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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

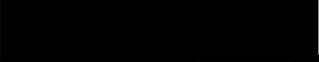


**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **APR 22 2010**

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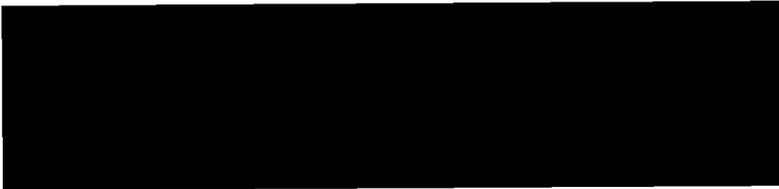
Petitioner:



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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner claims to be a skilled medical and nursing facility. It seeks to permanently employ the beneficiary in the United States a registered nurse. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition contains a blanket labor certification application 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 U.S. 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 (l)(3)(i), an applicant for a Schedule A position must file a Form I-140, Immigrant Petition for Alien Worker accompanied by an application for Schedule A designation. The priority date of the petition is the date the petition is properly filed with U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 204.5(d).

The Schedule A application must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion an ETA Form 9089, Application for Permanent Employment Certification, and evidence that the employer has provided appropriate notice of filing the labor certification (Posting) to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). The petitioner must also obtain a prevailing wage determination (PWD) in compliance with 20 C.F.R. § 656.40. Also, according to 20 C.F.R. § 656.15(c)(2), aliens who will be permanently employed as professional nurses must have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, hold a full and unrestricted license to practice professional nursing in the state of intended employment, or have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

The petition was filed on August 17, 2007. On February 3, 2009, the director denied the petition. The decision states that the petitioner failed to submit a Posting that met the requirements of 20 C.F.R. § 656.10(d). The decision also states that the petitioner failed to include a PWD and provide any evidence establishing its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.¹

¹ In order to obtain classification in the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

On March 12, 2009, 37 days after the denial was issued, counsel appealed the decision to the AAO. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing an appeal. However, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The director treated the late-filed appeal as a motion to reopen or reconsider, and, on May 19, 2009, dismissed the motion. The decision affirmed the director's finding that the petitioner failed to submit a Posting that met the requirements of 20 C.F.R. § 656.10(d).

On June 22, 2009, counsel appealed the director's decision. On Part 2 of Form I-290B, Notice of Appeal or Motion, the petitioner indicated that a brief and/or additional evidence will be submitted to the AAO within 30 days. To date, the AAO has not received a brief or additional evidence in support of the appeal, and the regulation requires that any brief shall be submitted directly to the AAO. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii). On Part 3 of Form I-290B, counsel did not provide a statement explaining any erroneous conclusion of law or fact.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states that the AAO "shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in this proceeding, the appeal must be summarily dismissed.

The petitioner fails to provide any evidence on appeal or specifically identify why the director's decision was factually or legally erroneous. Consequently, the appeal must be dismissed.

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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

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. The petitioner has not met this burden.

ORDER: The appeal is summarily dismissed.