



U.S. Citizenship
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FILE: WAC 04 031 52287 Office: CALIFORNIA SERVICE CENTER Date: **APR 11 2006**

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: 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 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 home health nursing agency. 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 notice of filing the Application for Alien Certification was not provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

On appeal, the petitioner submits a brief and additional evidence.

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 registered 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. §656.22 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 [Form ETA 750 at Part A] in duplicate with the appropriate Immigration and Naturalization Service [Predecessor of the Bureau of Citizenship and Immigration Services] office.

and

(b) The application for Alien Employment Certification form shall include:

(2) Evidence that notice of filing for the application for Alien Employment Certification was provided to the bargaining representative of the employer's employees or the petitioner's employees as prescribed in §656.20 of this part.

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

In applications filed under ^{oo}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).

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.

In this case, Form I-140 was filed on November 14, 2003. The petition states that the petitioner would employ the beneficiary in Las Vegas, Nevada. The petitioner did not provide a copy of a completed Form ETA 750 Application for Alien Employment Certification as required.

Further, although the petitioner submitted a notice of the proffered position, dated November 3, 2003, that notice did not contain a job description, did not state that the notice was being provided as a result of the filing of an application for permanent alien labor certification, did not state that any person might provide evidence bearing on the application, and did not state that it was posted for the required ten days prior to the filing date at the facility or location of employment.

On October 20, 2004, the Director, California Service Center, denied the petition. In the decision of denial the director noted that, because the notice of the proffered position had not been posted for at least ten days prior to

the filing date, attempts to retroactively conform the posting to the requirements of 20 C.F.R. §656.20(g)(1) would be fruitless, citing *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971) and *In re Izummi*, 22 I&N Dec. 169, 175.

On appeal, counsel submits (1) a copy of a completed Form ETA 750, Parts A and B, (2) a copy of the original of a posting notice dated August 1, 2003, (3) a copy of a letter, dated September 1, 2003, to the Nevada Department of Employment, (4) a copy of another posting notice, dated October 24, 2003, (5) photographs of its office doorway and its bulletin board, (6) a copy of a flier distributed to potential employees, (7) a copy of an advertisement that the petitioner ran in the August 5, 2003 edition of the "Sunday Church Newsletter," and (8) a statement on the Form I-290B appeal.

The August 1, 2003 posting notice did not contain a job description, did not state that the notice was being provided as a result of the filing of an application for permanent alien labor certification, and did not state that any person might provide evidence bearing on the application. Further, although that notice states, "Posting August 1, 2003," it does not state that it was posted for the required ten days at the facility or location of employment.

The September 1, 2003 letter lists the requirements of the proffered position.

The posting notice dated October 24, 2003 does not state that any person might provide evidence bearing on the application. That statement is required by 20 C.F.R. §656.20(g)(3). Further, that notice did not state that it was posted for the required ten days at the facility or location of employment as required by 20 C.F.R. §656.20(g)(1).

The photographs of the petitioner's office door and its bulletin board show the August 1, 2003 notice of the proffered position was posted at those locations. The sheet on which those photographs are mounted is dated October 24, 2003. Those photographs do not show, however, that the October 24, 2003 version of the posting notice was posted at either location.

On appeal the petitioner states,

Sincerely, I apologize for this inconvenience. I am a starting business and I personally did all the paperworks [sic] hoping to save from [sic] lawyer's fees. Unfortunately, I made an error for [sic] not enclosing Form ETA [750] A&B which caused this denial. I am hoping for your understanding of my situation and hoping for a positive response to my appeal. I have been in touch with the beneficiary who has been patiently waiting for a positive outcome.

The regulation at 8 C.F.R. § 103.2(b)(12) 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).

Of the three versions of the posting notice submitted, only the October 24, 2003 version contains a description of the of the education and experience required by the proffered position sufficient that the posting would enable an applicant to determine whether he or she was qualified to apply for the proffered position. Although that notice

indicates that it was posted on October 24, 2003, however, it does not indicate that it was posted at the facility or location of intended employment or that it remained posted for ten days prior to the filing date of the petition, both of which are requirements of 20 C.F.R. §656.20(g)(1)¹ Further, that notice does not state that any person might provide evidence bearing on the application, a requirement of 20 C.F.R. §656.20(g)(3).

The petitioner attempts to demonstrate that notice of the proffered position was posted at its offices by providing photographs and a statement that indicates that the photographs were taken on October 24, 2003. This office finds that the petitioner would not likely post that notice on that date, take pictures to demonstrate that it was posted, and then fail to provide the evidence with the petition. Further, even if the version shown was posted on the date indicated and remained posted for ten days it would not conform to the requirements of the regulations, as was noted above.

The regulations require that the notice be posted for at least ten consecutive days and evidence of such posting be submitted with the Application for Alien Employment Certification. As the job offer notice was posted subsequent to the filing of the Application for Alien Employment Certification and Form I-140, the petitioner has not complied with the instructions stipulated in the regulations. Consequently, the petition may not be approved. Under these circumstances this office need not reach the issue of whether the failure to submit the Form ETA 750 with the original petition, and its subsequent submission on appeal, is sufficient to satisfy the requirements of 20 C.F.R. §656.22(a) or, in itself, renders the petition unapprovable.

Because the petitioner did not post notice of the proffered position in accordance with the regulations the petition may not be approved. The record, however, raises additional issues that were not addressed in the decision of denial.

The petitioner's failure to identify the location at which the beneficiary would work raises yet another issue, whether the proffered wage is equal to the prevailing wage for the position at the location of employment.

The regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.² Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §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." See 20 C.F.R. § 656.20(c)(2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

¹ If the petitioner's employees are represented by collective bargaining the 20 C.F.R. §656.20(g)(1) requires that the notice of the proffered position be served on the employees' bargaining representative. This record contains no indication, however, that the petitioner's employees are represented in collective bargaining.

² Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e).

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b)(3), shall be determined as follows:

(2) 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;

The petitioner is obliged, therefore, to demonstrate that it is offering the beneficiary the predominant wage for registered nurses in the area of intended employment, rather than in the area of the petitioner's business office. Because this issue was not raised in the decision of denial it forms no part of the basis for today's decision. If the petitioner attempts to overcome today's decision with a motion, however, it should address this additional issue.

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.