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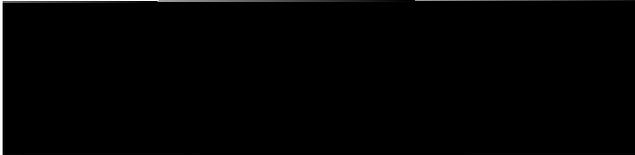
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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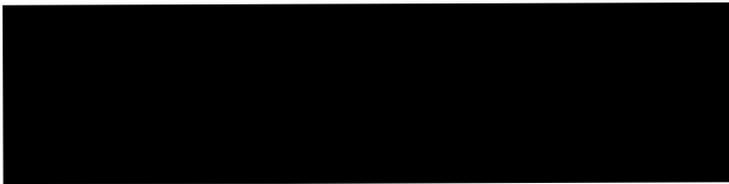
Petitioner:



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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Global Nurses Network, LLC (GNN), is a medical staffing firm. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had not established that it was the actual employer of the beneficiary. The director also determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification of filing requirements and denied the petition on December 6, 2006.

On appeal, the petitioner, through counsel, maintains that the petitioner is the actual employer and that the posting of notice of the certified position was consistent with the applicable requirements. Counsel asserts that the petition should be approved.¹

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).

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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.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). Here, the priority date is April 13, 2006.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is April 13, 2006.

¹ 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 petitioner claims the professional classification on Form ETA 9089, Part I, a.1.

According to Part C of the ETA Form 9089, the petitioner's main office is in Franklin, Wisconsin. The location of where the work to be performed is designated in Part H as Temple City, California. Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on April 13, 2006, indicates that the petitioner was established in November 2002 and claims four current employees.

The appeal in this case is based in part on whether the petitioner may be considered the actual intended employer offering a full-time permanent position or whether a third-party entity is the intended employer.

The regulation at 20 C.F.R. § 656.3 states in pertinent part :

Employer means:

(1) 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. . . .

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. . . .

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 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 directly pay the beneficiary's salary; would provide benefits; 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* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment 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 was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where 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.*

A copy of a four-page "Employee Agreement" was submitted to the record by the petitioner, signed by the beneficiary on February 15, 2006. Its introductory paragraph refers to the petitioner as a privately owned healthcare recruitment and staffing company who will be referred to as GNN. It describes itself as working with hospitals, agencies and other healthcare facilities in the United States to recruit and place highly quality therapists who are licensed in India and want to live and work in the United States. An attachment identified as Annexure A as appended to the agreement was not provided. The agreement contains seventeen paragraphs describing the terms under which the beneficiary will be employed.

Copies of two additional faxed documents titled "Temp Agreement" and consisting of, by its own terms, two pages, are also contained in the record which refer to the petitioner's agreement with a customer that the petitioner asserts is the healthcare facility worksite where the beneficiary was intended to perform her duties as a physical therapist. Both documents are signed by a representative of the customer and by the petitioner's representative on February 14 and February 15, 2006, respectively. One faxed page names the customer as "Life Enhancing Therapies" and contains its phone number and fax number and omits its address and other information such as job duration and job location, but the job information refers to the job name as a physical therapist and number of persons needed is described "as needed." The temporary placement billing rate is given and the "permanent placement administrative fees" section is not completed. The beneficiary is not mentioned on either document. The other document summarizes the petitioner's agreement to provide personnel to the customer. One of the six paragraphs refers to the customer faxing either its own time sheet to the petitioner or the petitioner's time sheet in contemplation of the petitioner invoicing and receiving payment. Another paragraph refers to the petitioner's disclaimer of liability for expenses incurred by the customer on behalf of any GNN employee or contract nurse without consent, its disclaimer of any responsibilities for supervision and control at the customer facility and its responsibility to replace the employee or contract nurse if problems are incurred.

The director also refers to a paragraph in the Temp Agreement in concluding that the beneficiary's offer of employment actually comes from the client facility rather than the petitioner. This provision states that:

If a customer desires a GNN employee on a permanent basis the one-time permanent placement fee will be reduced 1/24 each successive month on the hire date. After twenty-four months from date of hire there will be no conversion or placement fee. Customer agrees to not hire directly or through another agency or contract service firm for a period of twenty four months after interviewing, working, or receiving the name or resume from GNN of any such individual except under the terms outlined above.

The director also cited two other paragraphs in the Employee Agreement between the petitioner and the beneficiary:

1. In consideration of the Therapist duly agreeing, promising and undertaking to comply with the terms and conditions hereof, from the moment of signing these presents, through a period until 24 months after the Therapist obtaining employment visa and starting employment with the employer in United States as well as securing a license in the state of employment in the United States, GNN shall secure employment for the Therapist for the full term.
15. The Therapist understands and agrees that GNN has no control over any particular employer's personnel requirements or need for Therapist's services. The Therapist acknowledges and agrees that GNN is not responsible and agrees to hold GNN harmless for any delays experienced by the Therapist in starting employment, whether such delays occur before or after Therapist enters the United States, and regardless of the cause of such delays. The Therapist further acknowledges and agrees that such delays may adversely affect the Therapist's offers to work in the United States and shall hold GNN harmless should any offer of employment be cancelled, amended or withdrawn due to any delay, including without limitation, any change in any employer's need for the Therapist's service. In no event shall

Therapist be entitled to any refund of monies or fees paid to GNN due to any processing delay or change of circumstances.

In determining that the actual intended employer was actually the third-party client facility, the director also cited the petitioner's website under the heading of "foreign therapists" where the petitioner states that it partners with hospitals to recruit Indian therapists and states that it is a "permanent placement company, thereby ensuring that you have a long-term solution for your therapy needs."

Relevant to this issue on appeal, counsel submits a letter, dated January 4, 2007, signed by the petitioner's vice-president of recruitment, [REDACTED]. She affirms that the beneficiary has made an offer of full-time permanent employment to the beneficiary as a physical therapist and has been employed at their customer site since August 2006. She states that the clauses in the petitioner's contracts that refer to third parties offering employment to the petitioner's employees were intended to discourage such offers so that the employees remain employed with the petitioner and that this forms their source of revenue and business model. Accompanying this letter is a copy of the petitioner's internal payroll record, dated November 11, 2006 indicating that the beneficiary had been paid \$13,344.50 year to date and was being paid \$26 per hour.

Counsel states on appeal that the petitioner's website information could be out of date or targeted to a different customer. He asserts that the contract between GNN and Life Enhancing Therapies refers to the beneficiary as a GNN employee and that she is also referred to as an employee in the agreement between the GNN and the employee.

It is noted that the AAO is looking at the petitioner's business operation at the time that the priority date of April 13, 2006. It is further noted that the location on the website referred to by the director under "foreign therapists" is no longer accessible.³ Additionally, it must be noted that the petitioner's incomplete 2005 tax return submitted in support of its ability to pay the proffered wage at the time of the filing date of April 13, 2006, also reflects no salaries and wages paid and no labor costs claimed. "Statement 1" (line 20) detailing other deductions was omitted from the document. Although we do not find that the beneficiary is specifically referenced in the agreement between the petitioner and Life Enhancing Therapies, it is noted that the twenty-four month sliding calculation of "permanent placement fee" contained in that agreement appears to generically attempt to restrict the customer's hiring an employee from the petitioner.

The employee agreement is contradictory, referring to GNN as an entity separate from the "employer" and promising to secure employment for the therapist (paragraph 1), not explicitly referring to its responsibility to pay wages, insurance, withhold taxes or supervise the employee, but referring to the employee's option to receive medical and dental benefits from GNN (paragraph 2), and referring to liquidated damages to be assessed if the therapist secures employment with an employer other than GNN (paragraph 6ii). Finally, paragraph 15 cited by the director referring to the hold harmless provisions in favor of GNN if any delays in employment are incurred because of a "particular employer's" "personnel requirements."

It is noted that the existence of a contract for a term of employment of (at least 365 days) does not preclude a finding that it may be considered a permanent job as long as it is not contemplated by the employer to end at a specified date in the future. *See e.g., Matter of Crawford & Sons*, 2001 INA-121 (2004) (*en banc*). In this case, based on the current record, however, it appears that the petitioner may have been operating as both a permanent placement agency and as a temporary outsourcing firm. It remains however, the petitioner's burden to establish that it is the intended employer offering full-time, permanent employment and not an

³ Attempted access on 4/18/08. (www.globalnursesnetwork.com)

entity that attempts to simultaneously promise to secure employment for the beneficiary and then advise her that they bear no responsibility if the offer of employment is cancelled, amended or withdrawn due to delay or any change in the “employer’s need for the Therapist’s services.” (paragraph 15 of the employee agreement). Due to the omission and vagueness of terms related to the areas of responsibility between the petitioner and Enhanced Life Therapies, we do not believe that the director erroneously denied the petition on the basis that the petitioner failed to demonstrate that it was the intended employer offering a permanent full-time position to the beneficiary.

This appeal is also based in part on whether the petitioner posted the notice of the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

- (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with sec. 656.40 and sec. 656.41.
- (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer’s employees as prescribed in sec. 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 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:

- (i) To the bargaining representative(s) (if any) of the employer’s employees in the occupational classification for which certification of the job opportunity is sought in the employer’s location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
- (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 shall 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.

Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

* * *

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

- (i) State 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.

With the petition's filing, the petitioner submitted a copy of the notice of posting with certification of posting from the petitioner's vice-president, Saru Tumuluri, who is located at the petitioner's main office in Wisconsin, according to Part D of the ETA Form 9089. On the copy of the notice of posting, it advises that the work site will be in Temple City, California but that interested applicants should apply to the petitioner's Wisconsin office. The notice also states that the notice is being provided to workers at the place of intended employment and the location is specified as the bulletin board lobby.

The director denied the petition in part based upon his observation that as the petitioner's representative signed the notice of posting describing the bulletin board lobby as the location of notice of posting, it could not be determined whether the notice of posting was actually posted in the place of intended employment in California.

As to this issue on appeal, counsel merely states that a letter from [REDACTED], the Vice-President of Operations at Life Enhancing Therapies is enclosed that confirms the notice of posting was physically posted at the worksite. This letter, however, is not included with the materials submitted on appeal. Thus, the AAO concurs with the director's conclusion that the petitioner failed to establish that a proper notice of posting for the job opportunity was completed.

The AAO also notes that the notice of posting listed the USCIS Service Center with its address and a DOL office in Dallas, Texas as the location where persons may provide documentary evidence relevant to the job opportunity. According to the DOL's Frequently Asked Questions (FAQs) found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>, the address of the DOL certifying officer for both California and Wisconsin is located at:

United States Department of Labor
Employment and Training Administration
Chicago Processing Center
Railroad Retirement Board Building
844 N. Rush Street, 12th Floor
Chicago, Illinois 60611

The notice of posting additionally fails to use the specific language set forth in 20 C.F.R. § 656.10(d)(3)(i) and (ii) in advising that the notice is being provided as a result of the filing of an application for permanent alien labor certification rather than stating it is the result of the filing of a Schedule A occupation I-140 application and that persons may provide documentary evidence to the Certifying Officer of the Department of Labor rather than to the “USCIS listed below.” Since the petitioner failed to post the notice in compliance with regulations at 20 C.F.R. § 656.10(d)(3)(i)(ii) and (iii), the petition is not approvable on this basis as well as on the failure to establish that it was the intended actual employer.

Beyond the decision of the director, it is noted that the 2005 federal income tax return submitted by the petitioner in support of its ability to pay the proffered wage of \$25.00 per hour, annualized to \$52,000 per year, did not demonstrate the petitioner’s continuing financial ability to pay this wage beginning at the priority date of April 13, 2006 as required by the regulation at 8 C.F.R. § 204.5(g)(2). That regulation requires that the petitioner must provide either federal tax returns, audited financial statements, or annual reports in support of its financial ability. The petitioner’s 2005 partnership tax return (Form 1065) reflects net income of -\$57,419 (Section K, Analysis of Net Income).⁴ Besides net income, a petitioner’s net current assets indicated on Schedule L of a partnership tax return may also be considered as cash or cash equivalent funds available to pay a proposed wage offer. The difference between current assets and current liabilities represents net current assets. Here, as shown on line(s) 1 through 6 of current assets and line(s) 15 through 17 of current liabilities, there are no amounts indicated for either category of current assets or current liabilities. As the tax return was submitted to support the petitioner’s ability to pay as of the April 13, 2006, priority date, it fails to show that either the petitioner’s net income or net current assets was sufficient to cover the proffered wage or demonstrate the petitioner’s ability to pay the proffered wage as of this date. It is noted that the submissions on appeal did not indicate that the beneficiary’s employment commenced until August 2006.⁵

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).

⁴ Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. “The [CIS] may reasonably rely on net taxable income as reported on the employer’s return.” *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, *supra*; *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

⁵ If a petitioner pays the beneficiary the proffered wage, it is considered *prima facie* proof of the petitioner’s ability to pay during a given period.

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.