \$15.00 per hour which equates to \$31,200.00 per annum.

To show the petitioner's ability to pay the wage offered, counsel initially submitted copies of the petitioner's Internal Revenue Service (IRS) Form W-3 Transmittal of Wage and Tax Statements for 2000 and 2001.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that "[a]lthough W-3 forms are federal forms that are used to report the annual wages paid to employees these forms can in no way be considered federal tax returns."

On appeal, counsel submits copies of the petitioner's IRS Form 1120-A for 2000 and 2001, copies of IRS Forms 1099-MISC, a copy of IRS Form 1096 for 2000, and W-2 Wage and Tax Statements for the petitioner's employees for 2000.

The petitioner's Form 1120-A for 2001 shows a taxable income of \$84,292. The petitioner could pay a salary of \$31,200 a year from this figure. Consequently, the petitioner has overcome this portion of the director's decision.

The second issue in this proceeding is whether the beneficiary is eligible for Schedule A certification as a registered nurse.

Aliens who will be employed as professional (registered) nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

U.S. Department of Labor regulations at 20 C.F.R. §656.22(c)(2) state that a Schedule A labor certification application for a professional (registered) nurse should be accompanied by "documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or that the alien holds a full and unrestricted license to practice nursing in the State of intended employment."

With the initial submission of this petition, the petitioner furnished a letter, date August 19, 2000, from the Commission on Graduates of Foreign Nursing Schools that the beneficiary had passed the CGFNS qualifying examination. The CGFNS notice says that if the beneficiary submits an acceptable Test of English as a Foreign Language (TOEFL) score by July 12, 2002, they will issue a CGFNS Certificate.

In his decision, the director stated that the petitioner failed to supply either evidence that the beneficiary had passed the CGFNS Examination, or that she held a full and unrestricted State license, as requested. The director made no reference to the CGFNS letter.

Although the letter from CGFNS is not a Certificate, it is notice that the beneficiary had passed the CGFNS Examination, and therefore is in conformity with the regulatory requirements. The petitioner has, therefore, overcome this portion of the director's decision.

In a notice to the petitioner, dated July 10, 2002, the director requested, among other things, that the petitioner furnish evidence that the beneficiary would be employed to fill a specific vacancy. The director requested that the petitioner furnish specific job duties, level of responsibility, and number of hours of work per week. The director also requested evidence of contracts between the petitioner and clients where the beneficiary would perform services.

In response to this portion of the director's request, counsel for the petitioner requested that the director adjudicate the petition, implying, it would seem, that the requested documentation has already been submitted.

Department of Labor regulations at 20 C.F.R. 656.22(b) state that a Schedule A application must include:

- (1) Evidence of prearranged employment for the alien by having an employer complete and sign the job offer description portion of the application form. There is, however, no need for the employer to provide the other documentation required under § 656.21 of this part for non-Schedule A occupations.

- (2) 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 § 656.20(g)(3) of this part.

The petitioner has overcome the grounds of the director's decision except that there is no evidence in the file that the petitioner

complied with the requirements of 20 C.F.R. §656.22 (b)(2) by providing notice of filing the application for Schedule A certification with the bargaining representative or with the employer's employees.

The decision of the director will be withdrawn, and the petition will be remanded for further action and consideration. The director must afford the petitioner reasonable time to provide the required documentation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements.

ORDER: The director's decision of September 26, 2002 is withdrawn. The petition is remanded to the director for entry of a new decision in accordance with the foregoing which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.