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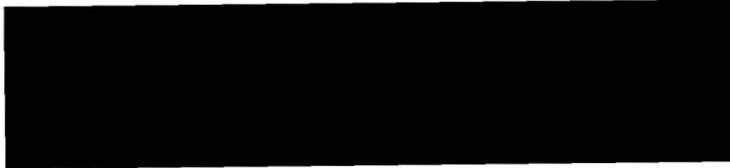
U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 096 52530 Office: CALIFORNIA SERVICE CENTER Date: **MAY 03 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:



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 sustained.

The petitioner is a skilled nursing facility. 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 evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made according to the regulation at 20 C.F.R. § 656.20(g)(1).

On appeal,¹ petitioner submits an explanatory letter 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 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. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 (Applications for labor certification for Schedule A occupations.) (b)(2) states that [the Application for Alien Employment Certification form shall include:] Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees.

The regulation at 20 C.F.R. § 656.20(g)(1) states that:

... 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:

¹ There is a second preference visa petition filed by the petitioner for the beneficiary (WAC 05 083 50206). The director has informed the petitioner in that petition review process that a decision is necessary on the subject petition since the visa benefit sought is the same in the second petition.

(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)(8) states that:

(8) 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, and the requirements of paragraphs of this section.

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

Any notice of the filing of an Application for Alien Employment Certification shall:

* * *

(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. § 656.22(c)(2) states:

An employer seeking a Schedule A labor certification as a professional nurse (§ 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.

In a memo dated December 20, 2002, the Office of Adjudications of the CIS issued a memo instructing Service Center to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

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 U.S. Citizenship and Immigration Services office. 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).

In this case, Form I-140 was dated January 26, 2004 and it was filed on February 23, 2004. On November 1, 2004, the Director, California Service Center, issued a decision in this matter. The director stated that the documentation submitted did not conform to the requirements of the notice of filing as recited above

The director found that the petitioner failed to comply with the regulation at 20 C.F.R. 656.20(g)(1) and (g)(8). The director found that petitioner failed to state in the notice of filing pertinent information needed for its approval. Specifically, the petitioner failed to note in the job posting detailed job description, rate of pay, job, and education requirements needed for the position, and, that any person may provide documentary evidence bearing on the application to the to the local state Employment service Office and/or the Regional Certifying Officer of the Department of Labor. The director found that the petition was not, therefore, approvable on the date of filing and denied the petition.

The regulation at 20 C.F.R. 656.22(e) states in 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 ...

(2) The Schedule A determination of INS [CIS] shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

On appeal, petitioner asserts as follows:

We respectfully request the Service to reopen/reconsider this motion because the Notice of Vacancy that was posted by Downey Community Health Center was inadvertently omitted as an attachment to the petition filed for the ... [the beneficiary]

The regulation at 20 CFR 656.20(g)(1)(i) and (ii) states:

(g)(1) 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).

According to petitioner's explanatory letter in this matter dated January 26, 2004, the petitioner stated that "concurrent with the filing of this application" we are posting a copy of the attached notice at our office for 10 consecutive days starting on January 26, 2004. The petitioner stated that in the letter that it does not have a bargaining agent.

The above notice provided with the letter did state the following required notices under the aforementioned regulations: the notice of filing the Application for Alien Certification; did state that applicants should report to the employer, not to the local Employment Service office; did 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; did state a detailed job description, rate of pay, job, and education requirements needed for the position and, did to 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 according to the regulation at 20 C.F.R. § 656.20(g)(1) and (g)(8).

This office finds the evidence sufficient to show that notice according to 20 CFR 656.20 was posted.

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 met that burden.

ORDER: The appeal is sustained.