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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **JUL 25 2006**
WAC-03-248-50442

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

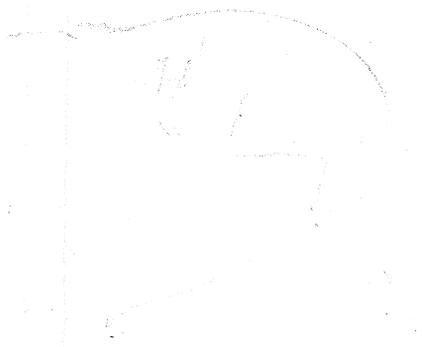
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

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 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 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).

The director determined that the petitioner had not established that notice of the filing of an application for alien employment certification was posted in accordance with the regulation at 20 C.F.R. § 656.20(g)(1). The director found that the petitioner omitted the rate of pay on the notice of filing sent to the bargaining representative. The director accordingly denied the petition.

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

As set forth in the director's September 23, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes that the petitioner complied with the notice requirements of the regulation at 20 C.F.R. § 656.20(g)(1).

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 August 29, 2003. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour. The ETA 750 does not state the total hours per week, therefore the annual rate of pay cannot be calculated.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits no brief and submits no additional evidence.

Relevant evidence in the record includes a copy of a letter dated May 29, 2003 from the petitioner's director of nurse recruitment to the Service Employees International Union. The record also includes documents pertaining to the beneficiary's qualifications and to the petitioner's ability to pay the proffered wage, but such documents are not relevant to the instant appeal.

On appeal, counsel states that the regulations do not require that notice to the bargaining representative be sent 10 days before the filing of the application. Counsel states that the regulations only require notification of the filing of the application and that consequently, the petitioner may be permitted to cure any omission in the original notice to the bargaining representative.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). However, the instant petition is governed by the prior regulations. The citations below are to the Department of Labor regulations as in effect prior to the PERM amendments.

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.

(c) An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:

(2) An employer seeking a Schedule A labor certification as a professional nurse (Sec. 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. Application for certification of employment as a professional nurse may be made only pursuant to this Sec. 656.22(c), and not pursuant to Sec. 656.21, 656.21a, or 656.23 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.

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

With the I-140 petition, the petitioner submitted a copy of a letter dated May 29, 2003 from its director of nurse recruiting to an official with the SEIU, which is the abbreviation for the Service Employees International Union. The letter states as follows:

This is notification of the filing of ten (10) "Applications for Alien Certification" Form ETA 750 by [the petitioner] for the following position:

REGISTERED NURSE: Provide skilled nursing care to patients at hospital. Duties include assessment, treatment and carrying out procedures pursuant to physician's orders. Administer medications as prescribed by physician. Administer intravenous medications; prepare equipment and aid physician during treatment and examination of patients. May rotate through various specialties. Must possess CGRNS certificate or successfully pass NCLEX exam. 36 hours per week

This notice is being provided as a result of filing an application for permanent alien labor certification. Any person may provide documentary evidence bearing on the application to

EDD Alien Labor Certification Office
P.O. Box 269070
Sacramento, CA 95826

Certifying officer
U.S. Department of Labor, ETA
P.O. Box 193767
San Francisco, CA 94119

(Letter from Director of Nurse Recruitment, May 29, 2003).

The May 29, 2003 letter fails to comply with the regulation at 20 C.F.R. § 656.20(g)(8), since it does not contain the rate of pay for the position of registered nurse.

In the notice of appeal, counsel states that the regulations do not require that notice to the bargaining representative be sent 10 days before the filing of the application. Counsel states that the regulations only require notification of the filing of the application and that consequently, the petitioner may be permitted to cure any omission in the original notice to the bargaining representative.

Notwithstanding counsel's assertions, 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). CIS cannot consider facts that come into being only subsequent to the filing of a petition. *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

In his decision, the director correctly found that the notice in the record was deficient in failing to include the rate of pay. The decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director to deny the petition.

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.