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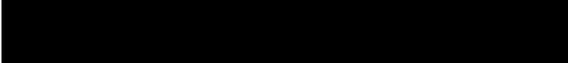
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U.S. Citizenship
and Immigration
Services



FILE: WAC 01 240 54119 Office: CALIFORNIA SERVICE CENTER Date: **JAN 27 2004**

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

The petitioner appears to be a temporary employment agency, although it declined to specify, in Part 5 of the petition, the nature of its business. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petition was filed pursuant for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). 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 nature, for which qualified workers are unavailable in the United States.

Aliens who will be employed as nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are qualified and available to work in those occupations, and that employment of aliens in those occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

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 (Form ETA 750 at Part A) in duplicate with the appropriate [Immigration and Naturalization Service or INS, now CIS] office.
- (b) The Application for Alien Employment Certification 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 20 C.F.R. 656.20(g)(1).

As required, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification asserting that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I.

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 submits a brief and additional evidence.

I. **The petitioner has established that it has the ability to pay the proffered wage to the beneficiary.**

Eligibility in this matter hinges on the petitioner demonstrating its continuing ability to pay the proffered wage beginning on the priority date, April 30, 2001, the day the petition was submitted. The proffered wage as stated on the Form ETA 750 is \$20 per hour, which equals \$41,600 per year.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

With the petition, counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, the director, on September 26, 2001, requested additional evidence. The director requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and stipulated that the evidence should be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director's notice also stated that if the petitioner employs more than 100 workers, a statement from a financial officer of the company indicating that the petitioner has the ability to pay the proffered wage would suffice. The director also noted that the petitioner's petition was filed without evidence of compliance with 20 C.F.R. § 656.20(g)(1), and that portions of the petition were not completed and asked that the petitioner complete those portions of the petition.

In response, counsel returned the director's notice, but without copies of annual reports, federal tax returns, audited financial statements, or any evidence that the petitioner employs 100 or more workers. The petitioner also did not provide evidence of compliance with 20 C.F.R. § 656.20(g)(1), and did not complete the remaining portions of the petition as the director requested.¹

On May 29, 2002, the director again requested additional evidence. Again, the request for evidence stipulated that the evidence of the petitioner's ability to pay should be in the form of copies of annual reports, federal tax returns, or audited financial statements. The notice stated again that if the petitioner employs more than 100 workers, a statement from a financial officer of the company indicating that the petitioner has the ability to pay the proffered wage would suffice. The notice again requested evidence of compliance with 20 C.F.R. § 656.20(g)(1) and also, again, requested that the petitioner complete the petition.

In response, counsel returned the director's notice. On a copy of the petition, some unidentified person indicated that the petitioner employs 1,400 people, but no evidence of that assertion was provided.² No copies of annual reports, federal tax returns, or audited financial statements were provided. The director accordingly determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on September 24, 2002, denied the petition.

On appeal, counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. Counsel stated that the petitioner had not understood the request for evidence.³ The petitioner's 2001 tax return shows that the petitioner declared ordinary income of \$360,921 during that year.

¹ These issues will be further discussed below.

² The AAO notes that contrary information is provided on the petitioner's website, <http://www.ussinurses.com>, where the petitioner's entity claims to have thirty-five (35) employees.

³ The AAO is not required to consider this evidence on appeal since it was requested by the director

The petitioner has demonstrated the ability to pay the proffered wage. The petitioner has, therefore, overcome the only basis stated in the director's decision for denying the petition. However, beyond the decision of the director, the petition fails on other grounds to be discussed below.

II. The petitioner failed to prove it is the beneficiary's actual employer and that permanent employment was prearranged at the time of filing the immigrant visa petition.

With its initial petition, on the Form I-140 Immigrant Petition for Alien Worker, the petitioner left blank all of Part 5, which requests information concerning the petitioner such as a description of its services. Additionally, the petitioner left blank a question in Part 6 that requests information about where the beneficiary will work. This question could be left blank if the beneficiary would be working at the location specified on Part 1 about the petitioner's name and address; however, the petitioner did not specify whether the work location is the same location as the petitioner's address. The petitioner's address is listed as 12069 Jefferson Blvd., Culver City, California. On Form ETA 750 A, Application for Alien Employment Certification, the petitioner also did not indicate that the beneficiary would be performing her work at a location different from the petitioner's address. No supporting statements or contracts were provided to further describe the proposed employment scenario or the petitioner's type of business.

Subsequent to the initial filing, the director requested additional evidence including, *inter alia*, omitted items on the petition. In response to multiple requests for such evidence as described above, the petitioner submitted an updated Form I-140 that described the petitioner as a company or organization; established in December 1996; employing 1400 employees, with gross annual income of \$17,500,000 and net annual income of \$1,300,000, but did not provide the company's "type of business."

A search of the Internet identified the petitioner's website as <http://www.ussinurses.com>.⁴ At that website, additional information about the petitioner was found. Under its "About Us, Letter of Introduction," the following information is provided:

We have an excellent group of candidates ready to start working at your facility should you decide to utilize our services; as we are a prominent provider of both Travel and Per-Diem nurses and other Healthcare Professionals throughout Southern California. Our vast Clients reach as far as San Diego, Orange, Riverside, San Bernardino and Los Angeles Counties; and we currently have over two hundred hospitals utilizing our temporary and travel services throughout these areas. Additionally, we have a branch office in Detroit, Michigan; and sponsor immigration services from various areas.

Additionally, under "About Us, Agency Experience and Corporate Overview," the petitioner's entity is described as follows:

numerous times prior to the appellate level. 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 CIS, formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). However, the AAO will exercise favorable discretion in this limited circumstance and consider the petitioner's tax return.

⁴ The petitioner's address on the petition matches the headquarters address listed under the "Contact Us" section.

[The petitioner] (USSI) was established as a parent company in 1996, as a result of a merger of three prominent healthcare organizations . . .

. . . .

We support all of our Client facilities with Registered Nurses . . . The corporate office is located in Culver City, California . . .

[The petitioner] has over thirty-five (35) internal employees throughout its five (5) branch offices . . . Our combined efforts enable us to provide services to over two hundred (200) hospitals throughout Southern California and the Michigan areas.

Finally, under “About Us, Staffing Services Available,” the petitioner’s services are described as follows: “[The petitioner] is available to assist its Client facilities with Per-Diem and Travel Nurses, Specialty Nursing, and Support Services on an “as-needed” basis.”

Apparently the petitioner may employ healthcare professionals for outsourcing to third party clients. If the beneficiary will be outsourced to an employment site different from the petitioner’s headquarters, than more information is required prior to analyzing the employment-based immigrant visa petition and concomitant analyses such as whether or not the proffered wage meets the prevailing wage rate, and whether specific requirements delineated under 8 C.F.R. § 656.20(g)(1) are met, as will be further discussed below. While the director’s decision did not address these issues, they will be addressed in this decision on appeal.

A discussion follows concerning (1) whether the petitioner is the beneficiary’s actual employer, and (2) whether the petitioner has offered employment to the beneficiary that is permanent and 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.

A. **The petitioner has failed to establish that it 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 petitioner did not submit contracts or any information or documentation that clearly delineates its relationship with third-party client health care facilities with respect to the instant visa petition. Under certain circumstances, contracts may illustrate pre-arranged, full-time employment at a third-party client worksite for

specifically named health care professionals.⁵ Additionally, under certain circumstances, contracts may also establish an employer-employee relationship between the petitioner and specifically named health care professionals, if, for example, the contracts delineate the petitioner's responsibility to directly pay salaries and provide fringe benefits to the nurses.⁶

The record of proceeding, however, does not contain any documentation or information such as a contract or an appendix to a contract, or completed immigration paperwork, that clearly delineates the scope of the beneficiary's employment. Thus, it is impossible to determine if the petitioner or the petitioner's third-party clients would be the beneficiary's actual employer or if the petitioner has the ability to offer pre-arranged, full-time, permanent employment for the beneficiary. The petitioner failed to provide documentation concerning the beneficiary, itself, and/or a third-party client, that unequivocally states that the petitioner is the beneficiary's actual employer and all details concerning the scope of the proffered employment, such as a specific third-party worksites to which the beneficiary would be assigned. Since a review of the petitioner's website indicates that it outsources its healthcare professionals, the beneficiary would most likely not be working at its headquarters. It is unclear if the petitioner retains employment over its healthcare professionals or if it facilitates permanent employment with third-party clients. The petitioner never made clear where the beneficiary would work, rendering it impossible for CIS to clearly analyze the visa petition. Thus, the petitioner failed to establish that the position offered to the instant beneficiary is a pre-arranged, permanent, full-time position and that the petitioner is the actual employer for failure to provide enough information concerning the scope of employment terms as set forth under 20 C.F.R. §§ 656.22 and 656.3. The petitioner is reminded that it has the burden of proving its eligibility for the immigration benefit it is seeking. *See* Section 291 of the Immigration and Nationality Act.

III. **The petitioner failed to identify a geographical location where the proposed employment will be performed and thus fails to satisfy that its proffered wage meets the prevailing wage rate.**

Section 203(b)(3)(C) of the Act makes clear that an immigrant visa may not be issued until a determination is made by the Secretary of Labor that overcomes the inadmissibility bars found at section 212(a)(5)(A) of the Act. Section 212(a)(5)(A) of the Act states the following:

Labor certification and qualifications for certain immigrants. –

⁵ Fixed-term contracts in certain circumstances have been upheld as pre-arranging permanent employment. *See Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968)(a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients which guaranteed permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits"). *See also Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992)(permanent employment is established when a constant pool of employees are available for temporary assignments); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), (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).

⁶ *Matter of Smith*, *supra*, at 773, has held 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.

(A) Labor certification. –

- (i) In general. – Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –

.....

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The employment of aliens in Schedule A occupations must not adversely affect the wages and working conditions of United States workers similarly employed. *See* 20 C.F.R. § 656.10. The regulations governing Schedule A do not contain any language that certifies that the employment of any alien registered nurse anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e) which sets forth that CIS has authority to review a Schedule A immigrant visa petitioner's satisfaction of labor certification requirements delineated under 20 C.F.R. § 656.20. The regulations at 20 C.F.R. § 656.20(c)(2) state that a labor certification application must clearly show that the wage offered meets the prevailing wage rate and references 20 C.F.R. § 656.40 (discussed above). Thus, a petition that fails to prove that its proffered wage does not adversely affect the wages and working conditions of United States workers similarly employed results in a denied visa petition and an inadmissible beneficiary. In other words, a petition that offers a salary that fails to meet the prevailing wage rate as determined by the Department of Labor (DOL) will be denied.

In this case, the prevailing wage rate is impossible to determine since the petitioner failed to provide details concerning the geographical location of the beneficiary's employment. DOL established an on-line wage library (OWL) for identifying prevailing wage rates for various occupations. However, OWL's system requires designation of a geographical location where the employment will be performed. The petitioner's website indicates that it outsources its healthcare professionals to hospitals in Southern California and Michigan. However, the petitioner does not clearly specify where the beneficiary will work on its immigrant visa petition or supporting documentation. Since the petitioner failed to specify the geographical location where the proffered employment will be performed, it is impossible for the AAO to evaluate whether or not the proffered wage meets the prevailing wage rate as established by DOL. Thus, the petitioner failed to meet its evidentiary burden that its proffered wage in this case will not adversely affect the wages and salaries of similarly employed U.S. workers.

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

Pursuant to 20 C.F.R. § 656.22, the petitioner must also demonstrate that it complied with the notice requirements of 20 C.F.R. § 656.20(g)(1) in order for the petition to be approved. 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 of location of the employment.

Although the director twice requested evidence of compliance with the requirements of 20 C.F.R. § 656.20(g)(1), the petitioner has not submitted that evidence to date. The regulations at 20 C.F.R. § 656.20(g)(1) state 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:

- (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. 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 regulations at 20 C.F.R. § 656.20(g)(3)(iii) also require a petitioner to "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." However, as duly noted above, the petitioner has not clearly indicated where the employment will be performed, and based on the petitioner's website, it appears it could be performed in five counties in southern California or in the state of Michigan. Therefore, the petitioner fails to meet the requirements delineated under 20 C.F.R. § 656.20(g)(3).

Additionally, since the petitioner has failed to clearly identify the location where the work will be performed and the petitioner, according to its website, may contract the beneficiary to a third-party client's facility, the notice cannot conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. 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), (g)(3), or (g)(8). 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 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.⁷ 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 that it will be the beneficiary's actual employer, and has prearranged employment with proffered wages at the prevailing wage rate, this issue need not be discussed further.

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

⁷ 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).