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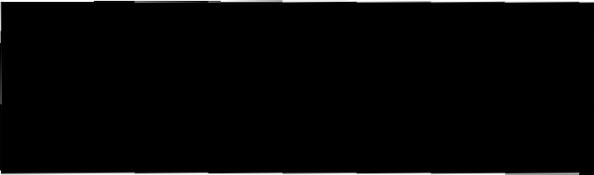
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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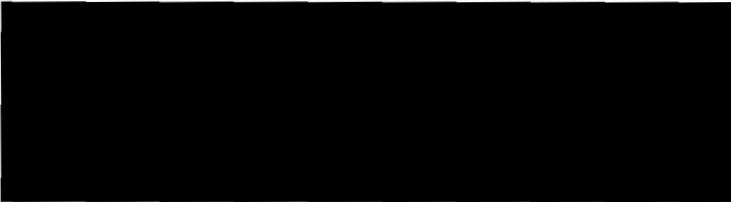
B6



FILE: LIN 06 241 52243 Office: NEBRASKA SERVICE CENTER Date: **AUG 26 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:



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

The petitioner, Global Nurses Network, LLC (GNN), is a medical staffing firm. 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, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had not established that it was the actual employer of the beneficiary. The director also determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification of filing requirements and denied the petition on December 12, 2006.

On appeal, the petitioner, through counsel, maintains that the petitioner is the actual employer and that the posting of notice of the certified position was consistent with the applicable requirements. Counsel asserts that the petition should be approved.¹

Counsel requests oral argument in this matter. Oral argument will be granted only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the written record of proceeding fully represents the facts and issues in this matter. Counsel has identified no unique factors or issues to be resolved. Consequently, the request for oral argument is denied.

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).

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*.

Section 203(b)(3)(A)(ii) of 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 are members of the professions.²

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). Here, the priority date is August 17, 2006.

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. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM

¹ 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.

² The petitioner does not claim the professional classification on Form ETA 9089, Part I, a.1.

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. Therefore these regulations apply to this case because the filing date is April 13, 2006.

According to Part C of the ETA Form 9089, the petitioner's headquarters or main office is in San Jose, CA 95121.³ The location of where the work to be performed is designated in Part H as Regent Care Center of Laredo, located in Laredo Texas. Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on August 17, 2006, indicates that the petitioner was established in November 2002 and claims eight current employees.

The appeal in this case is based in part on whether the petitioner may be considered the actual intended employer offering a full-time permanent position or whether a third-party entity is the intended employer. Based on the provisions contained in the contracts between the petitioner, GNN and its customer, Regent Care Center of Laredo as well as the provisions in the employee agreement between the petitioner and the beneficiary and representations noted on the petitioner's website, the director determined that the petitioner had not demonstrated that it would be the intended actual employer of the beneficiary.

The regulation at 20 C.F.R. § 656.3 states in pertinent part :

Employer means:

(1) 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. . . .

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. .

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 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 directly pay the beneficiary's salary; would provide benefits; 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* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment 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 was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again

³ Financial and other documents submitted with the petition indicate that the petitioner is a Wisconsin limited liability company.

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.*

A copy of a four and a half-page "Employee Agreement" was submitted to the record by the petitioner, signed by the beneficiary on February 6, 2006. Its introductory paragraph refers to the petitioner as a privately owned healthcare recruitment and staffing company based in Franklin, Wisconsin who will be referred to as GNN. It describes itself as working with hospitals, agencies and other healthcare facilities in the United States to recruit and place highly quality nurse who are CGFNS (Commission on Graduates of Foreign Nursing Schools) and IELTS (International English Language Testing Service) certified and want to live and work in the United States. An attachment identified as Annexure A as appended to the agreement was not provided. The agreement contains twenty-one paragraphs describing the terms under which the beneficiary will be employed.

Copies of an additional faxed document titled "Temp or Temp to Perm Agreement" and consisting of, by its own terms, three pages, is also contained in the record which refer to the petitioner's agreement with Regent Care Center of Laredo as the customer that the petitioner asserts is the healthcare facility worksite where the beneficiary was intended to perform her duties as a registered nurse. Both documents are signed by a representative of the customer and by the petitioner's representative on May 2, 2006 and May 3, 2006, respectively. One faxed page names Regent Care Center of Laredo and contains its phone number and address and includes job information referring to the job skills as "RNS" and persons needed is described "as needed. The "permanent placement one time fee" section is specified as \$18,000. The beneficiary is not mentioned on the document. The main body of the document summarizes the petitioner's agreement to provide personnel to the customer. It states that the petitioner will directly employ the Candidates and staff them at Customer for an agreed to hourly fee and that the petitioner will provide the customer with candidates on an ongoing as needed basis with customer agreeing to employ the candidates on a full-time basis as registered nurses. One of the seven paragraphs refers to the customer faxing either its own time sheet to the petitioner or the petitioner's time sheet in contemplation of the petitioner invoicing and receiving payment. Another paragraph refers to the petitioner's disclaimer of liability for expenses incurred by the customer on behalf of any GNN employee or contract nurse without consent, its disclaimer of any responsibilities for supervision and control at the customer facility and its responsibility to replace the employee or contract nurse if problems are incurred. Finally, as noted by the director, another provision contained in the petitioner and customer's agreement states as follows:

If Customer desires to hire a GNN employee on a permanent basis there will be a permanent placement fee per Candidate, also detailed on the attached Exhibit A. The full permanent placement fee will be applicable prior to the Candidate starting and during the first thirty-day period of the Candidate working for Customer. After twenty-four months from date of hire there will be no conversion or placement fee.

The director further cited four other paragraphs in the Employee Agreement between the petitioner and the beneficiary:

1. In consideration of the Nurse duly agreeing, promising and undertaking to comply with the terms and conditions hereof, from the moment of signing these presents, through a period of 24 months worked and billed as a Registered Nurse in USA, GNN shall provide the Nurse placement with a healthcare facility.

2. GNN shall secure the market pay rate for Nurse once she lands in the US and begins working at the healthcare facility...
17. The Nurse understands and agrees that GNN has no control over any particular Employer's personnel requirements or need for Nurse's service. The Nurse acknowledges and agrees that GNN is not responsible and agrees to hold GNN harmless for any delays experienced by the Nurse in starting employment, whether such delays occur before or after Nurse enters USA, and regardless of the cause of such delays.
18. The Nurse further acknowledges and agrees that such delays may adversely affect the Nurse's offers to work in USA and shall hold GNN harmless should any offer of employment be cancelled, amended or withdrawn due to any delay, including without limitation, any change in any employer's need for the Nurse's services.

In determining that the actual intended employer was actually the third-party client facility, the director also cited the petitioner's website under the heading of "For Hospital Recruiters" where the petitioner stated:

Global Nurses Network is in the business of permanent placement of nurses, not temporary, per diem or travel placement. Global Nurses Network does not employ nurses directly; rather, it acts as your partner in screening high quality candidates from abroad and assisting you with the process of bringing them over. AS the hospital, you will directly employ the nurse. Therefore, you will receive nurse that sign 2-year contracts, as opposed to 13-week nurse. Instead of paying exorbitant hourly rates, you will be paying a regular nursing salary.

Counsel states on appeal that the petitioner's website information could be out of date or targeted to a different customer. He asserts that the contract between GNN and Regent Care Center of Laredo refers to the beneficiary as a GNN employee and that she would be directly employed by the petitioner and staffed at the customer's facility.

It is noted that the AAO is looking at the petitioner's business operation at the time that the priority date of August 17, 2006. It is further noted that the language on the website referred to by the director has been changed and does not contain the paragraph cited above.⁴ Rather the petitioner now describes its duties in performing recruitment and screening for hospital nurses, and further affirms, under the heading of "recruitment," that it will prepare the visa petition for the hospital, but that the hospital is the actual sponsor and will sign the petition.

Although it is noted, as counsel points out, that the agreement between the petitioner and Regent Care Center of Laredo states that the petitioner will directly employ the nurses, as the beneficiary is not mentioned, it is unclear whether she is the subject of this agreement or whether she may be a prospective employee of Regent Care Center subject to the payment of permanent placement fee. We also find that the employee agreement is contradictory, referring to GNN as an entity separate from the "employer" and promising to provide placement for the Nurse with a healthcare facility (paragraph 1), and referring to liquidated damages to be assessed if the nurse secures employment with an employer other than GNN (paragraph 7i). Finally, paragraph(s) 17 and 18 cited by the director do not support finding that GNN is the actual intended employer

⁴ Accessed on 6/24/08. (www.globalnursesnetwork.com)

by referring to the hold harmless provisions in favor of GNN if any delays in employment are incurred because of an employer's needs or "personnel requirements."

It is noted that the existence of a contract for a term of employment of (at least 365 days) does not preclude a finding that it may be considered a permanent job as long as it is not contemplated by the employer to end at a specified date in the future. *See e.g., Matter of Crawford & Sons, 2001-INA-121 (BALCA Jan. 9, 2004) (en banc)*. In this case, based on the current record, however, it appears that the petitioner may have been operating as both a permanent placement agency and as a temporary outsourcing firm. It remains however, the petitioner's burden to establish that it is the intended employer offering full-time, permanent employment and not an entity that attempts to simultaneously promise to secure employment for the beneficiary and then advise her that they bear no responsibility if the offer of employment is cancelled, amended or withdrawn due to delay or any change in the employer's need for the nursing services. (paragraph 17 and 18 of the employee agreement). We concur with the director's decision to deny the petition on the basis that the petitioner failed to demonstrate that it was the intended actual employer offering a permanent full-time position to the beneficiary.

The director's denial was also based in part on whether the petitioner posted the notice of the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(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).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

(1) In applications filed under Section 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), 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 shall 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.

* * *

(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.

With the petition's filing, the petitioner submitted a copy of the notice of posting with certification of posting from the petitioner's vice-president, [REDACTED], who is located at the petitioner's main office in San Jose, California, according to Part D of the ETA Form 9089. On the copy of the notice of posting, it advises that the work site will be in Laredo, Texas. The notice also states that the notice is being provided to workers at the place of intended employment and the location is specified as the bulletin board.

The director also noted in his denial that as the petitioner's representative signed the notice of posting describing the bulletin board as the location of notice of posting, it could not be determined whether the notice of posting was actually posted in the place of intended employment in Texas or at another location.⁵

⁵ It is noted that the individual who affirmed the notice of posting is "[REDACTED] VP Recruitment." The petitioner's representative who signed the ETA Form 9089 is "[REDACTED]" As the signature for both names appears to be identical, we concur with the director's observation that the petitioner's representative signed the notice of posting.

As to this issue on appeal, counsel merely states that the posting was accomplished at the Regent Care Center in Texas. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel further asserts that the director should have issued a request for additional evidence to resolve this question as well as address the interpretation of the contractual provisions of the employee and customer agreements provided to the record. Although this may have been a reasonable option relevant to location of the notice of posting of the job opportunity, the director was not obliged to issue a request for evidence to resolve this question. The regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, “if there is evidence of ineligibility in the record.” Further, if the petitioner had wanted additional evidence to be considered, there was sufficient opportunity on appeal to provide it.

Thus, the AAO concurs with the director’s observation that the petitioner failed to demonstrate that a proper notice of posting for the job opportunity was completed.

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.