

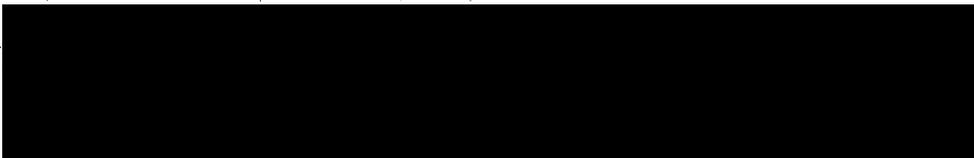
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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U.S. Citizenship
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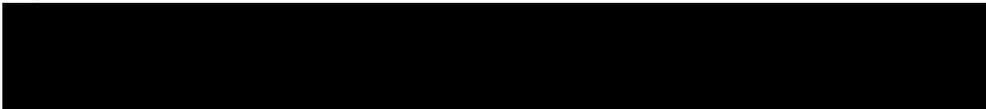
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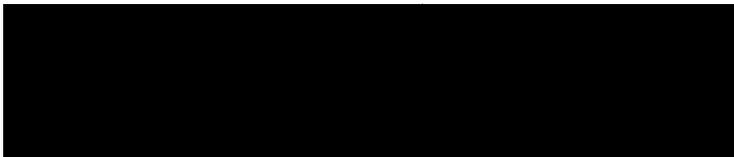
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IN RE: Petitioner:
Beneficiary:



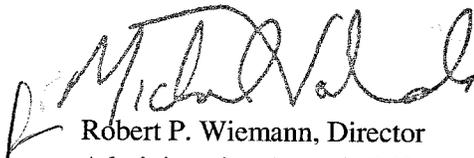
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a nursing care facility, 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 asserts that there is no prohibition to posting the notice of job opportunity after the application has been filed and 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 March 21, 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, descriptions of the petitioning business, 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 25, 2003, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director 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.

In response, the petitioner, through counsel, submitted a copy of the notice of the posting of the certified position. Counsel's transmittal letter indicates that it was posted at the petitioner's place of business. The job posting indicates that it was posted from August 11, 2003 until August 24, 2003.

The director denied the petition. 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 March 21, 2003.

On appeal, counsel asserts that the regulatory requirements do not specify that proof of posting of the job opportunity be accomplished prior to filing an application. Counsel cites to the language of the job posting notifying interested parties that the notice is being provided as a result of the filing of an application for permanent alien labor certification in maintaining that this proves that the actual posting need not be made until the application is filed.

While counsel's observation may offer some merit, the AAO finds that the plain reading of the statute and, therefore, the intent behind the regulatory language, as stated above, is more accurately interpreted as a requirement for the employer to have performed its obligatory notification of a bargaining representative or posting of the job opportunity as of the priority date of the application, not at some time subsequent to the filing date.

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, as noted above, the petition must contain 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. § 656.22.

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 March 21, 2003, rather than more than four months later in August 2003. 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 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 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.