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U.S. Citizenship
and Immigration
Services

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File: EAC-04-252-52045 Office: VERMONT SERVICE CENTER Date: **SEP 28 2006**

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director (Director), Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care staffing service. The petitioner seeks to employ the beneficiary permanently in the United States as a registered 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)(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.

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.

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). 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.

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-750,¹ with the I-140 Immigrant Petition on August 31, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A (only filed with the appeal) for the position of a registered nurse is \$20 per hour, 40 hours per week, with a listed overtime rate of \$30.00 per hour, which equates to an annual salary of \$41,600 based on a 40 hour schedule at the basic pay rate. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 2003; gross annual income: none listed; net annual income: none listed; and current number of employees: 4.

The Service Center issued a Request for Additional Evidence (“RFE”) on October 6, 2004, with a response due date of January 1, 2005, requesting that the petitioner submit an original completed Form ETA 750, Part A, job offer, as well as a copy of the letter from the employer to the bargaining representative, or notice that the job offer was posted at the employment location. Counsel, who took over the petitioner’s representation after receipt of the RFE, requested three extensions of time in order to properly respond. On March 14, 2005, the Service Center denied the petition as the petitioner failed to respond and to provide evidence that the beneficiary qualified for a Schedule A occupation.

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 appeal².

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 contends that the “unfavorable decision” should be reversed “based on evidence that: (1) the Beneficiary possesses the requisite qualifications of a Schedule A occupation as a registered nurse; (2) the Beneficiary has a job position placed with the Central Vermont Medical Center of Barre; and (3) the requisite job posting has been accomplished.”

To correct the deficiency in the underlying filing, the petitioner submitted Form ETA 750A, the “job offer” for the position of a “registered nurse,” which required an associate’s degree in nursing, and further required that the individual must pass CGFNS or NCLEX (as provided by statute). The job offer provided that the beneficiary would be placed by the petitioner at a worksite in Vermont, at the Central Vermont Medical Center of Barre. The petitioner properly submitted documentation to show that the beneficiary passed the CGFNS Qualifying Exam.

The petitioner additionally submitted a posting notice of job availability. The posting notice listed PPR as the employer, rather than the petitioner, Healthstaff International. Further, the posting notice is unsigned, and does not list the dates that the notice was posted, and, therefore, is not in compliance with statutory provisions requiring that the notice of opportunity be posted for ten consecutive business days prior to the filing of the petition. In counsel’s letter submitted with the appeal, counsel provides that the notice was “currently posted

¹The petitioner initially only submitted Form ETA 750B completed by the beneficiary, and not the required ETA 750A “job offer portion” as required.

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).

at the contract location of Central Vermont Medical Center of Barre. Once this Notice has been posted for the required 10-day period, we will provide you with the fully executed Notice.”

Here, the petitioner failed to submit the completed posting notice as required with the initial filing. On appeal, the posting notice provided was unsigned, and further, by counsel’s own admission was not completed at the time that the appeal was filed. Therefore, the petitioner has failed to meet the posting requirements, and, therefore, has failed to meet the filing requirements for the Schedule A position.

Further, although not raised in the director’s denial, we find that the petitioner has also failed to document its ability to pay the beneficiary 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*, 229 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 petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner must establish that the job offer was realistic as of the priority date, here, August 31, 2004, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner failed to submit any Federal Tax Returns, annual reports, or audited financial statements in compliance with 8 CFR § 204.5(g)(2). Instead, the petitioner confirmed its job offer to the beneficiary in a separate letter, which addressed the ability to pay issue. However, the letter provides that “HealthStaff has teamed with Professional Placement Resources, LLC (“PPR”), a nurse staffing company located in Jacksonville Beach, Florida. Together, HealthStaff and PPR intend to place qualified foreign nationals in appropriate nursing positions with client hospitals across the United States. To memorialize their working relationship, HealthStaff and PPR have entered into a Vendor Fee For Service Agreement . . . which outlines the provision of qualified nursing and healthcare personnel . . . PPR has agreed to place certain qualified nursing candidates at a contracted worksite and compensate them at or above the applicable prevailing wages. Specifically, PPR has accepted the responsibility of compensating the Beneficiary in connection with his placement at a client hospital.” In support, the petitioner has attached the Vendor Fee Agreement. Since the petitioner is HealthStaff International, HealthStaff International must provide evidence of its ability to pay the beneficiary the proffered wage. HealthStaff has failed to do so.

As other evidence of ability to pay, the petitioner provided several letters. One letter provided was from North Fork Bank. which confirms the “financial relationship between North Fork Bank and [REDACTED] an [partners of HealthStaff International]. They are reliable and ambitious entrepreneurs that have had a banking relationship with us for many years.” [REDACTED] and [REDACTED] signed a second letter, on Lex Management Inc. letterhead, which provided that “this is to assure you that HealthStaff International Inc. will not have any problems meeting the payroll of the nurses or other Health care professionals that are brought into the U.S.” The petitioner also provided a letter from the Executive Vice President and the Chief Financial Officer of Beth Israel Medical Center, a facility in the New York area, and part of Continuum Health Services, which the petitioner works with. This letter is not connected to the beneficiary’s work location in Vermont, and does not reference the petitioner at all. The letters provided are all insufficient to demonstrate HealthStaff International’s ability to pay. The letters do not meet the statutory evidence requirement, which requires that the petitioner send a Federal Tax Return, audited financial statement or annual report. Further, two letters provided do not reference HealthStaff International, and the

third letter makes a “blanket statement” that HealthStaff can pay without attaching any evidence in support to document this claim.

Additionally, we note that HealthStaff has filed 14 other I-140 petitions in the last two years, and would need to demonstrate its ability to pay the other petitioned for beneficiaries as well.

Based on the foregoing, the petitioner has failed to establish that it met the filing requirements for a Schedule A certification, and further, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

Accordingly, 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.