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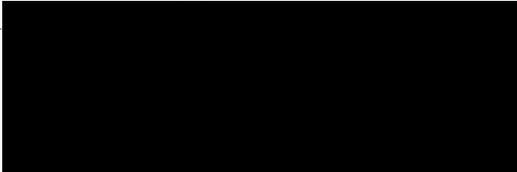
FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 183 50239

AUG 24 2005

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, Director
Administrative Appeals Office

DISCUSSION: The preference 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 hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3). The director also stated that the evidence does not demonstrate that the beneficiary is qualified for the Schedule A designation.

On appeal, counsel submits a brief.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, 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 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.20(g) provides, in pertinent part,

(1) 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 representatives) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's locations) 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).

The regulation at 20 C.F.R. § 656.22 (Applications for labor certification for Schedule A occupations.) (b)(2) states that [the Application for Alien Employment Certification form shall include:] Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(3) states that,

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) state that applicants should report to the employer, not to the local Employment Service office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.22(c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, **as part of its labor certification application**, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment. [Emphasis supplied.]

In a memo dated December 20, 2002, the Office of Adjudications of the INS, now Citizenship and Immigration Services (CIS), issued a memo instructing Service Centers to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state **in lieu** of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate CIS office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

In this case, Form I-140 was filed on June 2, 2003. With the petition counsel submitted an undated notice from the petitioner's employment manager. That notice, addressed "To Whom It May Concern," states that the petitioner has filed an immigrant petition for a nurse. No indication that it had been posted accompanied that notice.

Counsel also failed to provide (1) evidence that the beneficiary held an unrestricted license to practice registered nursing in California, the state of intended employment, (2) evidence that the petitioner had passed the CGFN examination, or (3) a certified copy of a letter from the state of California stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state.

On December 15, 2003, the California Service Center requested that the petitioner submit evidence that notice of the position had been presented to a bargaining representative or posted at the petitioner's place of business in accordance with the regulations. The director also requested that the petitioner submit evidence that the beneficiary has passed the CGFNS examination or holds an unrestricted license to practice nursing in the state of intended employment, or submit a certified letter from the state of intended employment stating that the beneficiary has passed the NCLEX-RN examination and is eligible to receive a state license to practice nursing.

In response, counsel submitted a certificate and wallet card showing that the state of California had awarded the beneficiary a registered nurse license on October 3, 2003. Counsel also submitted a posting notice and certification. That notice states that it was posted on the petitioner's employee bulletin board from September 10, 2003 to October 1, 2003. The body of the notice states that the petitioner is seeking to hire a registered nurse. The space provided for inserting the rate of pay was left blank. The certification is signed by the petitioner's employment manager and certifies that the notice was posted for ten consecutive business days in a conspicuous location.

On March 8, 2004 the Director, California Service Center, issued a decision in this matter. The director observed, citing *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), that the petitioner is obliged to show that the beneficiary was eligible for the proffered position on the priority date. The director noted that, because the priority date in this matter is June 2, 2003, the evidence that the state of California issued the beneficiary a nursing license on October 3, 2003 does not suffice.

As to the posting of the proffered position, the director noted that the petitioner is obliged to demonstrate that, by the priority date, the notice of the proffered position had been posted in accordance with the requirements of the regulations. Again, the priority date of the petition is June 2, 2003. The posting notice states that it was posted on September 10, 2003. The director observed that the notice was posted after the priority date, and cannot, therefore, demonstrate that the petition in this matter qualified for Schedule A treatment on the priority date.

On appeal, counsel submits a letter, dated April 7, 2003, from the state of California. That letter states that the beneficiary has passed the NCLEX-RN examination and is eligible for licensure in California.

As to the requirements of 20 C.F.R. § 656.20(g)(3), counsel states that the petitioner notified the company's union representative and, in addition, posted the notice of filing at the location of employment for ten days. Counsel states that, therefore, the petitioner has substantially complied with the posting requirements.

The April 7, 2003 letter from the state of California is sufficient to satisfy the requirements of 20 C.F.R. § 656.22(c)(2) as modified by the December 20, 2002 memo from the Office of Adjudications. The petitioner has demonstrated that the beneficiary was qualified for the proffered position on the priority date. The remaining issue is the petitioner's compliance with the posting requirements.

The regulation at 20 C.F.R. § 656.20(g)(1) requires that notice of filing shall be provided 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, or if there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment.

Counsel states on appeal that notice was provided to the petitioner's employees' bargaining representative. Prior to counsel's statement on appeal, neither counsel nor the petitioner ever stated that the petitioner's employees have a bargaining representative. If they do, then, as 20 C.F.R. § 656.20 makes clear, service of the filing notice on that bargaining representative was required by § 656.20(g)(1).

Counsel does not state when this alleged service on the bargaining representative took place, or state his basis for the assertion that it did. Counsel's assertion is not, in itself, evidence, and, if unsupported by evidence, is insufficient to sustain the petitioner's burden of proof. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). If collective bargaining represents the petitioner's employees, the instant petition must fail for lack of any evidence that the notice of filing was correctly served on the bargaining representative.

If collective bargaining does not represent the petitioner's employees, then this matter hinges on the sufficiency of the notices posted at the petitioner's place of business, the prospective place of employment.

As was noted previously, the evidence in the record of proceeding concerning that requirement includes an undated and incomplete posting submitted with the initial application with no indication when, where, or whether it was posted. Subsequently, in response to the Request for Evidence, counsel submitted a notice and

certification that are incomplete and indicate that the posting was not timely. Neither of those posting notices complies with the requirements of 20 C.F.R. § 656.20(g)(3). Further, neither shows that the petitioner complied with the requirements of 20 C.F.R. § 656.20(g)(1)(ii) prior to the priority date. Neither, therefore, can show compliance with the relevant posting requirements prior to the priority date.

A petitioner must establish eligibility at the time of filing. A petition cannot be approved at a later date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). If the petitioner is relying on the posting notice to show compliance with the posting requirement of 20 C.F.R. § 656.20(g)(1), then the petition does not qualify for treatment under Schedule A, and the petition was correctly denied on that ground. In either case, then, whether or not collective bargaining represents the petitioner's employees, the petition was correctly denied for failure to demonstrate compliance with the posting requirements.

Counsel asserts in the brief that the petitioner is in "substantial compliance." Counsel implies that the initial posting, though imperfect, was sufficient to merit approval of the petition because Schedule A applicants are "pre-certified." Counsel submits no authority for this statement or explanation of its meaning. Further, counsel explains that the posting requirement has been met without addressing the requirement that the posting must occur before the petition is filed. Regardless, if, as counsel asserts, the petitioner's employees are represented, the record contains no evidence of compliance, substantial or otherwise, with the requirement that the notice be served on the bargaining representative.

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.