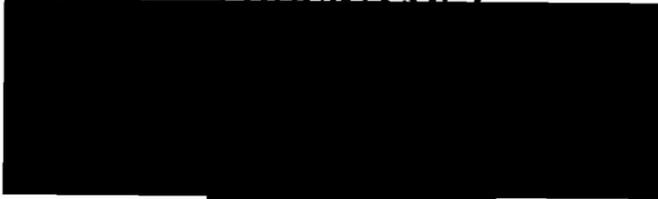


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FILE:



OFFICE: CALIFORNIA SERVICE CENTER

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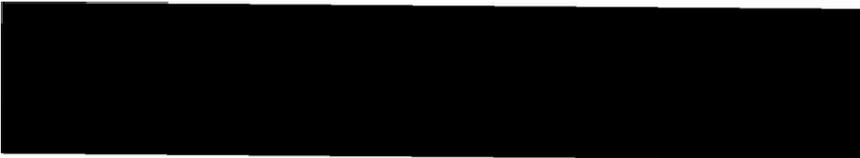
Petitioner:

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 employment-based immigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a hospital, seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted an Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the petitioner had failed to establish that the notice of filing the Application for Alien Certification had been properly provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated that the alien beneficiary qualifies for a blanket labor certification under Schedule A, Group 1.

Section 203(b)(3)(A)(i) of 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.

In this case, the petitioner has filed an I-140 for classification under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be employed as professional nurses are listed on Schedule A. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.10 with respect to 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.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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."

The regulation at 8 C.F.R. § 204.5(d) provides that "[T]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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)]."

The regulations in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A.¹ An employer

¹ 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). The PERM regulation became effective March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition was filed

must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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. § 656.20(g)(1). 20 C.F.R. § 656.22(a) and (b).

The procedure to post the availability of the job opportunity to interested U.S. workers is set forth at 20 C.F.R. § 656.20(g)(1). It provides:

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).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

In this case, the immigrant visa petition was filed on November 18, 2004. On June 27, 2005, the director issued a notice of intent to deny the petition based on the lack of evidence that the petitioner had properly posted the notice of the Form ETA-750, to the bargaining representative or had posted the job opportunity at the facility or location of the employment. The petitioner was afforded thirty days (thirty-three if mailed) to provide evidence to the director that a proper posting was accomplished. The director also informed the petitioner that it would accept a perfected notice of filing as of the date of response to the notice for requested evidence, pursuant to a Service Center operational memorandum, dated December 22, 2004, titled "Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations...", signed by Fujie O. Ohata. (hereinafter Ohata Memo).

prior to March 28, 2005 and is governed by the prior regulations. The Title 20 citations in this decision are to the Department of Labor regulations as in effect prior to the PERM amendments.

The director denied the petition on August 29, 2005. The director stated that no communication from the petitioner had been received. He concluded that the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA 750 and job opening as of the petition's priority date. He also stated that the petitioner had not established that it had the ability to pay the proffered salary.

On appeal, counsel asserts that the petitioner has shown that the beneficiary qualifies for a Schedule A, Group 1 designation. Counsel states that evidence of the posting of the certified position had been submitted to the director and that, as indicated on the accompanying postal delivery notice, it had been received by the director on August 15, 2005. Counsel also submits a copy of a notice of posting the job opportunity with the appeal. It shows that a notice of a registered nurse opening had been posted on July 1, 2005 and that the posting was "ongoing." Counsel also contends that the ability to pay the proffered wage should not be an issue as it was never brought up by the director in the past.

Relevant to the ability to pay the proposed wage offer, the AAO concurs with counsel and finds that ideally the director should have included his concerns in the notice of intent to deny the petition if the petitioner had failed to provide sufficient documentation.² It is observed that with the petition, the petitioner provided a letter from its human resources chief, as well as copies of its consolidated financial statements (2001-2003) related to its Form 10-K filing with the Securities and Exchange Commission (SEC). An annual report on Form 10-K provides a comprehensive summary of a publicly held company's business and financial condition and includes audited financial statements. Although some deadlines have been changed, Form 10-K was historically required to be filed with the SEC within 90 days after the end of the company's fiscal year. *See* (<http://www.sec.gov/answers/form10k.htm>). Both the letter and the financial statements suggest that the petitioner had the ability to pay the proffered wage set forth as \$26.94 per hour (annualized to \$56,035.20). Additionally, as the AAO concurs with the denial of the petition based on the lack of evidence demonstrating that the job opportunity had been properly posted, it is not necessary to remand the case on this issue.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility *at the time the application or petition was filed*. (Emphasis supplied).

Relevant to the director's notice of intent to deny and the petitioner's response, it is noted that although the record suggests that the director failed to send a copy of the notice of intent to deny directly to counsel as well as directly to the petitioner, there is no assertion that the notice was not received, merely that the response was appropriately sent and received by the director on August 15, 2005. The petitioner's response, however, was not timely as it was due by August 1, 2005, as set forth on the notice of intent to deny permitting the petitioner 33 days to provide a response.

² It is noted that the petitioner had the opportunity to submit additional documentation of the ability to pay on appeal and as such was not unduly harmed by the director's failure to include any concerns that he had regarding the petitioner's ability to pay in the notice of intent to deny, along with his primary basis of denial: the petitioner's failure to properly post notice.

As noted above, the petition must contain 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. § 656.20(g)(1). 20 C.F.R. § 656.22(a) and (b). It is further noted that the Ohata Memo mentioned in the director's notice of intent to deny is merely guidance³ and does not supersede existing regulatory provisions or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. The petitioner ultimately bears the burden of proof to establish eligibility for the visa classification sought. Here, the evidence submitted fails to establish that the job notice supporting the ETA 750 filed on behalf of this beneficiary was properly posted for ten consecutive days as of the priority date of November 18, 2004, rather than more than seven months later on July 1, 2005, as shown on the notice provided on appeal. 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). It cannot be concluded that the evidence of the posting of the certified position complies with the regulatory requirements set forth at 20 C.F.R. § 656.20(g)(1); 20 C.F.R. § 656.20(g)(8) and 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

Based on a review of the record, as well as the evidence and arguments offered on appeal, the AAO concludes that the director did not err in denying this petition based on the petitioner's failure to establish that it properly posted the position for a registered nurse under the blanket labor certification provisions of 20 C.F.R. § 656.10, Schedule A, Group I.

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.

³See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).