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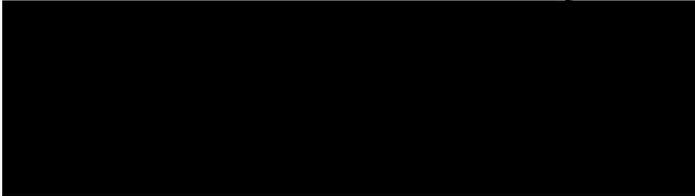


U.S. Citizenship
and Immigration
Services

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MAR 08 2005



FILE: WAC 03 102 54204 Office: CALIFORNIA SERVICE CENTER Date:

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

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office 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 physical therapist.

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.

The regulation at 8 C.F.R. § 204.5(d) additionally provides, in pertinent part, that:

The priority date of any petition filed for classification under Section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the petition filing date, and thus the priority date, is February 12, 2003. The proffered wage as stated on the Form ETA 750 is \$649 per week, which equals \$33,748 per year.

20 C.F.R. § 656.10 states, in pertinent part, that a person seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to § 656.22.

Schedule A includes persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the State in which they propose to practice physical therapy.

The regulation at 20 C.F.R. § 656.22(c) states in pertinent part as follows:

An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:

(1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (Sec. 656.10(a)(1) of this part) shall file as part of its labor certification application a letter or statement signed by an authorized State physical therapy licensing official in the State of intended employment, stating that the alien is qualified to take that State's written licensing examination for physical therapists. Application for certification of permanent employment as a physical therapist may be made only pursuant to this Sec. 656.22 and not pursuant to sections 656.21, 656.21a, or 656.23 of this part.

The regulation at 8 C.F.R. § 656.10 states in pertinent part as follows:

The Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and 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. An alien seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to Sec. 656.22.

Schedule A

(a) Group I:

(1) Persons who will be employed as physical therapists, and who possess all the qualifications necessary to take the physical therapist licensing examination in the state in which they propose to practice physical therapy.

Counsel filed a Form I-140 visa petition on February 12, 2003, in support of which he submitted:

- A Form G-28;
- Duplicate Forms ETA 750 A and ETA 750 B;
- A diploma from the beneficiary's college in the Philippines granting her a Bachelor's of Science degree in physical therapy;
- The beneficiary's college grades and coursework transcript;
- The beneficiary's Philippines physical therapist's license;
- The beneficiary's wallet-sized picture-ID physical therapist's license issued by the Republic of Philippines Professional Regulation Commission;
- A Philippines certificate showing the beneficiary's passing scores on a 1999 licensing exam;
- A Philippines hospital's November 21, 2000 statement that the beneficiary has been on staff as a physical therapist since September 5, 1999; and
- Various certificates showing the beneficiary's completion of training courses in the Philippines.

The director deemed the evidence filed with the petition insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage and the beneficiary's readiness to take a state-licensing exam, the latter explicitly required for physical therapy as a designated Schedule A occupation under 20 C.F.R. § 656.20 and § 656.22. Accordingly, on May 15, 2003, the service center sent counsel a request for additional evidence of the petitioner's continuing ability to pay and whether the beneficiary had qualified with the state-licensing panel to take the licensing examination.

On July 23, 2003, counsel responded with a letter asking the director to grant the petitioner 90 more days – until October 2003 – to gather the requested evidence and “documentation from the Philippines.” In response, on August 29, 2003, the director closed the record and denied the petition, finding the evidence insufficient to establish the petitioner's continuing ability to pay or that the beneficiary had qualified to take the exam.

On appeal, counsel submits evidence and a three-sentence summary his reasons for appealing, set forth on the Form I-290B as follows:

- The director denied counsel's July 23, 2003 request for 90 days extra to respond to the RFE;
- The extra time would have enabled counsel to obtain a letter from the Physical Therapy Board of California showing the beneficiary qualified to take the licensing exam.¹
- Counsel requested the AAO grant extra time to submit evidence.

Because of counsel's failure to submit evidence of the petitioner's ability to pay, the success of his appeal hinges upon whether the director erred in refusing to grant an extension of time to respond to the RFE. The pertinent regulation 8 C.F.R. § 103.2(b)(8) provides:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by the Service prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests. In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:

- (i) Submit all the requested initial or additional evidence;
- (ii) Submit some or none of the requested additional evidence and ask for a decision based on the record; or
- (iii) Withdraw the application or petition.

By giving counsel until August 7, 2003, to respond to the RFE, the director has fully complied with the foregoing regulation, affording the petitioner the specified 12 weeks to respond. The director correctly found that he lacked the power to grant more time for such a response. Had counsel submitted persuasive evidence of ability to pay on appeal, the AAO could have considered such proof in an exercise of its discretion. However, with no evidence submitted on appeal addressing the petitioner's ability to pay, the AAO must affirm the director's decision on the request for more time and on his denial of the visa petition.

From counsel's remarks on the Form I-290B², he implies that the director had the duty or the discretion to grant more time for a response. The exact nature of the director's authority arises from a construction of the regulation at 8 C.F.R. § 103.2(b)(8) when it states, "Additional time may not be granted." The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and 8 C.F.R. § 103.2(b)(12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Nothing in the regulation suggests the director possesses any comparable discretion or duty to change the time for the petitioner to respond.

Counsel's request for more time is also curious for several other reasons. From the record it appears he waited more than two months before seeking an extension. Further, nothing in the RFE would suggest any of

¹ The board told the beneficiary in a July 30, 2003 letter that she still needed to submit fingerprints and a credentials evaluation to complete her application to take the exam.

² The appeals form indicates that counsel did not submit either a separate brief or more evidence.

the requested information must come from outside the United States. The petitioner's financial capacity addresses the petitioner's operations, which from the record would appear to be in or around the state of California. As to further information from the state licensing authority, which sought a credentials evaluation and fingerprints, it was incumbent upon counsel or the petitioner to marshal such information before the initial filing. In any event, it is not apparent from counsel's remarks why documentation needed to come from the Philippines.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The RFE had asked for more evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's qualifications to take a state licensing examination for physical therapists, giving counsel 12 weeks, until August 7, 2003, to respond. On July 23, 2003, counsel wrote asking for 90 more days, until October 2003, to gather the requested documentation, some of which he contended the petitioner had to gather from the beneficiary's domicile in the Philippines. Citing 8 C.F.R. § 103.2(b)(8), the director issued a decision on August 29, 2003, denying the petition for lack of sufficient said he could not grant more than the allotted 12 weeks to respond, closed the record and denied the petition for lack of sufficient evidence of the petitioner's ability to pay or of beneficiary's licensure or a letter from the licensing board stating she qualified to take the exam for state licensure.

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 granting 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 not available in the United States.

Counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage continuing from the priority date of February 12, 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage 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.