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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 22 2006
WAC 03 006 54419

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 immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing registry. It seeks to permanently employ the beneficiary 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 denied the petition after determining that the petitioner had not established that the beneficiary would be employed in a permanent, full-time position.

On appeal, counsel submits an I-290B and states that Citizenship and Immigration Services misconstrued the petitioner's income and payroll. Although counsel states that he is sending a brief and/or evidence to the AAO within 30 days, the record is devoid of any further appeal materials. Therefore the AAO will review the petitioner based on the record as presently constituted.

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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on October 10, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. Pursuant to 20 C.F.R. § 656.22, the Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

With the initial petition, the petitioner provided copies of the beneficiary's academic accolades and license to practice nursing in the Philippines. The petitioner also submitted the beneficiary's letter from the office of Nursing and Licensure and Certification, Reno, Nevada, dated September 23, 2002 that states the beneficiary passed the NCLEX licensure exam, although the beneficiary lacked a social security number to finish processing her licensure applications. The petitioner also submitted an employment agreement signed by the beneficiary and the petitioner, with its principal office identified as [REDACTED], Los Angeles, California. This agreement is dated September 30, 2002. The petitioner also submitted pages from

an Internet website that indicated the petitioner is two incorporated businesses: one in Glendale, California and the other in Las Vegas, Nevada.¹

With regard to its ability to pay the proffered wage, the petitioner submitted a document entitled "G/L Financial Statement Worksheet Year to Date" prepared by [REDACTED] Beverly Hills, California. This document indicates that it was prepared for an entity [REDACTED] but does not indicate whether the document is for the California or Nevada business. The petitioner also submitted a Form 1120, U.S. Corporation Income Tax Return, for tax year 2001, without accompanying schedules or attachments for the Glendale California, business, signed by [REDACTED] and prepared by [REDACTED]. This document indicated that in 2001 the petitioner's principal nurse registry office in California had taxable income before net operating loss deduction and special deduction of \$53,365. Either as part of the tax return statement or as a separate document, the petitioner submitted a list of 52 hospitals, and convalescent centers, or medical centers with outstanding accounts receivable accounts totally \$816,650.96 as of July 23, 2002. Finally the petitioner submitted a Form DE-6 for the principal nurse registry office located at [REDACTED] Los Angeles, California. This document indicated that the business in California had from 153 to 169 employees during the first quarter of 2002..

Because the evidence was insufficient to adjudicate the petition, the director issued a request for evidence on November 23, 2002. The director requested evidence to show that the petitioner would be employing the beneficiary to fill a specific vacancy. The director requested a written contract between the petitioner and the company where the beneficiary would actually perform her duties. The director stated that the contract should be specific and requested a detailed description of the work to be performed, specific job duties, level of responsibility and number of hours per week of work to be performed.

The director also requested evidence to establish that a notice of filing the application of Alien Employment Certification (Form ETA-750) was provided to the bargaining representatives or the petitioner's employees. If there were not such bargaining representatives, the director stated that the petitioner must show the notice was posted to the employees at the facility or location of the intended employment for at least ten consecutive days in an unobstructed and conspicuous place where the petitioner's U.S. workers could readily read it.

With regard to the proffered wage, the director requested that the petitioner submit evidence of its ability to pay the proffered wage from tax year 2002 to the present. The director stated that such evidence could be annual reports, copies of filed federal tax returns or audited financial statements. The director finally requested a detailed list of all worksites where the beneficiary would be working.

On January 27, 2003, the petitioner responded to the director's RFE. With regard to the beneficiary's work schedule, counsel resubmitted the contract between the petitioner and the beneficiary dated September 26, 2002. Counsel stated that under clause three of the agreement the beneficiary must be available a minimum of 40 hours per week, and that given the local shortage of qualified nurses, the petitioner has no difficulty in providing the beneficiary with full time employment. Counsel stated that there would be specific vacancies that the beneficiary would fill given the nature of the nursing registry business, namely, providing for both the short and long term staffing needs of local hospitals, nursing homes, and diverse medical facilities. Counsel also provided a list of six hospitals in Clark County, Nevada where the petitioner provides staff. Counsel noted that the health care providers to which the petitioner provides staff was not limited to these six entities.

¹ The I-140 petition submitted by the Las Vegas, Nevada, office and the IRS Form 1120 submitted by the California-based company share the same employer identification number (EIN), namely [REDACTED]. This fact suggests that the California office is the principal office, with an additional office in Las Vegas.

Counsel also submitted copies of newspaper articles and association reports taken off the Internet that address the nursing shortage in the United States, and in Nevada. Counsel also submitted copies of contracts between the petitioner and the following agency or healthcare centers: [REDACTED] Las Vegas, Nevada which consists of four medical centers; [REDACTED] a company that operates a supplemental staffing company that provides staffing to three [REDACTED] facilities apparently in the state of Nevada,² and [REDACTED] Lake Mead, Nevada. These contracts are signed on April 22, 2002, January 1, 2003, and April 23, 2002, respectively.

With regard to the posting notice, counsel stated that there were no bargaining representatives for the petitioner's employees. and submitted a copy of the notice posted for the instant position. The text of the notice is as follows: Notice of Employees This is to inform you that we are filing applications for Alien Certification (Form ETA 750) for registered nurses. (1) Applicants should report to the employer, not to the local Employment Service office. (2) This notice is being provided as a result of the filing of applications for permanent alien labor certifications for registered nurses. (3) Any person may provide documentary evidence bearing on the application to the local Employment Service office and/or the Regional Certifying Officer of the Department of Labor. The notice is to remain posted in the office for the ten days. The Management."

With regard to the petitioner's ability to pay the proffered wage, counsel submit a copy of the petitioner's 2002 financial report with accompanying accountant's compilation report and stated that the petitioner has assets of over two million dollars. Counsel stated that although this financial report was unaudited, since the petitioner has over 100 employees, the report is a permissible form of evidence that can be used to established the employer's ability to pay the proffered wage. Counsel cited 8 C.F.R. § 204.5(g)(2). Counsel states that the financial reports also demonstrated that the petitioner is in fact able to pay the proffered wage because it was already doing so hundreds of times a year. Counsel cites to matter of *Quintero-Martinez*, (Reg. Com. August 1992) and stated that this decision held that as long as the employer was in fact actually paying the wage when the Form ETA 750 application was made, then the case could not be denied for lack of ability to pay the proffered wage. Counsel also submitted copies of Form DE-6 for the first three quarters of 2002, which identifies employees ostensibly paid by the petitioner's principal office in Glendale, or Los Angeles, California. The number of employees ranged from 169 in March 2002 to 128 in June 2002.

On March 25, 2003, the director issued a Notice of Intent to Deny (NOID) the petition. In his notice, the director stated that CIS did not accept the accountant's compilation report submitted to the record by counsel as it was created solely on the basis of the representations of management and therefore not considered probative evidence of the petitioner's ability to pay the proffered wage.

On April 22, 2003, counsel responded by submitting an audited financial statement for [REDACTED] for its fiscal year ending September 30, 2002. Counsel also noted that the petitioner had retained earnings of over \$1,000,000 and thus the petitioner had adequate funds on hand to pay a nurse's salary of approximately \$50,000. Counsel added that each nurse hired by the agency adds to the income of the petitioner because the petitioner makes a percentage of the salary earned by the nurses. Counsel concludes by stating that bringing a new nurse on board both increases the earnings and the profit of the petitioner and does not detract from the petitioner in any way.

² Based on the information in the contract, the corporate site of [REDACTED] is in Sunrise, Florida.

The report submitted by counsel is dated April 15, 2003 and issued by [REDACTED] and [REDACTED]. The report's cover letter states that the company audited the balance sheet of the petitioner as of September 30, 2002 and the related statement of income and retained earnings, and cash flow. The firm added that it conducted its audit in accordance with generally accepted auditing standards, and concluded that the financial statements made by management presents fairly, in all material respects, the petitioner's financial position. The audited document indicates that the petitioner as of September 2002, had a net income of \$100,924, total current assets of \$1,167,211, and total current liabilities of \$396,572.³

On April 1, 2004, the director issued a second NOID. In this notice, the director stated that the record did not firmly establish the beneficiary's employment location. The director noted that since the petitioner had failed to identify the actual facility or location of the employment, the petitioner could not establish that it complied with the notice requirement of 20 C.F.R. 656.20(g)(1). The director then determined that the petitioner did not qualify for Schedule A certification of the Form ETA 750, and that the petitioner must either submit an individual labor certification issued by the Department of Labor or show that the occupation qualified for Schedule A designation.

On April 20, 2004, counsel responded to the director's second NOID. Counsel stated that although the director indicated that the record does not firmly establish where the beneficiary will be working, the beneficiary, as clearly stated in the petition, will be working out of the petitioner's office in Las Vegas, Nevada, located at [REDACTED]. Counsel stated that given the nature of the petitioner's business, namely providing temporary help to health care providers in Clark County, Nevada, there were not one but many different sites where the beneficiary would work. Counsel further noted that the director's NOID stated that the petitioner cannot establish that it has complied with the notice requirements stipulated in 20 C.F.R. 656.20(g)(1). Counsel stated that the petitioner was being denied the opportunity to submit evidence that could establish that the petitioner is acting according to the law. Counsel describes this as an impermissible procedure that denies the petitioner due process of the law.

On December 10, 2004, the director denied the petition. In his decision, the director stated that the documentation submitted with the petition indicates that the beneficiary would not be employed in a permanent, full-time position. While the director noted that the petitioner's response to the director's first request for further evidence established the petitioner's sovereignty, the director stated that in the petitioner's response to the director's second RFE, the petitioner clearly stated that the beneficiary would be working out of the petitioner's office in Las Vegas, Nevada and that the beneficiary would be working at not one but many different sites.

The director then examined the Forms DE-6 submitted to the record for the period ending March 31, 2002, and stated that the report listed 212 employees⁴ for which the petitioner had submitted the Form DE-6. The director noted that of the total of 212 employees, 77 of the employees had no withholding tax withheld for the reporting period and that nine-six employees had less than one hundred dollars withheld during the period.

³ On the audited financial statement, the petitioner's total current assets were identified as cash, accounts receivables, net of \$17,000 allowance for doubtful accounts, and unbilled receivables. The petitioner's total current liabilities were identified as accounts payable and accrued expense, notes payable, income tax payable and deferred tax liability.

⁴ It is not clear how the director arrived at this number of the petitioner's employees. The DE-6 Form for the first quarter of 2002 which ended as of March 31, 2002, indicates the petitioner had 169 full time and part time employees.

Based on this evidence, the director stated that the beneficiary could not be guaranteed a full-time, forty hour work week since the employment as verified by the petitioner's DE-6 would be on a temporary, as needed basis. The director stated that as with most businesses providing a service, the petitioner's employees with seniority will be the first persons offered the opportunity to accept the job offer as opposed to the petitioner's newer employees.

The director further stated that even though the petitioner claimed 221 employees on the DE-6 form, approximately fifteen employees showed wages of \$3,000 to \$5,000 for a three month period, with a monthly salary of approximately \$1,000 to \$5,000 in reportable salaries. The director then concluded that it could be assumed that these employees were the fulltime staff, and that the other 206 claimed employees are on a will-call if needed employment list. The director concluded by noting that two other I-140 petitions were submitted for the beneficiary: the instant petition received by CIS on October 8, 2002; a second I-140 petition filed on September 18, 2003; and a third I-140 petition filed on April 28, 2004. The director stated that apparently the beneficiary's employment did not adequately provide for her living expenses and she sought other avenues of employment.

On appeal, counsel states that CIS misconstrued the income and payroll of the petitioner and wrongfully denied the petition. Counsel states that he is sending a brief and/or evidence to the AAO within 30 days. As of January 7, 2005, the day CIS received the appeal, some 20 months, the AAO has not received any additional materials from counsel or the petitioner. Therefore the AAO will examine the instant petition based on the record as presently constituted.

With regard to the director's comments as to the petitioner's Forms DE-6 and whether the beneficiary would be performing a permanent, fulltime job based on these documents, the AAO does not find the examination of the petitioner's DE-6 forms to be persuasive as to the availability of a **fulltime permanent position for the beneficiary**. These forms may reflect employees of the principal office of [REDACTED] in California and do not necessarily reflect the wages paid to nurses in the state of Nevada either as permanent fulltime employees, or part-time employees who chose to work part time. Furthermore as stated previously, it is not clear how the director arrived at his claimed number of employees. Thus, the AAO would find these documents problematic in attempting to establish either the petitioner's provision or non-provision of a full-time permanent position to the beneficiary. Thus, the director's comments are withdrawn.

Of more importance to the instant petition is whether the record establishes who is the beneficiary's actual employer. The director in his first RFE requested copies of a contract between the petitioner and the company where the beneficiary would perform nursing duties. The director requested evidence regarding the actual vacancy and a detailed description of the work to be performed, among other issues. The petitioner submitted general contracts between itself and four business entities, one of which was a supplementary staffing agency for Sunrise health facilities in Nevada. The petitioner never identified a specific vacancy that the beneficiary would fill. In addition, counsel then stated in his response to the director's second RFE that the beneficiary would be working out of the petitioner's office in Las Vegas. The evidence submitted to the record and the comments of counsel support the fact that there is no specific nursing job vacancy available to the beneficiary. Thus, the petitioner did not establish that it had a full time permanent position available for the beneficiary at the time it filed the ETA Form 750 or filed the I-140 petition.

Furthermore, the record is not clear as to which part of the Nurses R Special nurse registry the beneficiary would be working. Based on the IRS Form 1120 submitted to the record, and the audited financial statement, the actual

petitioner in the instant petition appears to be the California-based principal office, and not the Las Vegas-based office.⁵ Neither company would be considered the actual employer of the beneficiary.

Furthermore, with regard to regulatory requirements governing the posting notice. Under 20 C.F.R. § 656.20, the regulations require the following:

In applications filed under 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (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.
- (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 days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

In response to the director's first NOID, counsel submitted a posting notice that provides minimal information about the position, other than it was for registered nurses. There is no information as to the location of the position, and/or which office is posting the notice. Furthermore there is no information as to the position's minimum requirements and terms, pay rate, contact information for application, or how to contact the state's Department of Labor. While the posting notice indicates that it will be posted for ten days, but does not indicate how long it actually was posted or where. More importantly, there is no evidence that the posting notice was posted for ten consecutive days prior to the October 2002 petition filing. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such the AAO views the posting notice as deficient and the petitioner as not in compliance with 20 C.F.R. § 656.20. For this reason alone, the petition may not be approved.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.⁶ Since the petitioner had not removed the notice prior to filing the petition, it could not have

⁵ As stated previously, both the California principal office and the Nevada office share the same EIN number, which suggests they are one and the same corporation.

⁶ 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).

completed the process of considering qualified U.S. workers and any notices or comments submitted to the Department of Labor.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.