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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 168 51315

Office: TEXAS SERVICE CENTER Date: **APR 07 2008**

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:

SELF-REPRESENTED

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing service (i.e. a nursing registry). It seeks to employ the beneficiary permanently 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. § 656.5(a), Schedule A, Group I.¹ The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification. Specifically, the director stated that notice of the filing of the Application for Permanent Employment Certification was not posted between 30 and 180 days before filing the application. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific 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.

Issues in this case are whether or not the petitioner had posted the notice of the filing of the Application for Permanent Employment Certification between 30 and 180 days before filing the Application for Permanent Employment Certification, and whether or not the petitioner has demonstrated its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Notice of the Filing of the Application for Permanent Employment Certification

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.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(ii) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or May 12, 2006. *See* 8 C.F.R. § 204.5(d).

¹ 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. The current Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *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. The petition and the blanket labor certification were accepted May 12, 2006. This citation and the citations that follow are to the DOL PERM regulations.

The regulation at 20 C.F.R. §656.15(c)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination and hold a full and unrestricted license to practice professional nursing in the State of intended employment or “who have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.”

The regulation at 20 C.F.R. § 656.15 states in pertinent part for applications for labor certification for the Schedule A occupation of professional nurse the following:

(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).

(c) Group I documentation. An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:

* * *

(2) An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this Sec. 656.15(c) and not under Sec. 656.17.

The regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii) states in pertinent part the following:

In applications filed under Sec. Sec. 656.15 (Schedule A) . . . , 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 must 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.

The regulation at 20 C.F.R. § 656.10(d)(3)(i),(ii),(iii) and (iv) states the following:

(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.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

In this case, the Form I-140 petition was accepted for processing on May 12, 2006. Accompanying the petition were, *inter alia*, copies of the following documents: an Application for Permanent Employment Certification Form ETA 9089; a cover letter from the petitioner dated April 25, 2006 with an "Exhibits Index;" a statement dated May 4, 2006, directed to the director by the petitioner stating that the petition was submitted under Schedule A (i.e. 20 C.F.R. § 656.5, Schedule A, Group I); a statement entitled "Notice of Filing an Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I" made between January 25, 2006 to February 26, 2006 for a job located at Riverside, California with a copy of the webpage as dated January 25, 2006 from the petitioner's website advertising the position; a statement entitled "Notice of Filing an Application for Alien Employment Certification under U.S. Department of Labor Schedule A, Group I" for a job located at San Bernardino, California made between June 11, 2006 to July 12, 2006 with a copy of the

² The submission of additional evidence on appeal is allowed by the instructions to the Citizenship and Immigration Services (CIS) Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

webpage as dated June 12, 2006 from the petitioner's website advertising the position; a certification of posting dated April 26, 2006; a printed page entitled "Notice of Filing of an Application for Alien Employment Certification, ... etc." from the Internet web site http://www.westwaysstaffing.com/sub/eo_rch.htm accessed January 26, 2006; a prevailing wage determination (PWD) for the job of registered nurse from the State of California, Employment Development Department dated February 24, 2006, at the job site address of Riverside, California;³ a letter from the petitioner dated April 25, 2006 stating that the beneficiary will "perform nursing services" at Riverside Community Hospital; a contract of employment between the petitioner and the beneficiary dated April 26, 2006; a "Supplier Agreement" with attachments dated as of January 1, 2005 between All About Staffing Inc. and the petitioner; a letter from the petitioner dated August 21, 2006; "Fifth Amendment to Master Recruitment Agreement for Traveler Health Care Professionals;" "Master Recruitment Agreement for Traveler Health Care Professionals by and between Catholic Healthcare West and Westways Staffing Services Inc.;" a copy of the petitioner's business brochure; a letter from the petitioner dated April 26, 2006 providing financial information concerning the petitioner; the petitioner's Employers Quarterly Federal Tax Form (Form-941) for four quarters of 2005; transmittal sheets concerning wage summary totals for the petitioner relating to California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last three quarters in 2005 and the fourth quarter of 2004, that were accepted by the State of California; the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2004; an International Commission on Healthcare Professions (ICHP) certificate as issued January 21, 2005 stating that the beneficiary had met the requirements of the Act for the profession of registered nurse; a letter from the Commission on Graduates of Foreign Nursing Schools (CGFNS) dated April 29, 1991, that the beneficiary was awarded a CGFNS certificate as issued April 1991, as well as other documentation concerning the beneficiary's professional licensing, education and prior employment; and the beneficiary's personal documentation.

On September 5, 2006, the director denied the petition. The director stated that notice of the filing of the Application for Permanent Employment Certification was not posted between 30 and 180 days before filing the application.

On October 3, 2006, the petitioner appealed. The petitioner noted the director's finding and reason for her denial that was "... that the petitioner did not post the job posting the requisite 30 to 180 days prior to filing the petition as the instant petition was accepted for processing on May 12, 2006 and the notice was posted from June 11, 2006 to July 12, 2006."

Further, the petitioner asserted that under an "exception" under the CIS "Guidance for Schedule A Blanket Labor Certifications effective February 14, 2006" the posting abovementioned was in compliance with the guidance memorandum.

However, contrary to the petitioner's assertion, the plain language of the "exception" states that for all petitions or

³ According to the PWD the job site address is Riverside Community Hospital, 4445 Magnolia Avenue, Riverside, California. There is also a letter written by [REDACTED], R.N., chief executive officer of the petitioner dated April 25, 2006, in the record confirming the Riverside, California job site selection. It appears that the petitioner changed the beneficiary's job site but failed to post notice at the San Bernardino, California site prior to filing the petition but did in fact post notice at the Riverside, California job site. Now according to the petitioner, the actual job site is in San Bernardino, California. Although the petitioner in a letter dated August 21, 2006, stated it had submitted the PWD "for 2006 for Riverside/San Bernardino PMSA," no PWD was submitted into evidence for the San Bernardino, California job location. However, this office notes that the prevailing wage in Riverside, California, would be the same as the prevailing wage for the San Bernardino, California location.

motions to reopen filed after March 20, 2006 (and this petition was filed May 12, 2006 and the appeal was filed October 3, 2006) employers must comply with the posting requirements that are those set forth above at 20 C.F.R. § 656.10(d)(3)(i)(ii)(iii) and (iv). Specifically, the exception noted by the petitioner, which allows the employer to correct insufficient posting notices in certain circumstances, only applies to I-140 petitions that were pending on March 20, 2006, or to I-140 petitions that were denied and for which a timely motion to reopen or to reconsider is pending. Neither exception applies to the facts of this case.

There is no evidence in the record of proceeding that the petitioner posted the job posting the requisite 30 to 180 days prior to filing the petition but rather posted notice after filing the petition. The posting notice was posted from June 11, 2006, to July 12, 2006. The subject petition was filed on May 12, 2006. Therefore, the petitioner has not met the requirements of 20 C.F.R. § 656.10(d)(3)(iv).

The petitioner had submitted a letter to CIS dated August 21, 2006, requesting that the ETA Form 9089 be amended to state that the address where the beneficiary will work be St. Bernadine's Medical Center, 2101 N. Waterman Avenue, San Bernardino, California. A petitioner must establish eligibility at the time of filing the I-140 petition. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not demonstrated that the petition was approvable when submitted. We find that it may not be approved for the reasons above stated.

Ability to Pay the Proffered Wage

Beyond the decision of the director, an issue in this case is whether the petitioner has demonstrated its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. 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 regulation at 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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or May 12, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$27.60 an hour or \$57,408.00 annually.

Relevant evidence in the record includes copies of the following documents: the Form ETA 9089 Application for Permanent Employment Certification; a copy of the petitioner's business brochure; a letter from the petitioner dated April 26, 2006 providing financial information concerning the petitioner; the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements for the four quarters of 2005; transmittal sheets concerning wage summary totals for the petitioner relating to California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last three quarters in 2005 and the fourth quarter of 2004, that were accepted by the State of California; and the petitioner's U.S. Internal Revenue Service Form 1120S tax return for 2004.

On the petition, the petitioner claimed to have been established in 1996 and to currently employ 486 workers. There are no tax returns in the record. The net annual income and gross annual income stated on the petition were \$708,455.00 and \$29.3 million respectively. On the Form ETA 9089, signed by the beneficiary on April 18, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a petition with the Form ETA 9089 Application for Permanent Employment Certification establishes a priority date, the petitioner must establish that the job offer was realistic as of the priority date 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing

that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner did not submit tax returns to demonstrate the petitioner's ability to pay the proffered wage from the priority date. A tax return was submitted for 2004 which is approximately two years before the priority date. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. The petitioner had made assertions in a letter dated April 26, 2006, concerning its finances but the statements were not supported by independent objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

CIS electronic records indicate that the petitioner has filed 1090 other I-140 petitions⁴ which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA 9089). See also 8 C.F.R. § 204.5(g)(2).

The record in the instant case contains no information about the proffered wages for the beneficiaries of the other 1090 I-140 petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries, whether those beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Furthermore, no information is provided about the current employment status of those beneficiaries, the date of any hirings of beneficiaries and any current wages of those beneficiaries.

Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 or ETA 9089's labor certifications.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

⁴ According to the regulation at 8 C.F.R. § 204.5(g)(2), "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The petitioner has submitted a letter dated April 26, 2006, from its chief financial officer stating that it has 486 employees. However, the large number of pending petitions would triple the petitioner's employee roster and, under the factual circumstances of this case, the unsupported statement is not acceptable as the sole determinative of the petitioner's ability to pay the proffered wage. According to the regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

The petitioner had not posted the notice of the filing of the Application for Permanent Employment Certification between 30 and 180 days before filing the Application for Permanent Employment Certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.