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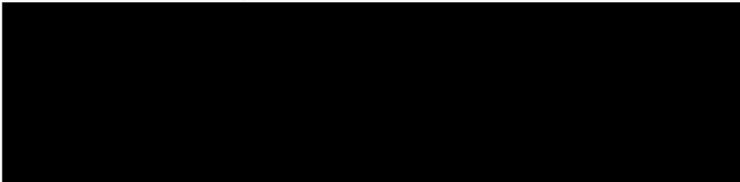
Office: CALIFORNIA SERVICE CENTER

Date: DEC 06 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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, Chief
Administrative Appeals Office

DISCUSSION: the Director, California Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the petition will be approved.

The petitioner is a healthcare business. 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(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that it had posted the notice of filing of the Application for Alien Employment Certification (ETA 750) in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8) and denied the petition accordingly. The director specifically stated that the petitioner had failed to post the correct wage "rate required under the statutory determination set by the Department of Labor (DOL) Employment Standards Administration."

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original July 14, 2005 denial, the single issue in this case is whether or not the petitioner has established that it posted the notice of filing of the ETA 750 in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8).

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. 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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on December 15, 2004. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment.

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. Pursuant to 20 C.F.R. § 656.22, 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).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The position will be in Benecio, California which is in Solano County. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, two copies of a website, www.flcdatacenter.com, showing the prevailing wage for the position of a level 1 registered nurse position in Napa, Solano, and Sonoma counties as of September 24, 2004 and as of August 11, 2005, a copy of a 2004 Labor Market information sheet for various counties in the state of California, and a copy of the petitioner's posting notice for the position sought. The record does not contain any other evidence relevant to the petitioner's posting notice for this beneficiary.

The two copies of the website, www.flcdatacenter.com, show the prevailing wage for a Registered Nurse I as \$18.33 per hour or \$38,126 per year as of September 24, 2004 and \$23.18 per hour or \$48,214 per year as of August 11, 2005. It is noted that the \$23.18 wage rate did not take effect until March 8, 2005, after the date of filing of the petition, December 15, 2004.

Under 20 C.F.R. § 656.20, the regulations require the following:

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).

On appeal, counsel states that the petitioner has established that it posted its notice of filing in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8) in that the notice was posted at the prevailing wage determined by DOL's wage survey not more than ten days prior to filing the petition and that the prevailing wage was not changed until May 23, 2005, after the filing of the petition.

The AAO agrees with counsel. The evidence in the record clearly shows that the notice of posting was posted from September 27, 2004 through October 8, 2004 with a salary of \$38,126.00 as stated on the Form ETA 750. In addition, the website, www.flcdatacenter.com, establishes that the wage rate in 2004 was \$18.33 per

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

hour or \$38,126 per year, and it did not change until March 8, 2005 to \$23.18 per hour or \$48,214 per year, after the filing of the petition on December 15, 2004. It is not logical for the director to expect that the petitioner would know what the prevailing wage would be after the filing of the petition. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

After a review of the record, it is concluded that the petitioner has established that it posted its notice of filing in compliance with 20 C.F.R. §§ 656.20(g)(1) and (g)(8).

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.