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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 27 2008
WAC-04-089-50052

In re: Petitioner:
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:

[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 Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a skilled nursing facility. The petitioner seeks to employ the beneficiary permanently in the United States as a physical therapist, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As set forth in the director's April 20, 2005 decision, the director found that the I-140 petition as originally filed, was invalidated when the beneficiary changed to a new employer under the American Competitiveness in the 21rst Century Act ("AC 21") prior to the I-140's approval, and denied the petition.[1]

The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service 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.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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.

Based on 8 C.F.R. § 204.5(a)(2) 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." 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. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). The petitioner must provide evidence that the beneficiary has a permanent license to practice in the state of intended employment, or a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating that the beneficiary is qualified to take that state's written licensing examination for physical therapists. 20 C.F.R. § 656(c)(1).

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[1] An individual may qualify for "portability" (employment with a new employer) based on the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, which became law on October 17, 2000.

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 Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on February 9, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a physical therapist is $24.00 per hour, based on 40 hours per week, for an annual salary of $49,920, with an allowed overtime rate of $36 per hour as needed. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 1993; gross annual income: $7,000,000; net annual income: not listed; and current number of employees: 150.

The director issued a Request for Additional Evidence ("RFE") on December 17, 2004, requesting that the petitioner submit evidence of the beneficiary's license to practice in the state of anticipated employment, and tax documents related to the beneficiary, including the beneficiary's 2003 Form 1040, along with W-2 statement, evidence of how the beneficiary supported herself, and the beneficiary's three most recent paystubs.

In response to the RFE, the petitioner submitted a copy of the beneficiary's renewed state physical therapist license, the beneficiary's 2003 Form 1040, and information regarding the beneficiary's change of employment. Additionally, counsel submitted the following statements: (1) a statement from Vegas Valley Rehabilitation Hospital that the beneficiary was employed by the petitioner and was transferred to Vegas Valley Rehab, which are both owned by Trans Health Inc.; (2) a statement from Vegas Valley Rehabilitation that the beneficiary is employed as a Physical Therapist at a pay rate of $26.00 per hour; (3) a statement from the petitioner that the beneficiary was employed from April 17, 2003 to November 25, 2004; and (4) statement from the beneficiary that she is now employed as a physical therapist at Vegas Valley Rehabilitation Hospital. Counsel additionally provided the beneficiary's 2003 W-2 Form exhibiting payment by THI of Nevada, LLC, along with recent paystubs from THI of Nevada at Vegas Valley, LLC exhibiting payment at a rate of $26 per hour.

On April 20, 2005, the Service Center denied the I-140 petition on the basis that the beneficiary had left the petitioning employer prior to approval of the I-140, and that AC21 portability would not apply. Further, the decision provided that the new employer did not show that it was the successor in interest to the original petitioner in order to allow the beneficiary to continue processing under the previously filed application. The petitioner appealed that decision and the matter is now before the AAO.

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].

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.

On appeal, counsel contests the director's decision that AC 21[3] would not apply, and asserts that the beneficiary may change employment despite the fact that the initial I-140 petition was not approved. Further, the petitioner, College Park Rehabilitation Center, is an affiliated facility of Vegas Valley Rehabilitation Hospital. Counsel provides that THI of Nevada LLC owns both the petitioner and Vegas Valley Rehabilitation Hospital, where the beneficiary is now employed. Further, counsel provides that both facilities are engaged in the same healthcare activities.

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[2] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

> Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter had filed her Form I-485 on February 9, 2004, concurrently with the petitioner's filing of Form I-140.

As the director did not determine the merits of the initial petition, we will remand the petition back to the director to determine whether the petitioner has established eligibility for Schedule A classification, whether the petitioner has demonstrated its ability to pay the proffered wage, and whether the beneficiary meets the qualifications of Form ETA 750.

On remand, the director should specifically consider whether the petitioner has established its ability to pay, as well as who was the beneficiary's actual employer at the time of filing.

Regarding the petitioner's ability to pay the proffered wage, the petitioner provided a letter that it employed over 100 employees and that they were able to meet payroll when due. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner listed on both Form ETA 750 and Form I-140 is: College Park Rehabilitation Center, 2856 E. Cheyenne Ave., North Las Vegas, NV 89030, with a tax identification number of: [redacted] The petitioner provided the beneficiary's W-2 statement from 2003, which listed payment from "IHS at Cheyenne, Inc.," with an address of 910 Ridgebrook Road, Sparks, MD 89139, and listed a tax identification number of: [redacted].

The petitioner provided a letter, which stated that "College Park Rehab" and the entity to which the beneficiary transferred, Vegas Valley Rehab, are both owned by Trans Health Inc. However, the beneficiary's 2003 W-2 statement from THI of Nevada, LLC lists its federal tax identification number as: [redacted] a different tax identification number than that of HIS and the petitioner.

The petitioner should submit evidence of the connection between the petitioner and IHS, as well as evidence of the connection between IHS and THI, if any. Additionally, the petitioner should provide any relevant contract, if any, pursuant to which the beneficiary was assigned to the petitioner or Vegas Valley Rehabilitation in order to determine the beneficiary's actual employer at the time of filing.

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 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.*

As the beneficiary received pay from IHS of Cheyenne and THI of Nevada, rather than the petitioner, it is unclear that the petitioner as listed on Form I-140 would have been the beneficiary's actual employer. The issue of whether the petition was properly filed on behalf of the actual employer should therefore be addressed on remand.

After rendering a decision on the merits of the petition, the director would then have jurisdiction to determine whether portability applied based on the beneficiary's employment with a new employer. Thus, the petition will be returned to the director to determine the merits of the initial petition, as well as the beneficiary's attempt to adjust status under the terms and conditions of section 106(c) of AC21.

In view of the foregoing, the petition will be remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the AAO.