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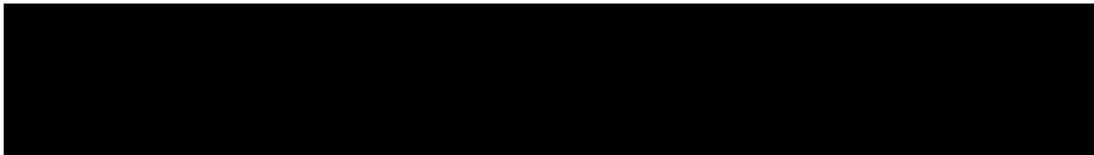
U.S. Department of Homeland Security  
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Washington, DC 20529



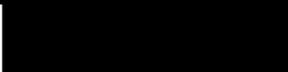
U.S. Citizenship  
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FILE:



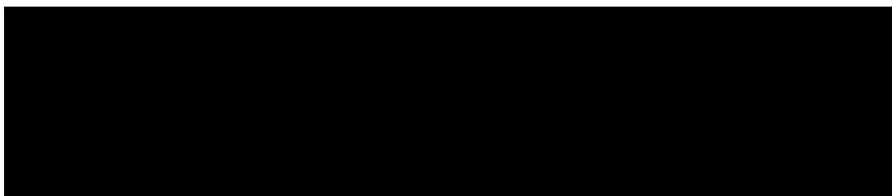
Office: VERMONT SERVICE CENTER

Date: JAN 02 2008

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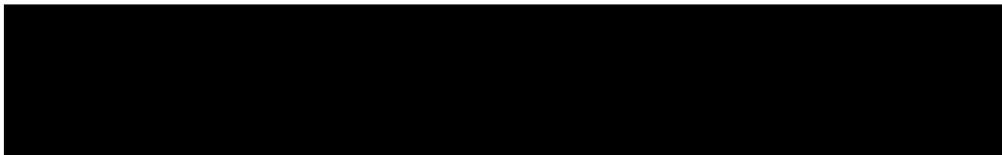
Petitioner:



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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an acute care medical facility/hospital. 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 ETA 750 Application for Alien Employment Certification accompanied the petition. The director determined that the petitioner failed to provide a valid prevailing wage determination (PWD) in support of the petition as required by 20 C.F.R. § 656.40, and denied the petition accordingly.

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.<sup>1</sup>

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.

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 granting 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 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. § 656.40 states, in pertinent part,

(a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA

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<sup>1</sup> If the petitioner were not claiming eligibility pursuant to Schedule A, it could have, in the alternative, provided a labor 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.

must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

The regulation at 20 C.F.R. § 656.40(c) states,

(c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by Sec. Sec. 656.17(d) or 656.21 within the validity period specified by the SWA.

As to petitions filed pursuant to Schedule A, the regulation at 20 C.F.R. § 656.15 states, in pertinent part,

(b) General documentation requirements. A Schedule A application must include:

(1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with §656.40 and § 656.41.

The petition in this matter was submitted on May 12, 2005. The determination date of the PWD submitted in support of the instant petition is August 26, 2005. On July 27, 2006, the Director, Vermont Service Center, denied the petition. The director found that the visa petition in this matter was filed before the PWD became valid, and that the petitioner had not, therefore, complied with the requirements of 20 C.F.R. § 656.40(c).

On appeal, counsel noted that the wage proffered in the instant case is the predominant wage as stated on the subsequently approved PWD. Counsel stated that, therefore, the petitioner is in substantial compliance with the law and to deny the petition constituted an abuse of discretion.

The revised version of the regulations became effective on March 28, 2005. The petition in this matter was filed on May 12, 2005, when the new regulatory language was in effect. The new regulatory language, therefore, governs this petition, and the petitioner is obliged to support the petition with a PWD valid on the date the petition was filed. The petitioner did not comply with 20 C.F.R. § 656.40(c), substantially or otherwise, and the petition may not be approved. The petition was correctly denied for this reason, which has not been overcome on appeal.

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.