

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B6

FILE: WAC-03-268-51875 Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 nurse staffing and placement company. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for 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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is September 29, 2003.

Eligibility in this matter hinges on whether the petitioner complied with regulatory requirements concerning posting of a notice of job availability as of the priority date.

The proffered wage as stated on the Form ETA 750 is \$23.00 per hour for 36 hours per week, which amounts to \$43,056.00 annually. On the Form ETA 750B, signed by the beneficiary on March 31, 2003, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on March 1, 1992, to have a gross annual income of \$4,500,000.00, to have a net annual income of \$100,000.00, and to currently have 160 employees.

In support of the petition, the petitioner submitted Form ETA 750 Application for Alien Employment Certification; a copy of a Notice of Job Opening for the Position of Staff Nurse; a letter dated June 14, 2003 from the petitioner's president stating a job offer to the beneficiary; a letter dated March 17, 2003 from the petitioner's director of recruiting; a copy of an agreement dated March 31, 2003 signed by the beneficiary and a representative of the petitioner; copies of two registration certificates of the Kerala Nurses and Midwives Council, Kerala, India of the beneficiary, each dated June 26, 2000, reflecting the beneficiary's registration as nurse and as a midwife; a copy of a General Nursing Certificate dated May 27, 1981 issued by the Armed Forces Medical Services Examining Board, New Delhi, India, to the beneficiary; a copy of a Midwifery Certificate dated August 24, 1981 issued by the Armed Forces Medical Services Examining Board, New Delhi, India, to the beneficiary; a copy of a transcript dated November 22, 2001 of the beneficiary's courses taken at Command Hospital, Bangalore, India; a copy of a Certificate of Midwifery Training dated January 31, 2002 of the beneficiary for nursing courses at an Armed Forces institution in Secunderabad, India; a copy of a certificate dated August 8, 1974 by the University of Kerala showing the beneficiary's successful completion of her pre-degree examination; a copy of a student record of the beneficiary dated September 1984 issued by the Little Flower High School, Oonnukal, India; a copy of the beneficiary's secondary school leaving certificate bearing notarial stamps from Maharashtra and Kerala, India; a copy of an Army Service Certificate dated November 6, 1984 of the beneficiary; a copy of an Experience Certificate issued by the Saudi Arabia Ministry of Health to the beneficiary, showing nine years of experience as a staff nurse, with dates given in an apparently non-Western

calendar; a copy of a score report dated December 23, 2002 issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) to the beneficiary; and copies of several pages of the beneficiary's Indian passport.

Subsequent to filing the I-140 petition, counsel submitted a letter dated March 29, 2004 to which was attached a copy of a CGFNS Certificate dated January 27, 2004 of the beneficiary.

In a decision dated November 1, 2004, the director found that the evidence in record indicated that the notice of job availability had been posted only at the petitioner's administrative offices, and that the record lacked evidence that the notice had been posted at the facility or location of the beneficiary's proposed employment or that a copy of the notice had been provided to the bargaining representative or representatives, if any, at the facility or location of the beneficiary's employment. The director therefore denied the petition.

On appeal, the petitioner submits a brief and a copy of memorandum dated May 16, 1994 by Barbara Ann Farmer, Administrator for Regional Management, United States Department of Labor. The memorandum by Ms. Farmer is relied upon by the petitioner as legal authority, and is not an evidentiary document. No new evidence is submitted on appeal.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

- (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
- (b) The Application . . . 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 § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 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.

(Emphasis added).

The petitioner submitted a copy of a Notice of Job Opening for the Position of Staff Nurse. The notice describes the duties of the position in terms which are consistent with the job duties described on the Form ETA 750. Concerning the time and location of posting, the notices states, "This job notice was posted in the message board in the Human Resources office for 10 consecutive days from 09/01/03 to 09/15/03."

The petitioner's Form ETA 750, block 7, states the address where the beneficiary will work as "Hospital in Southern California," but the ETA 750 fails to state at which hospital the beneficiary will work. Because the petitioner has failed to identify the actual "facility or location of the employment" and has posted the notice at its administrative offices, the petitioner's evidence does not establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1).

The Department of Labor has recently published a final rule modifying some portions of the labor certification regulations. The changes will become effective on March 25, 2005. In supplementary information accompanying the final rule the Department of Labor stated the following concerning the notice requirement:

[T]he notice requirement in the regulations has been a statutory requirement since the passage of IMMACT 90. Section 122(b)(1) of IMMACT 90 provide no certification may be made unless the employer-applicant, at the time of filing the application, has provided notice of the filing to the bargaining representative, or, if there is no bargaining representative, to employees employed at the facility through posting in conspicuous places. In our view, Congress' primary purpose in promulgating the notice requirement was to provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers.

Employment and Training Administration, Department of Labor, 20 CFR Parts 655 and 656, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77326, at 77338 (Dec. 27, 2004). *See* Immigration Act of 1990, Pub.L. No. 101-649, § 122(b)(1), 1990 Stat. 358 (1990). *See also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

In its comments accompanying the new rule, the Department of Labor reaffirmed the necessity of notice even in Schedule A applications, where no attempted recruitment of U.S. workers is required, noting that the documentation which might be provided by interested parties in response to a notice might include documentation on wage or fraud issues which those parties might wish to have considered as evidence. 69 Fed. Reg. at 77338.

In its revisions to the labor certification regulations, the Department of Labor retained the current notice requirements in substantially unchanged form, and also added an additional requirement for posting a notice of job availability "in any and all in-house media, both whether printed or electronic, in accordance with the procedures used for similar positions within the employer's organization." 69 Fed. Reg. 77326, at 77390. Under the new regulations, the notice provisions will be codified at 20 C.F.R. § 656.10(d)(1)(ii). *Id.*

In his decision on the instant petition, the director correctly analyzed the regulations concerning posting of the notice of job opportunity. The director noted that the evidence showed that the notice was posted at the petitioner's administrative offices. The director stated that the facility or location of employment in the instant petition would be the healthcare facilities where the beneficiary would provide services as a nurse. The director therefore concluded that the petitioner's evidence failed to establish its compliance with the regulatory provisions on notice. The decision of the director to deny the petition was correct.

On appeal, counsel submits a copy of memorandum dated May 16, 1994 by Barbara Ann Farmer, Administrator for Regional Management, United States Department of Labor. In that memorandum, the Administrator states, "Applications involving job opportunities which require the Beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Services office having jurisdiction over the area in which the employer's main or headquarters office is located." (Administrator's Memorandum, section 10). Counsel asserts that the memorandum shows that the Department of Labor accepts the possibility that an offer of permanent employment may involve an undetermined worksite at the time of filing.

Although the May 16, 1994 memorandum appears to contemplate the filing of labor certification applications without a prior identification of specific work locations, the memorandum does not address the regulatory requirements discussed above, notably, the requirement for posting the notice of job availability at the actual facility or location of employment. The regulation at 20 C.F.R. § 656.20(g)(1) is a Department of Labor regulation, and the Administrator's memorandum is presumably intended by the Administrator to describe policies which are consistent with all Department of Labor regulations. The Administrator's memorandum therefore does not support a finding that the notice provisions of the regulations are inapplicable to the instant petition.

For the foregoing reasons, the assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the notice of job opportunity is also deficient in respects not discussed in the director's decision.

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

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. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

In the instant petition, the notice of job opening states, "Job requires a candidate with at least a Diploma or Bachelor's Degree in Nursing and at least 1 year of experience as a Registered Nurse." The reference to one year of experience as a "Registered Nurse" is inconsistent with the Form ETA 750, which requires only one year of experience in the job offered, which is titled "Staff Nurse." The Form ETA 750 makes no reference to any requirement for a year of experience as a registered nurse, though the Form ETA 750 does state in block 15 that the candidate must hold a "nursing license in home country."

With regard to the compensation offered, the notice of job opening states, "The compensation package for the position of Staff Nurse is \$39,744 per year for 36 hours of work a week." That annual rate of pay is equivalent to \$21.23 for a 36 hour work week, 52 weeks per year, an hourly rate which is inconsistent with the rate of pay stated on the Form ETA 750 of \$23.00 per hour. The notice therefore fails to comply with the regulation at 20 C.F.R. § 656.20(g)(8), requiring a description of the rate of pay for the offered position, since the rate of pay stated in the notice is not the rate of pay stated on the Form ETA 750.

Another issue raised by the record in the instant petition concerns compliance with prevailing wage regulations.

The regulation at 20 C.F.R. § 656.20(c)(2) states in pertinent part:

Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

...

(2) The wage offered equals or exceeds the prevailing wage determined pursuant to Sec. 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work . . .

The regulation at 202 C.F.R. § 656.22(e), concerning applications for labor certification for Schedule A occupations, states in pertinent part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A (Sec. 656.10 of this part); shall review the application; and shall determine whether or not the alien is qualified for and intends to pursue the Schedule A occupation. . . .

The regulation at 20 C.F.R. § 656.40(a)(2) states in pertinent part:

If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed *in the area of intended employment* and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages . . .

(Emphasis added).

As noted above, the petitioner's Form ETA 750, block 7 states the address where the alien will work as "Hospital in Southern California." Although the address of the petitioner is in Pomona, California, nothing in the ETA 750 nor elsewhere in the record limits the area of intended employment to the area around Pomona, California. By failing to specify the specific area of intended employment the petitioner's evidence fails to provide a sufficient basis for a determination of the prevailing wage.

Another issue raised by the evidence concerns the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which, as noted above, is September 29, 2003, the date of filing the I-140 petition. The record in the instant case contains no copies of annual reports, federal tax returns or audited financial statements, as required by 8 C.F.R. § 204.5(g)(2). Nor does the record contain a statement from a financial officer of the petitioner, which could be an alternative form of evidence for this petitioner, since the petitioner claims to have 160 employees. The record before the director in fact contained no evidence at all pertaining to the petitioner's finances. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In some circumstances where the evidence initially submitted with an immigrant petition is insufficient to establish eligibility, the director is required to issue a request for evidence under the regulation at 8 C.F.R. § 103.2(b)(8). However that regulation states, "If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence." In the instant case, the evidence submitted with the petition was sufficient to show that the notice of job opportunity had been posted in the petitioner's administrative offices, rather than at the actual facility or location of the intended employment. As discussed above, the posting at the petitioner's administrative offices failed to comply with the regulation at 20 C.F.R. § 656.20(g)(1). Therefore the record contained evidence of ineligibility, and a request for evidence pertaining to other issues in the petition was not required. See 8 C.F.R. § 103.2(b)(8).

In summary, the decision of the director to deny the petition was correct, both for the reasons discussed in that decision and for the other reasons discussed above.

WAC-03-268-51875

Page 8

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.