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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

AUG 06 2007

WAC 05 185 52026

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, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration.

The petitioner is a medical staffing company. 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. § 656.5, Schedule A, Group I. As required by statute, a Form 9089 Application for Permanent Employment Certification accompanied the petition. The director determined that the evidence submitted does not demonstrate that notice of filing the Application for Alien Certification was provided to the petitioner's employees or their bargaining representative as prescribed in 20 C.F.R. § 656.10(d) and did not, therefore, demonstrate that the instant petition is qualified for treatment under Schedule A as the petitioner claimed.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the proffered position in this case is qualified for Schedule A treatment.¹

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. § 656.5. 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. § 656.15(b)(2) states that an employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS (Department of Homeland Security) office that will include:

¹ If the petitioner were not claiming eligibility pursuant to Schedule A it could have, in the alternative, provided a Form 9089 Application for Permanent Employment Certification approved by the Department of Labor. In the instant case, as the record does not include such an approved labor certification, the petitioner must show that the proffered position is amenable to treatment pursuant to Schedule A.

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 regulation at 20 C.F.R. 656.10(d)(1) states, in pertinent part,

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders) and 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment) 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 shall be posted for at least 10 consecutive business 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 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).

With the petition counsel submitted a notice of the proffered position. The notice describes the proffered position in accordance with the requirements in the regulations. A certification at the bottom of that notice indicates that it was posted in the petitioner's human resources department in the same location where wage and hour notices are located from May 5, 2005 to May 31, 2005. This office notes that the posting period encompasses in excess of ten consecutive business days. That posting notice states that the wage offered is \$24.25 per hour.

The regulation at 20 C.F.R. § 656.10(d)(3) states,

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 local 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.

The regulation at 20 C.F.R. § 656.15 states that an employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS (Department of Homeland Security) office that will include:

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).

On April 1, 2006, the Director, California Service Center, denied the petition. The director noted that the record did not establish that the notice of the proffered position was filed in accordance with 20 C.F.R. § 656.10(d), as the posting period of the notice of the proffered position was not within 30 to 180 days prior to the filing of the Form I-140 petition. The director also stated that the wage proffered on the posting notice is less than the prevailing wage.

On appeal, counsel stated that Citizenship and Immigration Services (CIS) was obliged to issue a request for evidence in this matter rather than summarily deny the petition. Counsel also submitted another posting notice of the proffered position. The regulation at 8 C.F.R. § 103.2(b)(8) states that a petition shall be denied if there is evidence of ineligibility.

The notice of the proffered position submitted on appeal states that it was posted from April 26, 2005 to May 10, 2005. Those dates are between 30 and 180 days prior to June 17, 2005, when the petitioner filed the Form I-140 visa petition. The petitioner has overcome the finding that the notice was not posted between 30 and 180 days prior to the date the petition was filed.

That posting notice also reiterates that the wage offered is \$24.25. Counsel did not address the assertion that the wage stated on the notice of the proffered position is less than the prevailing wage.

The regulation at 20 C.F.R. § 656.10(c) requires 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 offered wage equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage which is applicable at the time the alien begins work or from the time the alien is admitted to take up certified employment." See 20 C.F.R. § 656.10(c)(1).

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. § 656.15(e).

The regulation at 20 C.F.R. § 656.40(b)(2) defines the prevailing wage rate in this case³ as follows:

If the job opportunity is not covered by a [Collective Bargaining Agreement], the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

The Department of Labor (DOL) maintains a website at www.ows.doleta.gov which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically.⁴ The prevailing wage rates shown include historical data.

The petitioner proposes to employ the beneficiary in Culver City, California, which is in Los Angeles County. The DOL site states that the prevailing wage during 2005 for a Level 1 registered nurse in Los Angeles County was \$23.26 per hour. The wage proffered in the instant case, \$24.25, exceeds the prevailing wage for the proffered position in the area of intended employment. The petitioner has overcome both bases of the decision of denial.

However, additional issues exist in the instant case that were not addressed in the decision of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part, that a petitioner under the instant visa category must demonstrate its ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements except that, if it employs 100 or more workers, “the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.”

In the instant case, the Form I-140 indicates that the petitioner employs 1,600 workers and the petitioner submitted a letter from its CFO dated October 11, 2005. The petitioner’s CFO reiterates that the petitioner employs 1,600 workers⁵ and states that the petitioner is able to pay the proffered wage. Because the petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements, it clearly relies on that letter to establish its ability to pay the proffered wage consistent with the requirements of 8 C.F.R. § 204.5(g)(2).

³ The regulation at 20 C.F.R. § 656.40(b)(1) provides that the prevailing wage would be determined otherwise if the proffered position were covered by a collective bargaining agreement. The record contains no evidence, however, that the proffered position is covered by a collective bargaining agreement.

⁴ The city, state, and county of the employment location must be known order to identify the prevailing wage rate.

⁵ The CFO notes that this number includes full-time, part-time, and per diem employees.

CIS computer records show that the petitioner has filed multiple appeals. Further, in one of the other cases it filed,⁶ the petitioner made apparently conflicting statements pertinent to the number of workers it employs. In the instant case the petitioner stated on the Form I-140, filed on June 17, 2005, the petitioner stated that it employs 1,600 workers. On the Form I-140 submitted in the other case, on December 14, 2004, the petitioner stated that it had 2,045 employees. The petitioner's 2002 annual report, submitted with the other petition, stated that the petitioner then had approximately 1,500 workers. In the appeal brief, submitted in the other matter during 2006, counsel stated that the petitioner has "over 1,100 employees," as did a March 21, 2006 letter from the petitioner's CFO and a CPA.

Those figures may be discrepant or, if the number of workers the petitioner employs fluctuates with such substantial variation, they may be reconcilable. In any event, the director would be justified, if he wished, in requesting documentary evidence to demonstrate the number of workers the petitioner has on its payroll.

Even if the petitioner does employ more than 100 workers, as it claims, whether to accept the CFO's letter as reliably demonstrating ability to pay the proffered wage is discretionary, as 8 C.F.R. § 204.5(g)(2) makes clear.⁷ Depending on the number of workers the petitioner employs, the number of petitions it has had pending or recently approved since the priority date of the instant petition, the aggregate amount of the proffered wage due to the beneficiaries of those petitions, and any number of other factors, the director may require the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements.

Further still, the regulation at 20 C.F.R. § 656.15(c)(2) states,

An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (§ 656.5(a)(2)) of this part) must file, as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this § 656.15(c) and not under § 656.17.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also demonstrate that, as of the filing date the beneficiary possessed the qualifications imposed by the regulations.

⁶ File A [REDACTED] WAC 05 054 51758 for beneficiary [REDACTED]

⁷ "(T)he director **may** accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." [Emphasis supplied.]

Here, the petition was filed on June 17, 2005. The record contains no indication that the beneficiary is licensed to practice nursing in California, the state of intended employment. The record does contain a CGFNS certificate issued to the beneficiary, but it was issued on June 24, 2005. The record does not presently demonstrate that the beneficiary was eligible for the proffered position on the priority date. The petition could have been denied on this additional basis.

The matter will be remanded for further proceedings. In addition to evidence pertinent to the number of workers the petitioner employs and whether the beneficiary had a license to practice nursing or a CGFNS certificate on the priority date, the director may require the petitioner to provide information pertinent to the number of alien worker petitions it had pending or recently approved on and since the priority date in this matter, including the wages proffered to the beneficiaries of those cases, the dispositions of those cases, the dates of those dispositions, the number of beneficiaries of approved petitions that the petitioner continues to employ, and any other information the director may find relevant to the approvability of the instant petition. The director may also request other evidence pertinent to the approvability of the instant 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 petition is remanded for further consideration and action in accordance with the foregoing.