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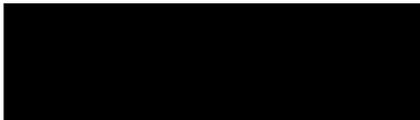
FILE: WAC 04 061 50775 Office: CALIFORNIA SERVICE CENTER Date: **OCT 09 2007**

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 Director, California Service Center, denied the immigrant visa petition on June 16, 2005. On July 20, 2005, the petitioner filed an appeal but it was untimely. In accordance with 8 C.F.R. § 103.3(a)(2)(v)(B)(2) the director treated the late appeal as a motion to reopen/reconsider. After review, on August 24, 2005, the director affirmed the decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal filed September 26, 2005. The appeal will be dismissed.

The petitioner states it is a 24-hour skilled nursing facility. 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. § 656.10, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made at the place of employment¹ according to the regulation at 20 C.F.R. § 656.20(g)(1).

The director also determined that the petitioner had not demonstrated that the beneficiary would be employed in a permanent full-time position. The director found that the subject ETA 750 lists the address where the alien will work as [REDACTED] California, identified as the "Burlingame Hacienda." The director found that the evidence submitted demonstrated that the Burlingame Hacienda is a "Residential Care Facility" and no evidence was submitted that California State licensing allowed or required the services of a registered nurse. The director found that the petitioner had filed two other similar petitions with the same priority year as the subject petition for the employment of registered nurses at the Burlingame Hacienda, and, that evidence submitted was insufficient to show that any full-time positions exist for registered nurses at the Burlingame Hacienda.

Further, the director found that with the addition of the two petitions, although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, the petitioner had not established its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending.

The director also found that additional evidence submitted by counsel claiming a new work location and employer is insufficient to claim eligibility for the preference classification citing the case precedent of *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc.Comm.1998).

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(ii) of the Act as a professional worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found 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 able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed. The petitioner must demonstrate the continuing ability to pay the proffered wage

¹ According the director, the petition and labor certification, the place of employment is the Burlingame Hacienda, 1012 El Camino Real, Burlingame, California.

beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 750 was properly filed with CIS on December 31, 2003. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 750 is \$25.00 an hour or \$52,000.00 annually.

The regulation at 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states:

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the Citizenship and Immigration Services (CIS) issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

As a preface to the following discussion, the record of proceeding contains a Form I-140 that was filed on December 31, 2003 with an Application for Alien Certification dated by the applicant as of December 1, 2003. On June 16, 2005, the Director, California Service Center, issued a decision in this matter as noted above. The director found that the petition was not approvable on the date of filing and denied the petition. The petitioner filed an appeal on July 20, 2005, of the director's decision that was dated June 16, 2005. The appeal was filed 34 days after that decision and was untimely. In accordance with 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director elected to treat the late appeal as a motion to reopen/reconsider on August 24, 2005. The director made a new decision in this case on August 24, 2005 that denied the petition. The petitioner filed an appeal on September 26, 2005 of the director's decision of August 24, 2005.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence submitted in the record includes the following documents: an explanatory letter from counsel dated June 1, 2005; the petitioner's letter dated May 28, 2005, from [REDACTED], Vice President listing the number of staff in each Care Systems, Inc.'s facility; the California State licensing certificates for Gateway Health & Rehabilitation Center, Windsor House Convalescent Hospital, Creekside Convalescent & Mental Health Rehab "Prurm," Fircrest Convalescent Hospital, Bay Point Healthcare Center,

² The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Martinez Convalescent Hospital, La Mariposa Care and Rehabilitation Center, Park Central Care & Rehabilitation Center (and its business tax certificate), and Manteca Care and Rehabilitation Center; the petitioner's letter dated October 10, 2005, from [REDACTED] Vice President; approximately 20 pages of the petitioner's corporate information; four web pages from two Internet search engines concerning Manteca Care and Rehabilitation Center and Creekside Convalescent Hospital; Employers Quarterly Federal Tax Form (Form-941) statements for Nadhan Inc., Care Systems Inc. and other facilities for the first and second quarters of 2005; a "Notice of Filing the Application for Alien Certification ..." for the position of registered nurse, at the rate of pay of \$25.00 posted on May 1, 2005 to May 15, 2005 at 10 locations one of which is Nadhan Inc., d/b/a Creekside Convalescent & Mental Health Rehabilitation Center, [REDACTED] California; a "Notice of Filing the Application for Alien Certification ..." for the position of registered nurse, at the rate of pay of \$25.00 posted on October 1, 2003 to October 15, 2003 at Care Systems inc., 1014 El Camino Real, Burlingame, California; a "Notice of Filing the Application for Alien Certification ..." for the position of registered nurse, at the rate of pay of \$25.00 posted on October 1, 2003 to October 15, 2003 at Care Systems inc., 1014 El Camino Real, Burlingame, California; a City of Burlingame license and tax receipt for a residential care facility located at 1012 El Camino identified as "Burlingame Care Facility;" California State licensing certificates for Creekside Convalescent & Mental Health Rehab "Prurm," [REDACTED], [REDACTED] as a skilled nursing facility, and, Fircrest Convalescent Hospital, Sebastopol, California; Form I-290B appeal filed July 20, 2005; an explanatory letter dated July 14, 2005 from counsel; a "good standing certificate" from the State of California for CareSystems Inc. dated July 13, 2005; an application for Alien Employment certification for the beneficiary by the petitioner for employment located at [REDACTED]; a support letter from the petitioner for the beneficiary dated October 10, 2003; a letter from the petitioner, by [REDACTED] Chief Financial Officer, stating that the company has a 774 bed capacity, over 400 employees and annual gross income of \$30 million and is offering the beneficiary a position; a cover letter from counsel dated December 1, 2003; and, as well as documentation concerning the beneficiary.

On August 24, 2005, the director affirmed the decision to deny the petition.

Counsel stated on appeal that the director improperly denied the petition because the information has been furnished to CIS, and On January 17, 2006 additional a legal brief and additional evidence.

Relevant additional evidence submitted includes the following documents: an explanatory letter from counsel dated October 23, 2005; the petitioner's appeal of the director's decision dated August 24, 2005, Form I-290B filed September 26, 2005; an explanatory letter from counsel dated September 23, 2005; a "Listing of Corporations and Facilities ...;" an organizational chart of the Care Systems Inc. organization and facilities; letters by the petitioner dated August 1, 2005, and August 15, 2003, from [REDACTED] Vice President; copies of webpages from <http://kepler.ss.ca.gov> accessed August 11, 2003 and August 23, 2005, providing corporate information concerning CareSystems Inc. and Nadhan Inc.; a California State licensing certificate for Creekside Convalescent & Mental Health Rehab "Prurm," [REDACTED] California, as a skilled nursing facility; a compiled statement of "assets, liabilities and equity -income tax basis" of Creekside Convalescent Hospital, a division of Nadhan Inc, as of December 31, 2004, and a related financial statement; a City of Santa Rosa business license certificate for Creekside Convalescent Hospital; and Employers Quarterly Federal Tax Form (Form-941) statements for Nadhan Inc. for the first and second quarters of 2005; "Quarterly State Unemployment Media File" report for the quarter ended June 30, 2005 for Nadhan, Inc. d/b/a Creekside Convalescent Hospital; a new Notice of Filing application posted July 1, 2005 to July 15,

2005, as well as a new I-140 petition³ dated September 24, 2005 and an ETA 750A/b dated September 24, 2005.

Counsel also submitted on appeal a new I-140 petition dated September 24, 2005 in the name of Nadhan Inc. d/b/a Creekside Convalescent & Mental Health Rehabilitation Center, a new Form ETA 750 Parts A and B dated September 24, 2005 and September 19, 2005 respectively. There is no indication in the record of proceeding that this new petition was ever filed with CIS and amendments to a petition (assuming the new petition was intended as an amendment) cannot be made on appeal. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).⁴

There is no explanation by counsel for this submission. The submission of these documents cannot cure the deficiencies that the notice of filing the Application for Alien Certification was not made at the place of employment, the Burlingame Hacienda [REDACTED] California according to the regulation at 20 C.F.R. § 656.20(g)(1), and the lack of independent, objective evidence that the beneficiary would be employed in a permanent full-time position. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Permanent Full-time Positions

The director determined that the petitioner had not demonstrated that the beneficiary would be employed in a permanent full-time position. The director found that the subject ETA 750 lists the address where the alien will work as [REDACTED] California, identified as the "Burlingame Hacienda." The director found that the evidence submitted demonstrated that the Burlingame Hacienda is a "Residential Care Facility" and no evidence was submitted that California State licensing allowed or required the services of a registered nurse. The director found that the petitioner had filed two other similar petitions with the same priority year as the subject petition for the employment of registered nurses at the Burlingame Hacienda, and that evidence submitted was insufficient to show that any full-time positions exist for registered nurses at the Burlingame Hacienda. Counsel has not responded to the director's finding. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Some of the notices of filing the application for alien certification have an attachment that list approximately ten of the petitioner's facilities that are rehabilitation centers, convalescent and mental health rehabilitation facilities, convalescent hospital, and skilled nursing facilities. There is no employment contract or agreement in the record of proceeding between the petitioner and the beneficiary that assigns him to any of the

³ There is no evidence if the new petition was ever filed with CIS. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

⁴ A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

petitioner's facilities that could utilize his professional skills as a registered nurse. On appeal counsel has submitted Exhibit H to counsel's brief which is a letter of intent dated August 18, 2003, made between Care Systems Inc., [REDACTED] California for its facility located at [REDACTED] Rosa, California (i.e. Creekside Convalescent & Mental Health Rehabilitation Center) and the beneficiary. Since the address of the petitioner is [REDACTED] California, and the address of the employer (who is the petitioner) on the labor certification [REDACTED] California, is neither of these locations. The Santa Rosa, California, location is inconsistent with representations of the intended worksite on the petition and on the labor certification.

According to the letter, Care Systems Inc. states "it is our pleasure to petition you with the intent of hiring you" This Office finds that this is not an employment agreement but merely a letter of intent. An immigrant alien within the purview of section 212(a)(15), of the Act, must establish a bona fide intent to work in the United States, immediately or in the foreseeable future, in his qualifying endeavor or in a related field. See *Matter of Semerjian*, 11 I. & N. Dec. 751, Interim Decision (BIA) 1627, 1966 WL 14353 (BIA).

Ability to Pay

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA 750 was properly filed with CIS or December 31, 2003. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$25.00 per hour (\$52,000.00 per year). Counsel has not submitted relevant or admissible⁵ evidence from the petitioner concerning the ability to pay the proffered wage in this case. 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). Further according to the record of

⁵ On appeal counsel has submitted a compiled financial statement as of December 31, 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

proceeding, the facility where the beneficiary would work has substantially less than a 100 workers (i.e. between 13-15). This deficiency presents an additional ground of ineligibility.

The Beneficiaries of Pending Petitions

Further, the director determined that the evidence was insufficient to demonstrate that the petitioner had the ability to pay the proffered wages of all the beneficiaries of pending petitions. A review of the CIS electronic database accessed June 29, 2007, has identified 28 I-140 petitions for which Care Systems Inc. is the petitioner. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage.

Notice of Filing the Application for Alien Certification

The regulation at 20 C.F.R. § 656.22(e) states in 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 ...

(2) The Schedule A determination of INS [Citizenship and Immigration Services (CIS)] shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made at the place of employment according to the regulation at 20 C.F.R. § 656.20(g)(1). The Form I-140 that was filed on December 31, 2003 lists the petitioner's headquarters address, as Care Systems Inc., [REDACTED] California while the accompanying Application for Alien Certification dated by the applicant (i.e. the petitioner) as of December 1, 2003 states the place of employment as [REDACTED] California, identified by the director as the Burlingame Hacienda. The petitioner has not demonstrated or even stated consistently where the place of employment is located.

With the petition, the petitioner submitted a notice of filing the application for alien certification for the position of registered nurse, posted on October 1, 2003 to October 15, 2003. The notice does not state the place of employment or where it was posted, the wage rate, and other regulatory required content. It is insufficient as submitted to constitute a notice of filing the application for alien certification. This was the notice that accompanied the petition. The notice does not identify where it was posted, there is no certification of posting with it and it is so deficient of the required regulatory content to be a nullity.

According to counsel a "corrected" notice was submitted to CIS on October 22, 2004. According to the notice it was posted at [REDACTED] California, identified by the director as the Burlingame Hacienda. As already stated, the director found that the evidence submitted demonstrated that the Burlingame

Hacienda is a "Residential Care Facility" and no evidence was submitted that California State licensing allowed or required the services of a registered nurse. Counsel has not responded to the director's finding other than to provide a list of ten facilities of different types along with their state licenses. Further, the petitioner has evidenced its intent to employ the beneficiary at the [REDACTED] California. There is no explanation by counsel for this inconsistency.

Besides this the petitioner has submitted another notice of filing the application for alien certification on July 1, 2005 to July 15, 2005 was at Care Systems Inc./Nadhan Inc. d/b/a Creekside Convalescent & Mental Health Rehabilitation Center, [REDACTED] California. Since the priority date is December 31, 2003, counsel cannot over 18 months later cure the deficiency evident upon the filing of the petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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*, 229 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). In this instance, the director did in fact identify the above deficiency.

We find that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made at the place of employment according to the regulation at 20 C.F.R. § 656.20(g)(1).

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.