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U.S. Citizenship and Immigration Services

B6

PUBLIC COPY

[redacted]

FILE: LIN-04-145-52724 Office: NEBRASKA SERVICE CENTER Date: JAN 24 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded to the director.

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a "Disability Recreational Therapist (DOT: 076.124-014; OES 29-1125)." A photocopy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. No original ETA 750 is found in the record. The director determined that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and denied the petition accordingly.

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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 29, 2003.

The I-140 petition was submitted on April 23, 2004. On the petition, in Part 2, Petition type, the petitioner checked box "e" for "A skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, Part 2). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of "+$20 Million," and to have a net annual income of "+$889,000." (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a decision dated September 21, 2004, the director determined that the offered position requires the services of a skilled worker and that the beneficiary lacked two years of education or training relevant to the offered position. The director accordingly denied the petition.

On appeal, counsel submits a brief and submits no additional evidence. Counsel also submits copies of three AAO decisions in petitions submitted previously by the petitioner which had been certified by the director to the AAO. Those decisions are not evidentiary documents, but are submitted as legal authority in support of the instant appeal.

Counsel states on appeal that the beneficiary's post-secondary education includes a Bachelor's degree in Nursing, a field which counsel states has been found relevant to the position indicated in this petition by previous decisions of the AAO.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Disability Recreational Therapist. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14.	Education (number of years)		
	Grade School		8
	High School		4
	College		2
	College Degree Required		Associate Degree**
	Major Field of Study		Any field
	Training - yrs		n/a
	Experience		
	Job Offered	Yrs	0
	Related Occupation	Yrs	0
	Related Occupation (specify)		None
15.	Other Special Requirements		None ** U.S. Assoc Degree -or- Foreign Academic Equivalent -or- Employer will accept a combination of education and/or work experience in lieu of formal education that has been evaluated to be equivalent to a U.S. Assoc degree.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
[redacted]	Credential Evaluation	6/10/2003		U S Equivalent BS Nursing
Philippine Women University Manila, Philippines	Nursing	06/1974	10/1981	BS Nursing

[remaining rows blank]

On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
[redacted]	Nurse	10/1983	Present	Hospital

[remaining rows blank]

The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part:

> *Definitions.* As used in this part:
>
> *Skilled worker* means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

Copies of three AAO decisions submitted on appeal discuss the portion of the regulatory definition of skilled worker which states, "Relevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2). Each of those decisions was issued on July 9, 2004. In those decisions, the AAO discusses the meaning of the word "relevant" in the foregoing definition and states, "for a beneficiary's post secondary education to be considered it must be logically related and have appreciable probative value as to the capacity of the beneficiary to perform the job duties on the basis of the educational qualifications alone." (AAO decision in LIN-03-110-55083, at 6). The AAO's reasoning was based on the definition of the term "relevant" found in Black's Law Dictionary, a definition which appears to address the meaning of that term as it relates to evidentiary questions. (AAO decision in LIN-03-110-55083, at 6, *quoting* Black's Law Dictionary 1293 (7th ed. 1999)).

None of the three cases submitted by the petitioner has been published as a precedent case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in

bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nonetheless, the analysis in the three decisions submitted by the petitioner of the skilled worker definition in the regulation at 8 C.F.R. § 204.5(l)(2) is reasonable.

Two of the decisions state that study "in various fields of health care" would be sufficient to qualify as relevant post-secondary education for the position of developmental disability specialist. (AAO decisions in LIN-03-067-51563, at 8, and in LIN-03-110-55083, at 8). The other AAO decision finds that the beneficiary's education in the field of medicine is sufficient for that occupation. (AAO decision in LIN-03-072-51157, at 7). The latter decision also states the following:

> The AAO is not suggesting that a post-secondary education other than a medical degree is not relevant as a number of other fields would have a substantial connection to the duties of a Developmental Disability Specialist as set forth in the ETA 750. Among the post secondary education likely to have such a connection would be areas of study involving teaching, various fields of health care, occupational training, or therapy.

(AAO decision in LIN-03-072-51157, at 8, fn. 5).

In the instant I-140 petition, the ETA 750 specifies the following duties for the position of Disability Recreational Therapist:

> Organize and direct medically approved recreation program for patients in pediatric mental retardation facility. Direct and organize activities to implement a continuous active treatment program for mentally and physically handicapped resident children to enable each individual to function as independently as possible and prevent skill regression. Regulate content of programs in accordance with patients' capabilities, needs and interests. Prepare progress charts and periodic reports to keep other members of the treatment staff fully apprized of patients developmental history.

(ETA 750, Part A, block 13).

In his September 21, 2004 decision, the director determined that the offered position requires the services of a skilled worker and that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and denied the petition accordingly.

Based on the evidence in the record, the director's decision to deny the petition was incorrect.

The job duties described in the ETA 750 for the position of Disability Recreational Therapist are those of a skilled worker. The ETA 750 was certified by the Department of Labor with those job duties. The Department of Labor's job title for the occupation is "Recreational Therapist." The public Internet Web site of the Occupational Information Network contains information developed in coordination with the U.S. Department of Labor. The summary report for the job category "29-1125.00 – Recreational Therapists" classifies this job category as "Job Zone Four: Considerable Preparation Needed." The report states the following requirements for overall experience: "A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations." The report states the following requirements for job training: "Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training." The report states a Specific Vocational Preparation (SVP)Range of "7.0 to <8.0." Occupational Information Network, *O*Net OnLine, Summary Report for : 29-1125.00 – Recreational Therapists*, http://online.onetcenter.org/

link/summary/29-1125.00 (accessed November 21, 2006). The minimum SVP of 7.0 is the same as that for the position of developmental disability specialist, which is discussed above in the decision of the AAO in LIN-03-110-55083, which states that an SVP of 7 corresponds to a job which requires from two to four years of experience. (AAO decision in LIN-03-110-55083, at 10).

The offered position in the instant petition is not developmental disability specialist, but rather disability recreational therapist. Nonetheless, the job duties for the two positions contain many similarities. The position of developmental disability specialist includes the following duties, among others: "To develop and implement a continuous active treatment program for each profoundly mentally and physically handicapped resident to enable each individual to function as independently as possible and prevent skill regression." (AAO decision in LIN-03-110-55083, at 5, *quoting* ETA 750 in that petition). The position of disability recreational therapist includes the following duties, among others: "Organize and direct medically approved recreation program for patients in pediatric mental retardation facility. Direct and organize activities to implement a continuous active treatment program for mentally and physically handicapped resident children to enable each individual to function as independently as possible and prevent skill regression." (ETA 750 in the instant petition, block 13.)

The record contains a copy of a diploma from The Philippine Women's University, Manila, Philippines, granting the beneficiary a Bachelor of Science in Nursing degree, with an accompanying course transcript.

The record also contains a copy of an academic evaluation for the beneficiary by [redacted] and Consulting, New York, New York dated June 10, 2003.

The beneficiary's course transcript from The Philippine Women's University National University shows many courses relevant to the offered position, including Elementary Botany, General Psychology, Physical Education, General and Inorganic Chemistry, Elementary Zoology, Principles of Sociology, General Anthropology, Organic w/ Biochemistry, Social Foundation in Nursing, Introduction to Medical Science, Microbiology, Anatomy and Physiology, Child Psychology, Fundamentals of Nursing, Maternal and Child Nursing, Diet Therapy, Pharmacology and Therapeutics, Mental Hygiene and other nursing courses, as well as general education courses.

The academic evaluation by [redacted] and Consulting finds that the beneficiary's degree from National University is equivalent to a Bachelor of Science in Nursing degree from an accredited institution of higher education in the United States.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In the instant petition, the academic evaluation by [redacted] and Consulting appears to be a reasonable evaluation of the beneficiary's academic qualifications. Moreover, the field of Nursing is sufficiently relevant to the offered position of Disability Recreational Therapist to qualify as training for that position.

As noted above, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158 (Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The evidence in the record is sufficient to establish that the beneficiary had at least two years of post-secondary education which was relevant to the position of Disability Recreational Therapist as of the priority date.

For the foregoing reasons, the assertions of counsel on appeal are sufficient to overcome the decision of the director concerning the education of the beneficiary.

In his decision, the director did not discuss the issue of the petitioner's ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 29, 2003. The proffered wage as stated on the Form ETA 750 is $7.64 per hour, which amounts to $15,891.20 annually.

It may be noted that it has been approximately three years since the Application for Alien Employment Certification has been accepted and the proffered wage established. The employer certification that is part of the application states, "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid 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." (ETA Form 750 Part A, Section 23 b).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 17, 2003 the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed a total of 302 I-140 petitions since 1996. The great majority of those petitions have been filed since 2002. The number of I-140 petitions filed was 4 in 1996, 9 in 1997, 2 in 1998, 5 in 1999, 7 in 2000, 11 in 2001, 56 in 2002, 125 in 2003, 66 in 2004, 5 in 2005, and 12 in 2006, through August 22, 2006.

As noted above, the instant petition was filed on April 23, 2004. During the year 2004 the petitioner filed a total of sixty-six I-140 petitions, including the instant petition.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore the certified ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

CIS electronic records do not show the priority dates of all petitions filed by the petitioner. The priority date of the instant petition is July 29, 2003, which is about nine months earlier than the April 23, 2004 date on which the I-140 petition was filed.

CIS electronic records do not contain sufficient information on priority dates on which to base estimates of the effect of multiple petitions beginning with each petition's priority date. Therefore an estimate of the total wage commitment the petitioner for multiple petitions will be made beginning in the year of the I-140 filing, which in the instant petition is 2004.

The record in the instant case contains no direct information about the proffered wages for the beneficiaries of the other petitions submitted by the petitioner. The petitioner has submitted no list of proffered wages for each of the beneficiaries of the other I-140 petitions it has filed. The proffered wage as stated on the ETA 750 in the instant petition is $7.64 per hour. As noted above, an hourly wage of $7.64 for a 40-hour work week is equivalent to an annual wage of $15,891.20.

In the year 2004 the petitioner filed sixty-six I-140 petitions, including the instant petition. At an estimated annual proffered wage level of $15,891.20 for each beneficiary, sixty-six I-140 petitions would result in a total estimated proffered wage commitment of $1,048,819.20 for the I-140 petitions filed in the year 2004.

The instant I-140 petition states that the petitioner was formed in 1975 and employs "140*" employees. (I-140 petition, Part 5). The regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. The language "may accept" in the above regulation indicates that CIS is not required to accept such a statement, but rather may exercise its discretion not to accept such as statement. *See* 8 C.F.R. § 204.5(g)(2).

The record contains a copy of a Certificate of Solvency on the petitioner's letterhead, signed by [redacted], Certified Public Accountant, which states as follows:

> I, [redacted], do hereby certify that I am a Designated Agent of [redacted] d/b/a [redacted] a corporation authorized to do business under the laws of the State of Illinois.
>
> The corporation is now and will be for the expected future able to pay the wages offered to our employees.
>
> The corporation employs more than 140 people at our Champaign location.
>
> For the fiscal year ended June 30, 2003, financial results indicate that the corporation had gross revenues in excess of $26 million and net revenues in excess of $1,225,000.
>
> For the two quarters ending December 31, 2003, un-audited results indicate gross revenues in excess of $13,900,000 and net revenues in excess of $850,000.
>
> I hereby certify that the information provided herein, as of June 30, 2003 is true, accurate and complete in every material respect.

(Letter from [redacted], CPA, undated).

The letter from [redacted] does not state that Mr. [redacted] is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). The content of that letter provides some evidence of the **petitioner's ability to pay the proffered wage during the relevant time period.** The letter states that the petitioner's net income is in excess of $1,225,000.00 per year. That amount of net income is greater than the estimated $1,048,819.20 in proffered wage commitments which the petitioner has made in the sixty-six I-140 petitions which it submitted in 2004, including the instant petition.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage. In the absence of a statement by a financial officer of the petitioner, the regulation at 8 C.F.R. § 204.5(g)(2) requires "copies of annual reports, federal tax returns, or audited financial statements" to establish to establish the petitioner's ability to pay the proffered wage.

In his decision, the director did not address the issue of the petitioner's ability to pay the proffered wage. For that reason, the instant petition must be remanded to the director to determine whether the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period, as well as to pay the proffered wages to the beneficiaries of the other petitions filed by the same petitioner in 2004. On remand, the director may request updated financial information from the petitioner and may also request information on the number of any alternative petitions filed for beneficiaries in different preference categories. The petitioner is required to establish its ability to pay the proffered wage for each offered job for which a petition was filed during the year 2004. If the same job was the subject of two or more alternative petitions that year, the proffered wage for that job should be counted only once when calculating the petitioner's total wage commitments.

Another issue which must be addressed on remand by the director concerns the original ETA 750. As noted above, no original ETA 750 is found in the record. An original labor certification is required by the regulation at 8 C.F.R. § 204.5(g)(1). The record on appeal is a record of proceeding and it does not include the entire A-file of the beneficiary. The original certified ETA 750 may have been submitted in support of a different I-140 on behalf of the same beneficiary and perhaps will be found in the beneficiary's A-file. An original certified ETA 750 is required for approval of the instant I-140 petition in order to assure that the same ETA 750 is not used as the basis for another I-140 petition on behalf of another beneficiary as a substituted beneficiary.

For the foregoing reasons, a second reason for a remand to the director is to ascertain whether an original certified ETA 750 has been filed, and if so, to assure that the original ETA 750 will be used in support of the instant I-140 petition and no other I-140 petition.

In summary, the decision of the director concerning the education of the beneficiary is withdrawn. The petition is remanded to the director to evaluate the petitioner's ability to pay the proffered wage and to consider matters concerning the original ETA 750, as discussed above.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for actions consistent with the above decision.