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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: MAY 29 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
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 sustained.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a physical therapist pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition on February 27, 2009.

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. 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 must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was received by USCIS on December 26, 2007. The proffered wage, as stated on the ETA Form 9089, is $23.38 per hour ($48,630.40 per year). The ETA Form 9089 states that the position requires a Bachelor's Degree in Physical Therapy and also requires the beneficiary to hold a state physical therapy license, pass the NPTE examination and/or be eligible to sit for the NPTE examination.

Upon review of the entire record, including evidence submitted on appeal and in response to a Request for Evidence (RFE) issued by the AAO, the AAO concludes that the petitioner has established that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date (December 26, 2007, the date the Form I-140 was received by USCIS) onward. As noted above, 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. *See* 8 C.F.R. § 204.5(g)(2).

In this instance, the petitioner submitted a letter dated May 7, 2007 from to establish the petitioner's ability to pay the proffered wage. stated in that letter that is the largest privately owned nursing care management company in the United States and that the petitioner, is wholly owned and operated by further states that has more than 30,000 employees nationwide. In a second letter dated December 23, 2008, submitted in response to the director's Request For Evidence (RFE), stated that had more than 178 employees and is one of the largest privately owned nursing care operators in the United States and that the petitioner has the ability to pay the proffered wage. In denying the petition, the director found that had not established that it was the same entity as and that the financial operations of could not be considered in determining the petitioner's ability to pay the proffered wage.

On appeal, counsel for the petitioner submitted a brief stating that the petitioner listed on the Form I-140 is a . In support of that assertion, counsel submitted documentation from the official website of the Florida Department of State, Division of Corporations which indicates that (taxpayer identification number –) is an active organization in the State of Florida and is a "Fictitious Name" for its owner, (taxpayer identification number -

shall, therefore, be considered the same organization for the purposes of this proceeding. The letter submitted form the Chief Financial Officer will be accepted in this matter to establish the petitioner's ability to pay the beneficiary's proffered wage.

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 met that burden.

ORDER: The appeal is sustained, and the petition is approved.