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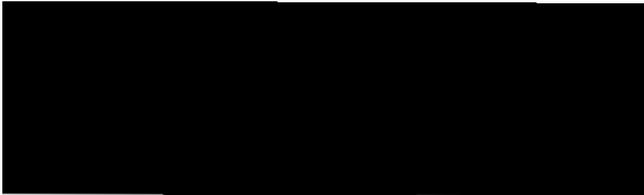
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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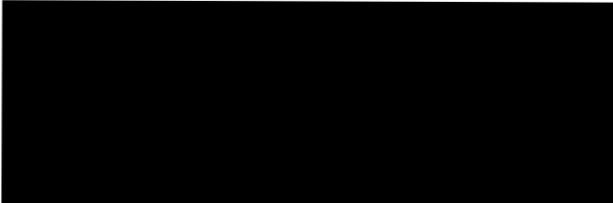


File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 07 2006
LIN-02-286-52973

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO remanded the petition to the director with instructions for further consideration. Following remand, the director denied the immigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed and the application will be denied.

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

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.

The petitioner 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.

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 regulation at 20 C.F.R. § 656.22(c)(2) also 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 the 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.¹

¹ On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN examination. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

Application for certification of employment as a professional nurse may be made only pursuant to this §656.22(c), and not pursuant to §§ 656.21, 656.21a, or 656.23 of this part.

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 petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on September 16, 2002, which is the priority date in the case at hand. The proffered wage as stated on Form ETA 750 for the position of a registered nurse is \$880 to \$1120 per week, 40 hours per week, with an estimated zero to ten hours of overtime to be paid at a rate of \$33 to 42 per hour. The annual salary would equate to \$45,760 at a minimum. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 2002; gross annual income: estimated at \$2,542,000.00; net annual income: estimated at \$1,016,860; and current number of employees: 4.

On December 31, 2002, the Service Center sent the petitioner a Request for Additional Evidence (“RFE”) in which they noted the petitioner was established in 2002, and had petitioned for 81 beneficiaries. The Service Center requested general documentation, as well as documentation to show the petitioner’s ability to pay all 81 beneficiaries, including: the petitioner’s articles of incorporation; a statement from an authorized official describing the size, scope, and staffing of the petitioner; a letter from an identified bank to set forth in detail information related to a one million dollar line of credit; submit copies of any lease or mortgage for office space; submit copies of the employer’s quarterly federal Form 941; and since the evidence did not establish the ability to pay all 81 beneficiaries, that the petitioner identify which petitions that it intended to withdraw.

In response, the petitioner submitted: the petitioner’s 2002 Form 1120S federal tax return; a letter from the bank’s vice president related to the one million dollar credit line; a second letter from the bank’s vice president reconfirming the one million dollar credit line and the petitioner’s ability to secure additional future credit lines; bank statements for the year 2002; and a brief in support. The petitioner additionally submitted information related to the company, including: articles of incorporation; notice of acceptance as an S Corporation; certificate of existence with the state of Washington; Profit Corporation Initial Annual Report filed with the state of Washington; statement from the president related to the petitioner’s business structure; evidence related to the company’s business plan, and business operation, including bills and cancelled checks; copies of leases for office space leased by the petitioner; copies of the petitioner’s quarterly Forms 941; and copies of the petitioner’s annual federal unemployment tax return. The petitioner stated further that it could pay all 81 potential beneficiaries and that it did not wish to withdraw any of the petitions.

On June 30, 2003, the Service Center denied the petition based on the petitioner’s failure to document its ability to pay the beneficiary the proffered wage, as well as failure to demonstrate the ability to pay the additional 80 petitioned for beneficiaries. The director concluded that the petitioner’s ability to pay centered around the one million dollar credit line offered by West America Bank, and noted further that the credit line, and any additional credit would serve only to increase the petitioner’s debt. Further, the director concluded that the business plan was predicated upon projected billing to clients unidentified at targeted hourly rates to

reach a projected gross annual income. However, the evidence provided was a projection as opposed to proof. The tax return submitted showed a loss of \$1,675 for 2002.

The petitioner appealed to the AAO and submitted a brief in support, but no further new documentation. On September 27, 2004, the AAO reviewed the record, issued a decision, and determined that the case should be remanded to the Nebraska Service Center for consideration of the additional petitions pending. The Service Center had identified that eighty additional petitions were initially pending. On remand, the director was to request evidence related to the total number of petitions pending, the receipt numbers, and the total of the proffered wages, as well as the petitioner's 2003 tax returns in order to determine the petitioner's ability to pay. Following the director's request, and an opportunity for the petitioner to respond, the director would render a new decision.

Following remand, the director requested documentation from the petitioner in accordance with the AAO decision and allowed the petitioner 87 days in which to submit a response to the request. The petitioner did not submit a response by the required date, and on April 25, 2005, the director denied the petition due to abandonment pursuant to 8 C.F.R. Section 103.2(b)(13). At the same time, the decision was certified to the AAO for review. The petitioner was notified and accorded an additional thirty day time period in which to submit a brief or additional statement. The petitioner did not send any response to the notice or any additional information. Accordingly, based on the petitioner's failure to respond to the director's request for additional evidence, and the failure to provide any response or new evidence in response to the certification notice, the director's decision will remain standing.

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.