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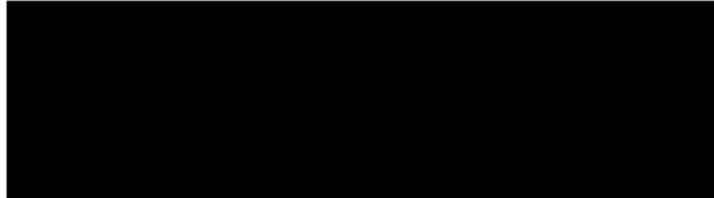
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



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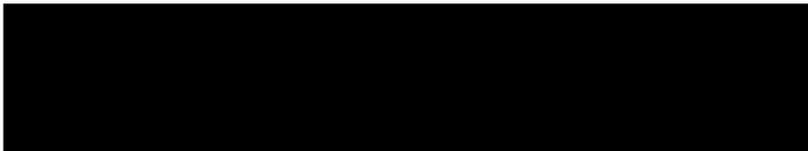


File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **APR 30 2008**
LIN-06-187-53152

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.

Kevin S. Poulos for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (“Director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a healthcare provider, and seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3).

The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provide 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.”¹ 8 C.F.R. § 204.5(a)(2). The priority date of any petition filed for classification under section 203(b) of the Act “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)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, aliens who will be permanently employed as professional nurses must have: (1) received a certificate from the Commission on Graduates of Foreign Nursing Schools (“CGFNS”), or (2) hold a full and unrestricted (permanent) license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (“NCLEX-RN”).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (“PERM”), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 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.

In the case at hand, the petitioner submitted the Application for Permanent Employment Certification, ETA 9089, with the I-140 Immigrant Petition on May 30, 2006, which is the priority date. The petitioner listed the proffered wage on the Form ETA 9089 as \$28.80 per hour for an annual salary of \$59,904, based on a 40 hour work week.² On the Form I-140 petition filed, the petitioner listed the following information: established: August 2003; gross annual income: \$6,798,315.30 million; net annual income: \$130,000; and current number of employees: 93.

On February 28, 2007, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with the terms of 20 C.F.R. § 656.10(d)(3)(iv). Specifically, the posting was deficient in that the petitioner failed to allow 30 days to elapse subsequent to posting for interested parties to respond to the notice, prior to filing the Form I-140. Further, the director denied the petition as the petitioner failed to provide a PWD in accordance with 20 C.F.R. § 656.40. The petitioner appealed and the matter is now before the AAO.

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).³

The record shows that the appeal is properly filed, timely, and makes an 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.

² Form 9089 as the petitioner submitted it is incomplete. The petitioner failed to list the prevailing wage for the position, and did not provide any information related to the prevailing wage determination. 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a prevailing wage determination and the wage obtained is assigned a validity period. In order to use a prevailing wage determination ("PWD"), "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the [State Workforce Agency ("SWA")].” 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. *See* 20 CFR § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

³ The submission of additional evidence on appeal is allowed by the instructions to the 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).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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.

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
 - (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
 - (iii) Provide the address of the appropriate Certifying Officer; and
 - (iv) Be provided between 30 and 180 days before filing the application.

- (6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

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 . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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).

The petitioner initially submitted a posting, which provided that the position was posted from May 24, 2006 to June 9, 2006.

As the petition was filed on May 30, 2006, the petitioner filed the petition prior to the end of the posting period. Accordingly, the posting did not meet the requirements of 20 C.F.R. § 656.10(d)(3)(iv), since the notice was not provided between 30 and 180 days before filing the application.⁴ Further, filing prior to the end of the posting period would deny interested parties the right to apply for the position prior to filing. Additionally, we note that the posting failed to adequately provide notice of the job requirements to any interested applicants. Form ETA 9089 provided that an Associate's degree was required for the position, as well as a California Nursing License. The posting notice did not list these requirements and was accordingly deficient.

On appeal, counsel provides that the petitioner met the ten consecutive business day posting requirement as the petitioner has an ongoing posting for the position of a nurse. In support, the petitioner provided a copy of a posting notice for a registered nurse from the dates of March 29, 2006 to April 11, 2006, which listed a wage of \$28.80, the same as the instant petition. The petitioner also provided copies of posting notices for the time period April 13, 2006 to April 26, 2006, and a posting for the dates of July 25, 2006 to August 7, 2006.⁵

DOL has provided guidance to the PERM regulations and posting requirements through issuance of "Frequently asked Questions." *See* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed March 28, 2008). DOL guidance related to posting notices provides:

May I post a Notice of Filing for a permanent labor certification indefinitely?

Yes, an employer may post a Notice of Filing indefinitely, provided that at the time of filing the permanent labor certification application, the Notice of Filing was posted for at least 10 consecutive business days and those 10 consecutive business days fell within 30 to 180 days prior to filing the application. In addition, the Notice of Filing must contain the correct prevailing wage information, the correct job description and must comply with all other Department of Labor regulatory requirements.

While DOL guidance would allow for a continuous posting beyond the requisite 10 consecutive business day time period, here the petitioner did not provide a continuous posting, but rather several prior and one subsequent posting for what appears to be a frequently posted position. However, the petitioner did not provide evidence that the posted notice contains the correct prevailing wage information, and the correct job description, as the notice failed to list the required education for the position. Accordingly, the position was not posted properly in accordance with 20 C.F.R. § 656.10(d).

⁴ We note that the petitioner's representative signed the posting on May 24, 2006, prior to the end of the posting.

⁵ While the July to August 2006 posting would be subsequent to the petition's filing, it does demonstrate the ongoing nature of the petitioner's posting.

As noted in the director's decision, the petitioner failed to provide evidence that it obtained a PWD in accordance with 20 C.F.R. § 656.40. 20 C.F.R. § 656.40 specifically sets forth that the petitioner must request a PWD and the wage obtained is assigned a validity period. In order to use a PWD, "employers must file their [Schedule A] applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA." 20 C.F.R. § 656.40(c). The petitioner must file Form ETA 9089 and Form I-140 with the prevailing wage determination issued by the SWA having jurisdiction over the proposed area of employment. See 20 C.F.R. § 656.15(b)(i). A petitioner must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The record does not contain any evidence that the petitioner obtained a PWD. Further, the petitioner failed to address this issue on appeal.

Although not raised in the director's decision, the petitioner failed to adequately document its 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 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 additionally provides that:

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.

As proof of the petitioner's ability to pay the proffered wage, the petitioner provided a letter, which stated that it employed 93 people, its gross annual income was \$6,798,315.30, and that its net income was \$130,000.

As the petitioner employs less than 100 employees, a letter from its administrator is insufficient to establish the petitioner's ability to pay the proffered wage. The record does not contain any other regulatory prescribed evidence of the petitioner's ability to pay the proffered wage. Accordingly, the petitioner failed to establish its ability to pay, and the petition should have been denied on this basis as well.

One additional issue we note is that the petitioner is: "Thekkek Corporation, DBA Gateway Care and Rehabilitation Center." The petitioner provided a copy of a California State License issued on August 1, 2005 to "Nadhi Inc. to operate and maintain the following Skilled Nursing Facility, Gateway Care &

Rehabilitation Center.” The petitioner should address the relationship if any between Thekkek Corporation and Nadhi, Inc., if any, in any further filings in relation to who is the beneficiary’s actual employer.⁶

Accordingly, based on the foregoing, the petitioner has not overcome the reasons for the petition’s denial. 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.

⁶ In determining the actual employer, the regulation at 20 C.F.R. § 656.3 provides:

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.

Further, 20 C.F.R. § 656.3 provides that employment means, “Permanent full-time work by an employee for an employer other than oneself.”

In *Matter of Smith*, 12 I&N Dec. 772 (1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary’s actual employer. To reach this conclusion, the director looked to the fact that the staffing service would make contributions to the beneficiary’s social security, worker’s compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* At 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord*, the Regional Commission determined that the petitioning firm was the beneficiary’s actual employer, not its clients, in part because it was between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner again determined that were a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc. The staffing service rather than the end-user is the actual employer. *Id.*