identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 03 148 50438 OFFICE: NEBRASKA SERVICE CENTER Date: NOV 18 200

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:

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, Director
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner, "Heartland Employment Services Inc., DBA HCR Manor Care," seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. On the Immigrant Petition for Alien Worker (I-140), the petitioner claims that it is a skilled nursing care facility. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA-750) with the I-140. The director determined that the notice of filing the Application for Alien Certification was not properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

On notice of certification, neither the petitioner nor counsel has submitted any brief or supplemental statement.

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 or seasonal nature, for which qualified workers are not available in the United States.

In this case, the petitioner has filed an I-140 for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to which the Director of the United States Employment Service 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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."

The regulation at 8 C.F.R. § 204.5(d) provides that "[T]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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).

The regulations in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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 Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b).

The employer must comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.20(g)(1) provides:

> In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the application for Alien Employment Certification was provided:
>
> (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.
>
> (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 days. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

In this case, the immigrant visa petition was filed on April 3, 2003. The ETA-750A accompanying the petition states that the position of staff nurse pays $18.00 per hour, requires two years of college culminating in an Associate's Degree in Nursing and a registered nurse license. It also indicates that the alien beneficiary's services will be rendered in Oak Lawn, Illinois. The petitioner initially submitted a copy of a "job posting" for a registered nurse, which indicates that it had been posted for ten consecutive days beginning January 17, 2003. The notice also advised any interested persons that relevant documentary evidence may be submitted to a local employment development department in Sacramento, California or a DOL office in San Francisco, California. The posting contained no description of the salary offered.

On November 19, 2003, the director instructed the petitioner to submit additional evidence pertinent to the position's notice of posting. The director advised the petitioner that the initial notice submitted with the petition had directed any interested persons to submit additional documentary evidence to California employment offices rather than to the relevant offices in Illinois where the worksite is located. The director instructed the petitioner to explain why it had supplied California labor office addresses on the job posting.

In response, the petitioner, through counsel submitted a copy of another job posting describing a registered nurse position at $17.61 per hour. It was signed by [redacted] a senior recruiter, and indicates that it was posted for ten consecutive days from January 17, 2003 to January 27, 2003. It also advised interested persons that documentary evidence may be provided to the relevant Illinois employment offices. A transmittal letter from

counsel states that it was posted on the petitioner's premises. No explanation was offered as to why the subsequent copy of the job posting was different from the original one submitted with the petition.

On March 16, 2004, the director denied the petition and certified his decision for review by the AAO. The director determined that the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA 750 and job opening as of the petition's priority date. The director concluded that the petitioner had failed to offer any reasonable explanation for the inconsistencies presented in the original notice of posting and the amended notice containing different addresses and different information.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed.* (Emphasis supplied).

The AAO concurs with the director's finding that the petitioner did not successfully demonstrate that the position was successfully posted. In addition to the director's observation that the petitioner failed to provide a credible explanation for the inconsistencies between to the two claimed postings of the job, neither posting described the minimum educational requirements set forth in the ETA 750A. Moreover, as noted by the director, the notice provided with the petition contained no reference to a rate of pay and the notice provided in response to the director's request for evidence contained a rate of pay that did not correspond to the hourly rate stated on the ETA 750A. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record also failed to demonstrate that the posting was accomplished at the place of physical employment rather than at the petitioner's premises in Toledo, Ohio. If the job posting was merely accomplished at the petitioner's office, as stated in counsel's transmittal letter accompanying the petitioner's response to the director's request for additional evidence, it does not appear that the petitioner has complied with the regulatory requirement at 20 C.F.R. § 656.20(g)(1).

A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not submitted evidence that a proper job offer posting had occurred as of the filing date of the Application for Alien Employment Certification and Form I-140, the petitioner has not established eligibility as of the priority date of the petition. Consequently, the petition may not be approved.

Beyond the decision of the director, it is noted that the evidence supplied in support of the petitioner's ability to pay the proffered wage consisted of an annual report for Manor Care, Inc. with financial information no more recent than the year 2000. No mention of Heartland Employment Services, Inc. is made within its contents. The record does not otherwise clearly establish the relationship between Heartland Employment Services, Inc. and HCR Manor Care. There is no indication that there was a buyout, a merger, or that there is merely a contractual relationship between an employment service and a medical facility. This ambiguity raises the issue as to who is the prospective employer of the alien. Further, the annual report mentions dates as early as 1995, but the I-140 states that the petitioner was only established in 1999. Additional information should be solicited as to the nature of this relationship before any future petitions are approved. Moreover, as mentioned above, the financial information presented in the annual report provided with the petition is too

dated to persuasively establish the petitioner's continuing ability to pay the proffered wage as of the visa priority date, based on a petition filed in April 2003. *See* 8 C.F.R. § 204.5(g)(2).

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 director's decision to deny the petition is affirmed.