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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



FILE: EAC-01-234-59269 Office: VERMONT SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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: SELF-REPRESENTED

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a nurse staffing agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for 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)(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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

The regulation at 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, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS) (formerly the Service or the INS). 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is June 26, 2001. The beneficiary's salary as stated on the Form ETA 750 is \$35.00 per hour or \$72,800.00 per year.

The petitioner initially submitted insufficient evidence on several issues. In a request for evidence (RFE) dated October 18, 2001, the director required evidence of the contractual agreement between the petitioner and the medical organization or institution where the beneficiary will be performing the duties of the offered position. The RFE also required evidence of the petitioner's having given notice of filing the Form ETA 750 to the bargaining representative of the employees or to the employees. Finally, the RFE required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

The petitioner responded to the RFE with additional evidence consisting of a copy of a Service Agreement dated July 1, 2001 between the petitioner and the Park Pleasant Nursing Home, a copy of a job notice for Park Pleasant Nursing Home dated June 1, 2001, and a copy of a Form 1065 U.S. partnership tax return for the petitioner for the year 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time of filing, and denied the petition.

On the Form I 290B submitted March 4, 2002 the petitioner checked the block indicating that it would be sending a brief and or evidence to the AAO within thirty days. The petitioner also included a statement on the notice of appeal that "We will send additional proof within 30 days." Nonetheless, to date, no brief and no additional evidence are in the file.

The petitioner states on appeal that it had already paid the proffered wage at the time of filing and that the beneficiary had filed a tax return which included a W-2 form showing income received from the petitioner.

In his decision the director stated that the petitioner had submitted a U.S. corporation income tax return for the year 2000. But in fact, as noted above, the tax return submitted was a U.S. partnership income tax return for that year, Form 1065. The director states that the return showed "taxable income" as a loss of -\$23,113.00. Again the director's terminology was incorrect, for the Form 1065 has no line for "taxable income." The figure cited by the director appears on line 22 of the return, for "Ordinary income (loss) from trade or business activities." Partnerships are not taxed on their income. Rather, the income is passed through to the partners, who pay taxes on their partnership income in proportion to their shares in the partnership. See Internal Revenue Service, Form 1065, Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., available on the Internet at www.irs.gov.

Despite the incorrect terminology, the director was correct in his finding that the income information on the tax return of the petitioner for 2000, showing a loss of -\$23,113.00, was insufficient to establish the petitioner's ability to pay the proffered wage as of the June 26, 2001 priority date.

The director also examined the assets of the petitioner shown on the Schedule L attached to the Form 1065 tax return. The director found that the petitioner showed assets of \$5,264 and no value for inventory. The director was correct in these findings. However, the director should have considered all current assets as well as current liabilities in evaluating whether the petitioner's net current assets established the petitioner's ability to pay the proffered wage. Calculations based on the figures on the Schedule L yield the figure for net current assets at the end of the year 2000 as -\$15,347. Although the director's analysis of current assets and current liabilities was incomplete, the director's conclusion that the petitioner's current assets were insufficient to establish the petitioner's ability to pay the proffered wage was correct.

Although the petitioner asserts in his notice of appeal that the petitioner was paying the proffered wage to the beneficiary as of the priority date and that the beneficiary had filed a tax return with a copy of a W-2 form from the petitioner, no evidence in support of that assertion is found in the record. Simply going on record without supporting documentary evidence is not sufficient for the 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).

For the reasons stated above, the decision of the director that the petitioner had failed to establish its ability to pay the proffered wage as of the filing date was correct.

Beyond the decision of the director, the petition must be denied because the petitioner failed to comply with the regulatory requirements for a blanket labor certification for a Schedule A occupation.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

(a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .

(b) The Application . . . shall include:

(1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form . . .

(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 regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(i) 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.

(ii) 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.

(Emphasis added).

The regulation at 20 C.F.R. § 656.20(g)(3) provides in pertinent part:

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) State that applicants should report to the employer not to the local Employment Service Office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

The job notice dated June 1, 2001 for positions at Park Pleasant Nursing Home contains no indication that it was provided to the bargaining representative of the employees and no indication of where that notice was posted nor of the dates for which it was posted. The evidence therefore fails to establish the petitioner's compliance with 20 C.F.R. § 656.20(g)(1).

Furthermore, even assuming that the notice was posted at the Park Pleasant Nursing Home, the service agreement dated July 1, 2001 between the petitioner and the Park Pleasant Nursing Home contains no address for the Park Pleasant Nursing Home. Lacking any indication of that address, the evidence is insufficient to establish that the notice was posted at the actual facility or location of the employment where the beneficiary will be assigned as required by 20 C.F.R. § 656.20(g)(1).

The job notice also fails to include the information required by 20 C.F.R. § 656.20(g)(3) and fails to include a description of the job and the rate of pay, as required by 20 C.F.R. § 656.20(g)(8).

The petitioner has completed the job offer description portion of the ETA 750 form. By doing so the petitioner has provided sufficient evidence of prearranged employment for the beneficiary. 8 C.F.R. § 656.22(b)(1). See *IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY], BENEFICIARY: [IDENTIFYING INFORMATION REDACTED BY AGENCY]*, WAC 96 191 50812, (AAU, March 19, 1997), available on Westlaw database at 1997 WL 33170407 (INS) (nurse staffing agency found to be the employer of the beneficiary). Cf. *Matter of Smith*, 12 I&N Dec. 772 (D.D. 1968) (secretarial agency found to be offering permanent, full-time employment to its employees, who were placed on temporary assignments with contracting customers).

Nonetheless, the petitioner has failed to provide an employment agreement with the beneficiary. Therefore the record lacks information concerning the scope of the proffered employment, such as a specific third-party worksite to which the beneficiary would be assigned.

The record contains a copy of an agreement dated September 6, 2001 between the petitioner and a nursing home in Pennsylvania. The agreement does not require the nursing home to accept any specific number of nurses or other personnel from the petitioner. Rather, the agreement states that "upon request" by the nursing home, the petitioner "shall assign as many such Personnel as are available for such assignment." The agreement further states that the petitioner "does not guarantee at any time that all orders will be filled." Therefore that agreement fails to establish that the nursing home is the intended job site for the beneficiary.

The petitioner's Form ETA 750, block 13, states that the job to be performed by the beneficiary is "working as a staff nurse or supervisor at various nursing homes and hospitals." Although the address of the petitioner is in Upper Darby, Pennsylvania, nothing in the ETA 750 nor elsewhere in the record limits the area of intended employment to the area around Upper Darby, Pennsylvania.

The regulation at 20 C.F.R. § 656.20(c)(2) states in pertinent part:

Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

...

(2) The wage offered equals or exceeds the prevailing wage determined pursuant to Sec. 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work . . .

The regulation at 202 C.F.R. § 656.22(e), concerning applications for labor certification for Schedule A occupations, states in pertinent part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A (Sec. 656.10 of this part); shall review the application; and shall determine whether or not the alien is qualified for and intends to pursue the Schedule A occupation. . . .

The regulation at 20 C.F.R. § 656.40(2) states in pertinent part:

If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed *in the area of intended employment* and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages . . .

(Emphasis added).

By failing to specify the area of intended employment the petitioner's evidence fails to provide a sufficient basis for a determination of the prevailing wage.

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.