

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

...offices are limited to
... grants
invention of personal privacy

Bf



APR 27 2005

FILE: [Redacted] WAC 03 203 50032

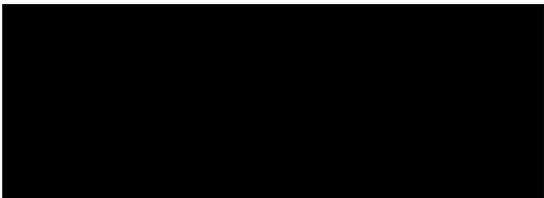
OFFICE: CALIFORNIA SERVICE CENTER

Date:

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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a hospital and medical center, seeks to employ the beneficiary permanently in the United States as a registered 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 an 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 submits additional evidence and asserts that the petitioner has demonstrated that the alien beneficiary qualifies for a blanket labor certification under Schedule A, Group 1.

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 June 30, 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). 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, 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).

As noted by the director, 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. 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).

With the initial filing of the petition, the petitioner included copies of the beneficiary's licensing and educational credentials and documentation related to the petitioner's ability to pay, but failed to include any evidence that the job opportunity had been posted in accordance with the guidelines set forth in 20 C.F.R. § 656.20(g)(1).

On July 19, 2004, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director specifically instructed the petitioner to submit evidence that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the facility or location of the employment for ten consecutive days.

In response, the petitioner, through former counsel, submitted various copies of the notice of the posting of the certified position in the form of media advertising representing announcements for career fairs. Counsel also included copies of two job announcements appearing on the petitioner's web site.

As none of the requested evidence submitted in response to the director's instructions to provide evidence that the specified notice of the job opportunity complied with any of the provisions of 20 C.F.R. § 656.20(g)(1), the director denied the petition on September 23, 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 June 30, 2003.

On appeal, current counsel submits another job posting indicating that it was posted from May 15, 2003 until May 25, 2003, along with an affidavit from a human resource specialist employed at the petitioning hospital. She attests that this new notice had been "continuously" posted during the months preceding the beneficiary's application for permanent residency. It is noted, however, that the stamp appearing in the right corner of the notice indicates that it was removed on May 25, 2003.

The AAO declines to consider such evidence as a basis of reversing the director's denial of the petition. Where a petitioner has been put on notice of the required evidence and given a reasonable opportunity to address the deficiency of proof by providing it to the record, such evidence will not be considered on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). 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).

In this case, the director specifically requested that the petitioner provide evidence that it had complied with the posting requirements described in 20 C.F.R. § 656.20(g)(1), *supra*. The petitioner's response did not establish that it had complied with such posting requirements.

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 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.