

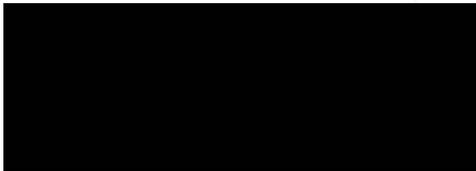
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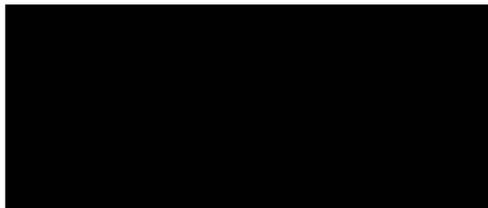
FILE: EAC 06 056 51829 Office: NEBRASKA SERVICE CENTER Date: NOV 20 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Acting Director, Nebraska Service Center denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an assisted living facility and nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. The petitioner submitted a Form ETA 9089, *Application for Permanent Employment Certification (Form ETA 9089 or labor certification)* with the petition. The acting director determined that the petitioner had failed to demonstrate that the petition is amenable to treatment pursuant to Schedule A and denied the petition accordingly.

The record shows that the appeal is properly filed timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The sole issue raised in the acting director's July 3, 2006 decision of denial is whether or not the instant petition qualifies for treatment pursuant to Schedule A.

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 not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In order for a position to be amenable to treatment pursuant to Schedule A, the position must qualify for Schedule A treatment pursuant to all of the applicable statutes and regulations. The regulation at 20 C.F.R. § 656.5 specifies that aliens who will be employed as professional nurses are included in Schedule A and petitions for those positions are amenable to Schedule A treatment. No other nurses are included in Schedule A. The regulation at 20 C.F.R. § 656.3 states, in pertinent part, "Professional occupation means an occupation for which the attainment of a bachelor's or higher degree is a usual education requirement"

On the Form I-140 visa petition the petitioner stated that the proffered position is for a LPN. In order to prevail, the petitioner must demonstrate that LPN positions are positions for professional nurses; that is, that LPN positions generally require a bachelor's degree.

According to the Occupational Outlook Handbook<sup>1</sup> of the Department of Labor (DOL) the position of LPN requires training lasting approximately one year. It continues,

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<sup>1</sup> Information pertinent to LPN requirements and duties is available at <http://www.bls.gov/oco/ocos102.htm>.

A high school diploma or its equivalent usually is required for entry [into a LPN training program], although some programs accept candidates without a [high school] diploma, and some are designed as part of a high school curriculum.

The DOL has determined that LPN positions require one year of vocational training, do not generally require a bachelor's degree, and do not even necessarily require a high school diploma. LPN positions are not, therefore, professional positions within the meaning of 20 C.F.R. § 656.3 and 20 C.F.R. § 656.5 and do not qualify for treatment pursuant to Schedule A. The visa petition was correctly denied on this basis,<sup>2</sup> which has not been overcome on appeal.

The record suggests an additional issue that was not mentioned in the decision of denial.

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 the Service.

In the instant case, the petitioner stated, on the Form I-140 visa petition, that it employs 254 workers. The petitioner submitted no statement from its financial officer attesting to its ability to pay the proffered wage. The acting director did not request any evidence in support of the assertion that the petitioner employs 100 or more workers and the petitioner provided none. The acting director did not request copies of annual reports, federal tax returns, audited financial statements, or any other evidence of its ability to pay the proffered wage and the petitioner provided none.

Further, reference to information available at a website<sup>3</sup> appears to indicate that Beaumont is a nursing home and Whitney Place is an adjoining assisted living facility. This suggests that the two may not be the same entity.

The petitioner stated that its IRS Tax ID number (EID) is [REDACTED]. A website of the Secretary of the Commonwealth of Massachusetts Corporation Division<sup>4</sup> states that the EID belongs to Beaumont Nursing Home Incorporated.

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<sup>2</sup> The petition could have been filed pursuant to the basic labor certification process, rather than Schedule A. In that event, however, a Form ETA 750 or Form ETA 9089 that had previously been approved by the DOL should have accompanied the visa petition. As the Form 9089 provided with the instant petition was not approved by the DOL, the instant petition is not, in the alternative, amenable to approval pursuant to the basic labor certification process.

<sup>3</sup> <http://www.high-profile.com/2003/jun/Cutler.html>

<sup>4</sup> <http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>

Further reference to that website reveals the existence of a [REDACTED] at [REDACTED] with EID [REDACTED] and principal offices at [REDACTED] in Westboro, Massachusetts, an address which likely adjoins the petitioner's [REDACTED] address. [REDACTED] and [REDACTED] have some officers in common and may also be affiliated by common ownership, in whole or in part.

This evidence, taken together, indicates that the petitioner in the instant matter has not been identified. The petition appears to contemplate two different entities, in the aggregate, employing the beneficiary. The number of workers listed on the Form I-140 may also be the aggregate number employed by both corporations.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.