



U.S. Citizenship
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Services

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AG



File: WAC-05-168-52901

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 23 2007**

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 (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a convalescent hospital, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3).

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b). *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) 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.

Based on 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i) an applicant for a Schedule A position would file Form I-140, “accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien’s occupation qualifies as a shortage occupation within the Department of Labor’s Labor Market Information Pilot Program.”¹ The priority date of any petition filed for classification under section 203(b) of the Act “shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer’s completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer’s employees as set forth in 20 C.F.R. § 656.10(d). Also, according to 20 C.F.R. § 656.15, 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 [s]tate of intended employment, or that the alien has passed the National Council Licensure Examination for Registered Nurses (“NCLEX-RN”).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (“PERM”), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner submitted the Application for Permanent Employment Certification, ETA 9089 with the I-140 Immigrant Petition on June 9, 2005, which is the priority date. The proffered wage as stated on Form ETA 9089 for the position of a nurse is \$25 per hour, 40 hours per week, which equates to an annual salary of \$52,000. On the I-140 petition filed, the petitioner listed the following information: established: May 1, 1979; gross annual income: "\$60K"; net annual income: "\$46K"; and current number of employees: 89.

On December 7, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence that it posted the position in accordance with 20 CFR § 656.10(d). The petitioner responded. On March 7, 2006, the director denied the petition on the basis that the petitioner failed to properly post the position in accordance with 20 CFR § 656.10(d)(1). Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

On appeal, counsel provided that, "within 20 days I will mail to you a reasoned explanation in this and request that the decision be reversed." Counsel attached an explanation, which further provided:

CIS in the last three lines of its decision states that 'the petitioner has not submitted documentation to show that the position qualifies for Schedule A certification, the petition is denied.' Petitioner contends and the beneficiary would like to say that the documentation provided with the I-140 and the ETA 9089 shall show beyond any doubt that the beneficiary is a professional nurse, has credentials, working experience and has been approved for a California Certified Nurse certification. Schedule A is a special pre-certified category and the group 1 to which the beneficiary belongs consists of professional nurses and physical therapists. Has [sic] the beneficiary not met the California State requirements, she would not have qualified to be approved for the "Registered Nurse" Category. Petitioner will in the next 20 days, mail a detailed explanation regarding the above, positing of the notice and the prevailing wage determination.

Counsel has misread the director's decision. The director determined that the petition did not meet Schedule A requirements, as the petitioner failed to provide a valid posting notice in accordance with 20 CFR § 656.10, not as a result of the beneficiary's qualifications,² or that a registered nurse position was not a Schedule A position. The petitioner here has not addressed the reasons stated for denial, the lack of a valid positing notice, and has not provided any additional evidence related to the denial.

² We note, however, that the petitioner has failed to demonstrate that the beneficiary's foreign education is the equivalent of an Associate's degree as required on Form 9089. We will address this issue below.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 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:

...

- (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 . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

...

- (3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) 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;
 - (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.

...

- (6) If an application is filed under the Schedule A procedures at § 656.15. . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing. *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).

To be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the June 9, 2005 filing, and have met the other requirements of 20 CFR § 656.10(d).

In response to the director's RFE, counsel submitted on behalf of the petitioner a photo dated January 6, 2006, which showed a banner attached to a fence and read "Now Hiring RN's - LVN's Full Time Positions." The petitioner did not submit any other evidence of posting.

The banner and photo submitted are deficient in meeting the requirements of 20 CFR § 656.10(d)(3) as they fail to: state that the notice is being provided in connection with an application for permanent alien labor certification for the relevant job opportunity; state that any person may provide documentary evidence related to the application to the DOL Certifying Officer; provide the address of the appropriate Certifying Officer; and be provided between 30 and 180 days before filing the application. Further, the banner and photo failed to contain a description of the job and the rate of pay.

Counsel provided no evidence on appeal to overcome this issue. Accordingly, the petition was properly denied and the appeal will be dismissed.

Further, although not raised in the director's denial, the petition should have been denied on other grounds as well. 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*, 229 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). 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The petitioner additionally failed to provide an attestation that the employer posted the position in any in-house media, as required by 20 CFR § 656.10(d)(1)(ii), and failed to provide evidence that it obtained a SWA wage determination prior to filing in accordance with 20 CFR § 656.40.

Further, a petitioner must establish that it can pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2): "evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements."

The petitioner provided no evidence of its ability to pay the beneficiary the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2).

Additionally, the petitioner failed to demonstrate that the beneficiary met all the requirements of Form ETA 9089. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The position as listed on Form ETA 9089 requires that the individual have an associate's degree in Nursing. The petitioner provided documentation to show that the beneficiary had an "Advanced Diploma in Health Education" from the University of Ibadan in Nigeria, but did not demonstrate that the beneficiary's foreign education was the equivalent of an Associate's degree as required on Form ETA 9089. Therefore, the petitioner did not demonstrate that the beneficiary met all of the requirements of the Form ETA 9089, and the petition should have been denied on this basis as well.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.