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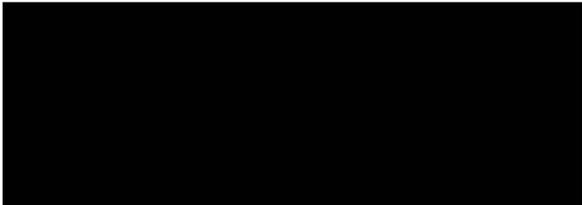
FILE: LIN 06 241 52258 Office: NEBRASKA SERVICE CENTER Date: OCT 19 2009

IN RE: Petitioner:
Beneficiary:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 is a healthcare recruitment company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The director determined that the petitioner had not established that it has made a permanent, full time job offer to the beneficiary and denied the petition accordingly.¹

The record shows that the appeal is properly filed, timely and makes 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.

As set forth in the director's December 5, 2006 denial, the single issue in this case is whether or not the petitioner has made a permanent, full time job offer to the beneficiary.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) 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) and (1)(3)(i) 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."² The priority date of any petition filed for classification under section 203(b) of the Immigration and Nationality Act (the Act) "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d).

¹ The director also noted that the posting notice submitted with the petition indicated it was posted on the "bulletin board." The director stated that since the attestation was signed by the petitioner, "it cannot be determined whether the notice was posted at the petitioner's offices or at the actual location of employment, as required." On appeal, counsel clarifies that the posting notice was placed on the Regional Care Center of Laredo's bulletin board. The petitioner claims that the beneficiary will work at the Regional Care Center of Laredo.

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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 Permanent Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must (1) have 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, or (3) demonstrate that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

Section 203(b)(3)(A)(i) of 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 regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

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

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

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 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.*

In his decision, the director noted certain deficiencies in the contract between the petitioner and Regent Care Center of Laredo, where the beneficiary will work. Specifically, the director noted that it is unclear from the contract whether the petitioner is the actual intending employer and whether there is a permanent offer of employment. Further, the director noted that the petitioner's website states that it does not employ nurses directly, and that its contract with the beneficiary indicates that the offer of actual employment is from the client facility and not the petitioner.

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.³ On appeal, counsel submits a brief. Relevant evidence in the record includes an agreement entitled "Temp or Temp to Perm Agreement" between the petitioner and Regent Care Center of Laredo executed by the parties in May 2006; and an Employee Agreement between the petitioner and the beneficiary dated February 22, 2006.

³ 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). 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).

On appeal, counsel indicates that the petitioner's website is irrelevant.⁴ He states that the contract between the petitioner and Regent Care Center of Laredo provides that the petitioner will employ the beneficiary. Counsel did not address the permanent nature of the job offer.

Pursuant to an agreement entitled "Temp or Temp to Perm Agreement" between the petitioner and Regent Care Center of Laredo executed by the parties in May 2006, the petitioner agreed to provide recruiting and staffing services to Regent Care Center of Laredo for the position of registered nurse. While the agreement does provide that the petitioner "will directly employ the [nurses] and staff them at [Regent Care Center of Laredo]," the agreement also states that Regent Care Center of Laredo "agrees to employ [nurses] on a full-time basis as a Registered Nurse." Further, pursuant to an Employee Agreement between the petitioner and the beneficiary dated February 22, 2006, the petitioner agreed to provide the beneficiary with placement in a healthcare facility and "secure the market pay rate" for the beneficiary once she "begins working at the healthcare facility." Under the terms of the agreement, the beneficiary agreed to "provide the full term of employment with [the petitioner] and designated healthcare facility at a minimum of 24 months as a Registered Nurse during the contract period." The agreement further states that it "will remain in effect for a maximum period of twenty-four (24) months after [the beneficiary] shall have entered USA and obtained her RN license in the state of employment... ." Therefore, as noted by the director, it is unclear from the agreements whether the petitioner is the actual intending employer and whether there is a permanent offer of employment. Specifically, the agreements do not indicate who will directly pay the beneficiary's salary; would provide benefits; will make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; will withhold federal and state income taxes; and will provide other benefits such as group insurance. Further, the agreements do not indicate whether the petitioner has the authority to retain the beneficiary for multiple outsourcing projects.

In a request for evidence (RFE) dated April 7, 2009,⁵ the AAO asked the petitioner to detail who will directly pay the beneficiary's salary; who will provide benefits; who will make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; who will withhold federal and state income taxes; and who will provide other benefits such as group insurance. The RFE also asked the petitioner to indicate whether it will have the authority to retain the beneficiary for multiple outsourcing projects. Further, the RFE requested the petitioner to provide copies of its IRS Forms 941, Employer's Quarterly Federal Tax Returns, filed for each

⁴ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

⁵ The AAO initially sent the petitioner and its counsel the RFE on January 29, 2009. The copy we mailed to the petitioner at the address listed on Form I-140 was returned to the AAO with a new forwarding address, although the petitioner had not informed USCIS of its new address. Therefore, the AAO mailed a copy of the RFE to the petitioner's new address.

quarter from the third quarter of 2006 to the present; copies of its Forms DE-6, California Quarterly Wage and Withholding Reports, filed for each quarter from the third quarter of 2006 to the present; a list of the healthcare facilities other than Regent Care Center of Laredo with which it has a direct employment relationship and contracts between the petitioner and those facilities; and a letter from Regent Care Center of Laredo detailing the proposed employment relationship between Laredo, the petitioner and the beneficiary. Additionally, the RFE requested the petitioner to address the permanent nature of the job offer, given that the contract between the beneficiary and the petitioner has a maximum 24-month term.

The petitioner did not respond to the AAO's RFE. The petitioner's failure to submit the requested information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that it has made a permanent, full time job offer to the beneficiary.

Beyond the decision of the director, the petitioner was also requested in the RFE to provide additional evidence of its continuing ability to pay the proffered wage.⁶ 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the completed, signed Form I-140 petition (including all initial evidence and the correct fee) is properly filed with United States Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 204.5(d).

Here, the Form I-140 was filed on August 17, 2006. The proffered wage as stated on the Form ETA 9089 filed with the Form I-140 is \$21.00 per hour (\$43,680.00 per year). On the Form ETA 9089, signed by the beneficiary on March 25, 2006, the beneficiary did not claim to have worked for the petitioner. The record indicates the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 2002, and to currently employ eight workers.

⁶ 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 cases on a de novo basis).

Relevant evidence in the record includes the petitioner's audited financial statement for the fiscal year ended June 30, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, USCIS 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 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 or subsequently.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent

either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In fiscal year 2006, the petitioner's audited financial statements stated net income of \$7,232.00. Therefore, for fiscal year 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ In fiscal year 2006, the petitioner's audited financial statements stated net current assets of \$970,472.00. Therefore, for fiscal year 2006, the petitioner had sufficient net current assets to pay the proffered wage.

However, USCIS electronic records show that the petitioner filed approximately 30 other I-140 petitions 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 (Acting Reg. Comm. 1977) (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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries.

Therefore, in its RFE, the AAO asked the petitioner to submit evidence of its ability to pay the instant beneficiary and all other beneficiaries on its pending petitions as of the August 17, 2006 priority date to the present. Specifically, the RFE requested the petitioner to provide a list of all preference visa petitions which the petitioner has filed as of the priority date and following; the status of each petition; the proffered wage of each beneficiary on each of the petitions; documentation of all wages actually paid to the beneficiaries since the priority date; a list of all petitions that have been approved; a list of all beneficiaries who have in the past or who currently work for the petitioner; and copies of the petitioner's federal income tax returns for 2006 and 2007.

As previously noted, the petitioner did not respond to the AAO's RFE. The petitioner's failure to submit the requested information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that it had the continuing ability to pay the proffered wages to the beneficiaries of its multiple petitions beginning on the priority date of each petition.

On appeal, counsel requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument 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, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.