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U.S. Citizenship
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Services

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[Redacted]

File:

SRC-05-025-51335

Office: TEXAS SERVICE CENTER Date:

JUN 07 2007

In re:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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, Texas 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 medical center and teaching 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).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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). 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.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, **Schedule A, Group I**. **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.**

Based on 8 C.F.R. § 204.5(a)(2) 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.” 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. § 656.20(g)(3). 20 C.F.R. § 656.22(a) and (b). Also, according to 20 C.F.R. § 656.10, 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.¹

¹ A CIS Memo formerly allowed alternatively for the beneficiary to have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* Memorandum HQ 70/6.1.3 from Thomas Cook, Acting Assistant Commissioner of Adjudications, December 20, 2002. Ability to show passage of NCLEX-RN as an alternative to passage of CGFNS was incorporated at 20 C.F.R. § 656.15(c)(2), under the new labor certification system, the permanent foreign labor certification program (PERM), 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 Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on November 4, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a nurse is \$22.75 per hour, 25 hours per week, which equates to an annual salary of \$29,575, with a listed over-time rate of one and one-half the hourly rate. On the I-140 petition filed, the petitioner listed the following information: established: 1960; gross annual income: over \$700 million; net annual income: over \$400 million; and current number of employees: approximately 5,000.

On August 25, 2005, the director issued a Notice of Intent to Deny (“NOID”) for the petitioner to submit evidence that the petitioner’s common practice in the geographic area is for employees to work 25 hours per week, and that such practice would be considered full-time employment in accordance with 20 C.F.R. § 655.302, which provides that:

Full-time work means work where the nurse is regularly scheduled to work 40 hours or more per week, unless the facility documents as part of its attestation that it is common for the occupation at the facility or for the occupation in the geographic area for nurses to work fewer hours per week.

The petitioner responded and submitted a statement from a hospital recruiter that “in an effort to minimize patient interruption and promote more continuous patient care, nurses and other medical personnel work 12-hour shifts. Saint Francis offers both 24 and 36 hour/week full-time schedules.” The petitioner additionally sent job postings for nurse positions listed by other employers, which listed full time employment at 36 hours per week. Some postings listed that twelve-hour shifts were required for a 36 hour full-time position, another listed a position at 24 hours, which it indicated would be part-time employment.

Following consideration of the petitioner’s response, the director denied the petition on November 22, 2005 on the basis that the petitioner failed to demonstrate that the job offer was permanent full-time employment. In the director’s decision, the director considered Operating Instruction 204.4(c), which applies to third and sixth preference petitions:

(3) Certification based on Schedule A. If the supporting documents establish that the beneficiary is qualified in an occupation on the current Schedule A, the decision on the petition shall be made without referring Statement of Qualifications of Alien and Job Offer for Alien Employment Forms and supporting documents to the Administrator.

The adjudicating officer shall apply the regulations contained in 20 C.F.R. § 656 when deciding the validity of a Schedule A entitlement. Specifically, application of the definition of “employment” contained in 20 C.F.R. § 656.50 requires that permanent, full-time work be contained in the job offer for a favorable ruling under 20 C.F.R. § 656.10. “Full-time” will generally mean forty hours per week.

The director found that the petitioner failed to establish that the 25 hours listed on the job offer was common practice, and looked to the requirements as set forth in 20 C.F.R. § 656.10 to determine that the position was not full-time. The petitioner appealed and the matter is now before the AAO.

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 appeal².

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel provides that the petitioner’s offer should be considered full-time based on 20 C.F.R. § 655.302, as it is common for nurses to work fewer than 40 hours per week. In support, the petitioner submitted an affidavit from the petitioner’s nurse recruiter. The affidavit provided that the petitioner “routinely offers 24 hour work/week full-time and 36 hour/week full time employment, as is the standard in the industry due to a shortage of registered nurses.” Further, the nurse recruiter provides that both schedules “are considered full-time.” Additionally, she provides that the beneficiary was hired on February 14, 2005 as a registered nurse on a full-time 36 hour per week basis, and has worked 36 hours from her time of hire until the present (affidavit signed and dated January 3, 2006).

The petitioner also submitted one page from the company’s Human Resource Policy Manual, with an effective date of July 1, 2001. The statement provides that “all employees . . . will be employed under one of the following employment categories: Regular Full-Time, Regular Part-Time, Emergency Call Basis (ECB), or Temporary.” The manual then defines each work category. Regular Full-Time is defined as, “a full-time position consisting of a regular schedule of 36 hours or more per week.” This category also includes, “an employee hired to fill a specifically designated and authorized position as defined by the organization.” Regular Part-Time is defined as, “a part-time position consisting of a regular schedule of at least 16 hours per week and maximum of 35 hours per week.” ECB is defined as an “employee hired to work only when needed by [the petitioner].”

Additionally, the petitioner submitted a listing of hours available broken into four types: (1) the “Premium Weekend Plan,” where an individual works 36 hours including two twelve hour weekend shifts, and one additional shift during the week, eligible for full-time benefits; (2) the “24 Hour Weekend Plan,” which is described as “full time 24 hours every weekend,” with immediate full time benefits available; (3) ECB, for a minimum of 32 hours per month; and (4) Float Pools, full and part-time positions available.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Despite the nurse recruiter's statement, the petitioner's Human Resource Policy Manual clearly defines 24 hour employment as part-time. The job offer submitted with the petition lists 25 hours per week, which the petitioner has not demonstrated to be full-time. The petitioner did not demonstrate that other hospitals hired employees on a full-time basis based on 24 or 25 hours of employment, and submitted documentation that showed the opposite. The job postings submitted in response to the NOID do not demonstrate that 25 hour per week employment is considered full-time employment in the field of nursing. A petitioner must establish the 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). 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).

Further, although not raised in the director's decision, we find that the petitioner failed to properly post the position in compliance with 20 C.F.R. § 656.20(g)(ii). The petitioner also failed to document its ability to pay the proffered wage, and that the beneficiary met the requirements of the ETA 750 job offer. 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 is required to post the position in accordance with 20 C.F.R. § 656.20(g)(1)(ii), which provides:

“(1) in applications filed under Sec. 656.22 (Schedule A) . . . the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

...

(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 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.”

...

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

- (i) State that applicants should report to the employer, not to the local Employment Service office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien certification for the relevant job opportunity; and

- (iii) State any person may provide documentary evidence bearing on the application to the local Employment Service and/or the regional Certifying Officer of the Department of Labor

...

(8) If an application is filed under the Schedule A procedures at Sec. 656.22, . . . the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3)(ii) and (iii) of this section.

See also § 212 (a)(5)(A)(i) 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.

The petitioner submitted a job description, but nothing demonstrating that the description was posted for the required time period in accordance with 20 C.F.R. § 656.20(g)(1)(ii). The statute clearly requires that notice of filing a Schedule A application be posted prior to filing the I-140 and labor certification forms with CIS.³ No evidence of such posting was submitted, and the petition, therefore, fails to meet the filing requirements for a Schedule A position.

The director's decision provides, "the record contains the beneficiary's credentials, [and the] petitioner's affirmation of ability to pay the proffered wage." We disagree. We see no evidence in the record that the petitioner has stated that it can pay, or demonstrated that it can pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). The record before us does not contain any statement or documentation related to this issue. Accordingly, the petitioner has failed to demonstrate that it can pay the beneficiary the proffered wage.

Further, the ETA 750A job offer lists that the position requires a "Diploma in Nursing." The beneficiary lists on Form ETA 750B that she studied nursing at the Bahamas School of Nursing, Nassau, Bahamas, from October 1977⁴ to June 1981. Further, the beneficiary listed that she studied Biology, and Pre-Medicine at Oral Roberts University, Tulsa, Oklahoma, from January 2003 to "present" (date of signature, October 28, 2004). In support, the petitioner submitted a transcript from Oral Roberts University for her studies in Biology, and Pre-Medicine, a certificate of registration from the Commonwealth of Bahama Islands that the

³ A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁴ We note that this is likely a typo, and that it should read "1977."

beneficiary was admitted to be a Registered Nurse,⁵ a certificate for the completion of a course in skin and wound assessment, a certificate for completion of a physical assessment course, a certificate for completion of a Trauma Nursing Core Course, a certificate for completion of a course in Basic EKG Interpretation, a certificate for completing a critical care seminar, a certificate for completion of a maternal and child health/post natal care workshop, and several letters attesting to her prior work experience. The petitioner did not, however, submit the beneficiary's Nursing Diploma as required on the ETA 750. While the other evidence documents that the beneficiary has extensive nursing training, it does not document that she has the required Nursing Diploma. The petitioner has therefore failed to document that the beneficiary met the qualifications as listed on the Form ETA 750.

Based on the foregoing, the petitioner has failed to establish that the position offered is a full-time position, that the position was properly posted prior to filing the Schedule A application, that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment, and that the beneficiary meets the requirements of the ETA 750A. 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.

⁵ Presumably, this was issued to the beneficiary following receipt of her diploma, although it is not clear from the record that the Commonwealth of Bahama Islands requires a Nursing Diploma to obtain the title of "Registered Nurse."