

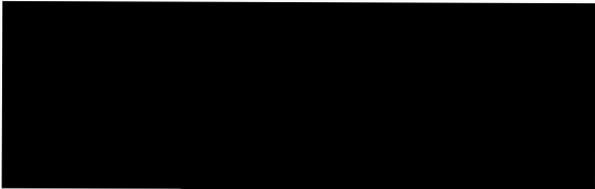
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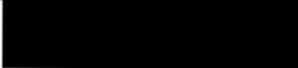
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: TEXAS SERVICE CENTER

Date: MAY 24 2006

SRC-06-057-51258

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 director of the Texas Service Center found no issues of ineligibility for the immigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) on appeal. The director's decision will be overturned. The petition will be remanded to the director.

The petitioner is an international nurse recruiter and also provides hospital management services. It seeks to sponsor the beneficiary 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 petition was eligible for approval after determining that posting notices submitted with the petition met the requirements of the applicable regulatory provision and internal policy guidance.

The petitioner did not submit a brief or evidence in connection with the certification.

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 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 13, 2005 with accompanying ETA Form 9089, Application for Permanent Employment Certification. 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 (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the abbreviation PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Thus, PERM applies to the instant case.

Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.5 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. § 656.5, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, (2) hold a full and unrestricted license to practice professional nursing in the [s]tate of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) administered by the National Council of State Boards of Nursing.

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 Citizenship and Immigration Services (CIS) 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. § 656.10(d).

The only issue the director raised in this case is whether or not the record of proceeding contains a posting notice that complies with regulatory requirements. The AAO does not concur with the director's decision.

Under 20 C.F.R. § 656.10(d)(1), the regulations require the following:

In applications filed under §§ 656.15 (*Schedule A*), 656.16 (Sheepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment) and 656.22 (*Schedule A*), the employer must give notice of the filing of the *Application for Permanent Employment Certification* and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

- (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. Documentation may consist of a copy of the letter and a copy of the *Application for Permanent Employment Certification* form that was sent to the bargaining representative.
- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must 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 locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). . . .

(Emphasis in italics in original. Emphasis with underline added).

Additionally, 20 C.F.R. § 656.20(d)(3) requires the following:

The notice of the filing of an *Application for Permanent Employment Certification* must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

With the initial petition, the petitioner submitted three posting notices. The director issued her decision on December 19, 2005 stating that there was no evidence of ineligibility since two of the posting notices were posted in the counties where it was "assumed" the beneficiary would perform the duties of the proffered position.

The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.¹

The visa petition reflects that the petitioner's address is in Brentwood, Tennessee, which according to http://www.naco.org/Template.cfm?Section=Find_a_County&Template=/cfiles/counties/citiescounty.cfm&countyid=47187 (accessed April 10, 2006), is located in Williamson County, Tennessee. The petitioner did not indicate that the petitioner would work for it. The petitioner's website states that it recruits and places nurses from around the world at hospitals in the United States. See <http://www.hccaintl.com/AboutUs.htm> (accessed April 10, 2006). However, a list of the petitioner's hospitals was not unavailable without a client user identification code and password. See <http://www.hccaintl.com/logon.asp> at "Current Hospitals" link (accessed April 10, 2006).

On the visa petition and Form 9089, the petitioner indicated that the beneficiary would work for "[v]arious HCCA International hospital clients in the United States" and "will be assigned to one of HCCA's client hospitals in Davidson County, TN," respectively. Also submitted with the petition were two unexecuted and incomplete contracts between the petitioner and the beneficiary indicating that she would be assigned to St. Thomas Hospital of Nashville, TN or Baptist Hospital in Nashville, TN. Correspondence from the petitioner noted that the beneficiary would be assigned to one of those two hospitals. Also submitted with the initial petition was a Prevailing Wage Request (PWR) form completed by the Department of Labor for a registered nurse position. The PWR form notes the petitioner and its address as the employer and for "Address Where Alien Will Work," the petitioner stated "Various HCCA Client Hospitals." The PWR form also wrote "HCCA Client Hospitals" in response to the question eliciting information about the county where the beneficiary would work. The PWR form was completed by DOL codifying the metropolitan statistical area (MSA) code as 5360. A review of DOL's Online Wage Library found at <http://www.flcdatabase.com/OesWizardStep2.aspx?stateName=Tennessee> (accessed April 10, 2006) reflects that both Williamson and Davidson counties are assigned 5360 as their MSA codes. However, both counties are separated in the database.

In the director's decision, she noted that the petitioner failed to indicate where the actual job opportunity would be located, however, she stated that it was "assumed any various contracting hospital" would be within Davidson County. The AAO does not concur because the record of proceeding does not contain evidence that the petitioner has relationships with Baptist or St. Thomas hospitals and because it failed to otherwise specifically indicate where the duties of the proffered position would occur. On its visa petition it stated any of its client hospitals in the United States instead of Davidson County, which directly conflicts with the Form 9089 and the petitioner's correspondence. Its website does not reflect its client relationships. The PWR form failed to delineate which specific county governed the location of the proffered position. And contrary to correspondence submitted with the petition, the record of proceeding does not contain any contracts, letters, or other evidence showing that the petitioner has undertaken a promise, obligation, right, or potential to place its recruited nurses at either hospital it claimed to have posted notices at. Even its contracts with the beneficiary were unexecuted and incomplete.

If the petitioner could establish the specific location of the proffered position, the posting notices it did submit otherwise conform to the content and procedural requirements of 20 C.F.R. §§ 656.10(d)(1) and 656.20(d)(3)

¹ See the 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).

since the prevailing wage rate is listed on the notices, the notices provide a description of the duties and basic requirements of the proffered position, the work site and location of posting is listed with contact information, a notice is provided that the posting was put up in connection with an application for lawful permanent residence with address information for DOL, and a signed certification that the notice was posted for 10 consecutive business days at least 30 days prior to filing the petition.

However, since the specific location of the proffered position has not been set forth with particularity nor supported with objective, independent corroborating evidence, the matter is being remanded to the director so that she may request any evidence she deems necessary to further analyze that factual issue and render her decision. The petitioner must establish that its job offer to the beneficiary is a realistic one. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The director was correct in her assessment that there must be evidence that the posting notice was posted at the location where the work will be performed as specifically set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Additionally, the AAO reviewed the other requirements under Schedule A applications under its *de novo* review authority² and determined that the petitioner has established its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) and that the beneficiary is qualified to perform the duties of the proffered position. However, the AAO finds that the record of proceeding fails to establish that the wage offered in this case meets the prevailing wage rate for nursing positions in accordance with 20 C.F.R. §§ 656.15 and 656.40 because the petitioner failed to specify the location where the work would be performed and to provide a PWR form that reflects a prevailing wage rate sought for a specific work location covering the county it clearly delineates for DOL and CIS as the location where the work will be performed. In this case, although the results were the same for Williamson and Davidson counties in Tennessee, the petitioner stated its “client hospitals” on the PWR form without any further clarification. Its address in Brentwood, TN could have led the DOL adjudicator to provide a prevailing wage rate for Williamson county instead of Davidson county (if that is where the work will be performed) and thus the PWR form would not be entirely accurate. The AAO further notes that the petitioner’s entire list of “client hospitals” is currently unknown but no relationship has been established with any hospital. Further, the AAO notes that the petitioner also retains a location in Baltimore, Maryland. Thus, the director should likewise clarify from the petitioner the specific location where the work will be performed and ensure the prevailing wage rate is being offered through any procedures available to her necessary to analyze that factual issue and render a decision.

Finally, the AAO also determines that it is unclear that the proffered position involves permanent, full-time employment prior to filing the visa petition. For ascertaining whether or not the petitioner is the beneficiary’s “actual employer,” the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means (1) [a] person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment,

² The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

and that proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. . . .

The petitioner's incomplete and unexecuted contracts between itself and the beneficiary reflect that it intends to provide all benefits, remain the beneficiary's actual employer, and assign the beneficiary for a term of 30 months to either Baptist or St. Thomas hospitals in Nashville, Tennessee.

Fixed-term contracts were considered in *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). In *Smith*, a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has demonstrated that it intends to be the beneficiary's actual employer but has not demonstrated a recurring demand for continuous outsourcing of its permanent healthcare workers to a specific employer source. Its unsigned and incomplete employment agreement does not state the beneficiary's name although it explicitly states that it would be the employee's employer. The petitioner intends to provide employment benefits, have the authority to hire and fire its employees, and control their full-time temporary work assignments. The petitioner indicated on Form I-140 that the position is a full-time, permanent position for a registered nurse and on other documents, such as the PWR form and posting notices, that the beneficiary would be employed 36-40 hours a week. However, as noted above, the record of proceeding does not contain a signed and completed contract between itself and the beneficiary or between the petitioner and third-party clients, particularly one for which it intends to assign the beneficiary. Thus, the petitioner has not provided evidence that it has met its past contractual obligations to place healthcare workers, primarily nurses, at healthcare facilities on demand. The petitioner has not demonstrated that there is ample demand for its supply of qualified registered nurses to a specific employer. Thus, the petitioner has failed to establish that the position offered is a permanent full-time position although it has demonstrated that it intends to be the actual employer for the beneficiary.

While the petitioner has established that the petitioner is the actual employer offering permanent full-time employment to the beneficiary, the petitioner failed to arrange permanent employment for the beneficiary prior to filing the visa petition. The petitioner's contract in the record of proceeding does not include the beneficiary and is unsigned, and thus is not entered into prior to filing the visa petition. Additionally, there is no contract at all with either hospital the petitioner intends to assign the beneficiary to. Thus, it is impossible for the beneficiary's employment to have been pre-arranged since no contract existed to delineate the scope of the proffered employment. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner has failed to establish that it offered pre-arranged, permanent, full-time employment prior to filing the visa petition.

Thus, the AAO overturns the director's decision that there is no evidence of ineligibility and remands the matter to the director to obtain additional evidence and information to ensure compliance with the regulatory requirements for Schedule A, Group I nurse petitions.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The director's decision on December 19, 2005 is overturned. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.