



U.S. Citizenship
and Immigration
Services

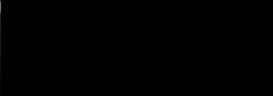
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: **NOV 14 2007**

SRC-00-178-51498

IN RE:

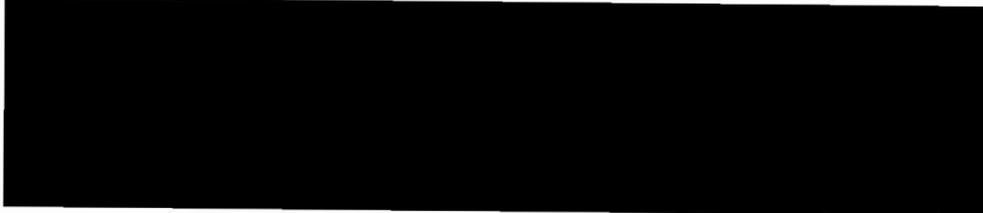
Petitioner:

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 preference visa petition was denied by Director, Texas Service Center and the matter is certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the petition will be denied.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a hospital. It 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 the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). As set forth in the director's January 8, 2001 denial, the director determined that the wage offered to the beneficiary did not meet the prevailing wage requirement and thus the petitioner failed to establish that the employment of the beneficiary would not adversely affect the wages and working conditions of workers in the United States similarly employed. The director denied the petition accordingly.

In response to the director's notice of certification, counsel submits a brief.

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.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in response to the director's notice of certification.

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 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). Here, the priority date is May 16, 2000.

The prior March 28, 2005 regulations set forth 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. An employer must apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification in duplicate with the appropriate Immigration and Naturalization Service [now CIS] office. The application must include evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form and evidence that notice of filing the application for Alien Employment Certification was provided 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).

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 Department of Labor (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).

The petitioner submitted a copy of the notice of posting with rate of pay. On August 16, 2000, the director issued a request for evidence (RFE) notifying the petitioner that the offered wage of \$13.85 per hour reflected on the Form ETA 750, Form I-140 and the notice of posting could not be considered as meeting the prevailing wage standard. In response to the director's RFE, the petitioner did not amend the offered wage to meet the prevailing wage standard but amended the educational requirements from 2 years of college and an associate degree in nursing to just a nursing diploma in nursing. The director found that the entry level wage for the Tampa/St. Petersburg/Clearwater MSA was \$16.45 per hour from the Occupational Employment Statistics (OES) website for the State of Florida; the wage offered the beneficiary on the Form ETA 750A, block 12 (\$13.85 per hour) is not within the 5% margin of this prevailing entry level wage for the area of intended employment that is allowed by law. The director also noted that the beneficiary is an experienced nurse, not an entry-level worker, and thus a Level I salary/wage is not appropriate for the beneficiary. Therefore, the director denied the petition.

CIS has the authority to review the petitioner's proffered wage for compliance with the DOL's prevailing wage rates. *See* 20 C.F.R. § 656.22(e). DOL maintains OES wage data which provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. Prior to March 8, 2005, the prevailing wage rates were broken down into two skill levels. According to General Administration Letter (GAL) 2-98 (DOL), Level I positions were:

beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practice, and programs.

According to GAL 2-98 (DOL), a Level II position included the following:

Level II employees are fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a Level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

Skill level determinations are based on the position requirements and general occupational standards delineated by the DOL. The minimum legal requirements for registered nurses (then professional nurses) were set forth by the regulations at 20 C.F.R. §§ 656.10(2) and 656.22(c)(2) as passing the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination or holding a full and unrestricted (permanent) license to practice nursing in the State of intended employment. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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). The Form ETA 750 filed with the instant petition requires 2 years of college studies, an associate degree in nursing and an associate degree in nursing, and CGFNS Certificate. The AAO finds that the petitioner did not require any credentials more than the minimum requirements set forth by the DOL's regulation. Therefore, the AAO concurs with counsel's argument and concludes that the proffered position resembles a Level I position because the proffered position of nurse will report to a supervisor and is an entry-level position not requiring any years of experience or training. The ground of the director's decision regarding the level of the proffered position is withdrawn.

The regulation requires that the job offer must clearly show that: "The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40." In reviewing the instant case, the AAO consulted with DOL and obtained its official OES 2000 Wage Data. The OES Data reports that for 2000, the year of the petition's priority date, the prevailing wage rate for a Level I professional nurse position (OES title code: 32502) in the Tampa-St. Petersburg-Clearwater, FL MSA (OES geographic code: 8280) is \$16.47 per hour (95% of which is \$15.65) and the Level II rate is \$21.15 per hour. The proffered wage for the position is \$13.85, which is less than the proffered wage. While DOL regulations allow for the proffered wage to come within 95% of the proffered wage, the instant petition's proffered wage does not fall within that threshold. See 20 C.F.R. § 656.40(a)(2)(i). Thus, the petitioner is not offering the prevailing wage rate and the petition cannot be approved for this reason. Therefore, AAO concurs with the director's determination that the petitioner failed to meet the prevailing wage standard with the offered wage of \$13.85 for the year of the priority date regardless of whether the position is classified as a Level I or II position.

After a complete review of the record of proceeding, the AAO finds that the director properly issued the RFE and determined that the petitioner failed to meet the prevailing wage standard. The director's January 8, 2001 decision must be affirmed.

ORDER: The director's January 8, 2001 decision is affirmed and the petition is denied.