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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 19 2005
WAC 03 269 50164

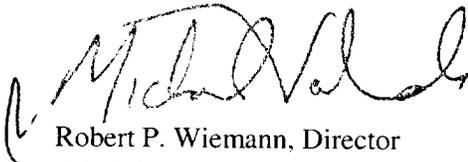
IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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: SELF-REPRESENTED

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

The petitioner is a nurse registry firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner states 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 Immigrant Petition for Alien Worker (I-140). The director determined that petitioner had failed to establish that the notice of filing the Application for Alien Certification had been properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(1).

On appeal, counsel asserts that the job opportunity posting procedure was properly followed and that the petitioner has demonstrated that the alien beneficiary qualifies for a blanket labor certification under Schedule A, Group I.

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)]." In this case, the priority date of September 26, 2003 was established when the petitioner filed the I-140 with CIS.

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. 20 C.F.R. § 656.22(b)(1). Title 20 C.F.R. § 656.22(b)(2) also provides that the Application for Alien Employment Certification under Schedule A shall include "evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or to the employer's employees"

as set forth in 20 C.F.R. § 656.20(g)(3).¹

In this case, Item 12 of Part A of the Application for Alien Employment Certification (ETA 750) specifies a proffered wage of \$22.17 per hour. Item 7 identifies the address where alien will work as “see Exhibit 2 (Petitioner’s Notice of Available Positions).” With the petition, the petitioner provided a “notice of available positions” and an accompanying employer’s certification, executed on September 18, 2003, verifying that the notice was posted for ten consecutive days at all of the petitioner’s offices. The notice presents the stated rate of pay as \$22.17 per hour and includes a description of the position’s duties as requiring the employee to report to client facilities as directed by petitioner. The applicant is also supposed to report to the petitioner’s address in Orange County for daily or weekly assignments at various hospitals or facilities.

Along with this notice, the petitioner provided a copy of the employment agreement with the beneficiary, as well as copies of a “master hospital list” containing the names of 137 client facilities, according to the exhibit list initially submitted. These 137 client names represent numerous client locations in California and three in Las Vegas, Nevada.

The regulation governing the procedure to post the availability of the job opportunity to interested U.S. workers is set forth at 20 C.F.R. § 656.20(g)(1). It 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). (Emphasis supplied).

Under these guidelines, the notice must have been posted at the facility or location of the beneficiary’s employment. In that a petitioner may not be a direct medical care provider, but provides medical personnel to a third party, the AAO holds the notice requirements must include the place of physical employment. The purpose of the posting regulation is to provide a meaningful opportunity for U.S. workers to compete for the position and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. If an application is filed under

¹ The Immigration Act of 1990, PL 101-649(S 358) also states in section 122(b)(1), that under the labor certification process under section 212(a)(5)(A) of the INA, that certification cannot be made unless the applicant “*has, at the time of filing the application,*” provided notice of the filing to the bargaining representative or if no bargaining representative, to employees working at the facility through posting in conspicuous locations. (Emphasis supplied).

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).

The director denied the petition on October 14, 2004. The director concluded 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 of September 26, 2003. The director determined that because the petitioner had not provided evidence that it had posted a notice of the certified job opportunity at the place of the beneficiary's intended physical employment, a correction of such notice would constitute a material change to a petition that has already been filed in an attempt to make an apparently deficient petition conform to CIS requirements. *See Matter of Izumii*, 22 I&N Dec. 169 (Assoc. Comm'r, 1998).

On appeal, the petitioner contends that posting the notice of job opportunity at all the petitioner's offices, as the employer, satisfies the requirements of the regulation. The petitioner also identifies the client hospital at which the beneficiary was assigned and offers copies of the DOL's website determinations of the prevailing wage rate for the location of her nursing-services assignment in Los Angeles. The petitioner further submits a copy of its contract with Beverly Hospital where the beneficiary performed nursing duties. The petitioner maintains that the Dept. of Labor's position on posting of the notice requirement is in accordance with its own interpretation.

It is noted that CIS has jurisdiction under 20 C.F.R. § 656.22(e) to process the labor certification applications for petitioners seeking the employment of aliens under Schedule A occupations. This employment must not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 20 C.F.R. § 656.10.

Schedule A regulations do not contain language that certifies the employment of any alien registered nurse anywhere among numerous locations of facilities in California or Nevada, at any wage rate. It is noted that the regulations at 20 C.F.R. § 656.20(c)(2) state that a labor certification application must clearly show that the wage offered meets the prevailing wage rate, and references 20 C.F.R. § 656.40. The petitioner's failure to designate a specific geographical location and place of actual employment of the beneficiary on the ETA 750A also failed in this regard. In this case, on appeal, it is noted that submitted documentation indicating that the beneficiary was assigned to the Beverly Hospital does not cure the petitioner's failure to submit an accurate application for labor certification to CIS.

It is further noted that the main body of the contract with Beverly Hospital does not identify the beneficiary as a prospective employee and also reflects that it was dated eight months subsequent to the September 2003 filing date of the petition. It is unclear how the May 2003 supplemental contract, regarding traveling healthcare personnel supplied by the petitioner to Beverly Hospital, establishes a connection to the specific beneficiary's services as a registered nurse.

For the reasons stated above, the AAO finds the intent of the regulatory language, when applied to petitioners not acting as direct medical service providers, is more accurately interpreted as a requirement for a petitioner to post the job notice at the place of physical employment. In this regard, the petitioner, by failing to notify the bargaining representative or properly posting of the job opportunity at the designated place of

employment as of the priority date of the application, has not established eligibility for the visa classification sought.

The regulation at 8 C.F.R. § 103.2(b)(12) further 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 petitioner's failure to designate a specific geographical location and place of actual employment of the beneficiary on the ETA 750A also affects the petition's eligibility for approval. As noted above, the petitioner does not directly provide medical services, but merely acts as a nurse staffing agency. The documentation submitted to the underlying record and on appeal did not clearly establish that the petitioner had a contract at a third-party worksite to provide the specific beneficiary's services as a registered nurse. As such, the evidence does not support the conclusion that a realistic job offer of permanent full-time employment existed for this particular beneficiary as of the priority date of September 26, 2003.

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 Enterprise, 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 appeals on a *de novo* basis).

The evidence submitted to the underlying record fails to establish that the job notice was properly posted for ten consecutive days as of the priority date of September 26, 2003. By merely posting the job notice at the petitioner's administrative offices, the petitioner failed to comply with the requirement. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It is finally noted that the petitioner also provided no evidence as to whether a bargaining representative was involved.

Based on a review of the record, as well as the evidence and arguments offered on appeal, the AAO concludes that the director did not err in denying this petition based on the petitioner's failure to credibly establish that it properly posted the position for a registered nurse. The AAO additionally concludes that the record fails to and fails to clearly demonstrate that a contract with a medical service provider existed to support a permanent job offer for this specific alien beneficiary. Consequently, the petition may not be approved.

The AAO finds the evidence inadequate to establish the alien beneficiary's eligibility for an employment-based visa under section 203(b)(3)(A)(i) of the Act. 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.