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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital and medical center. 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. 656.10, Schedule A, Group I. The director determined that the notice of filing the Application for Alien Certification was not provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. 656.20(g)(1).

On appeal, counsel submits additional information and asserts that the petitioner complied with the regulatory requirements in posting the job notice. Counsel requests oral argument.

Counsel has not specifically articulated why oral argument is required. The issue in the instant case of whether the petitioner complied with the job posting requirements for a Schedule A, Group I occupation is a straightforward question and does not involve a unique factor or issue of law. Counsel's request for oral argument is denied.

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 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.

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 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 20 C.F.R. § 656.22 provides in pertinent part that an employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate Immigration and Naturalization Service office. The Application for Alien Employment Certification shall include:

> 1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
>
> 2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. 656.20(g)(3).

The regulation at 20 C.F.R. § 656.20(g)(1) further 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)

In this case, Form I-140 was filed on December 16, 2002 and did not include the evidence described in sub-paragraph (i) or (ii) above. On April 28, 2003, in addition to requesting evidence that the beneficiary possessed the necessary licensure credentials, the director requested that the petitioner submit a copy of the letter from the employer to the bargaining representative or a copy of the job offer notice that was posted at the facility or employment location.

In response, the petitioner provided a "job posting" signed by Susan Ebner, dated June 10, 2003. The posting stated that it was posted for a period of 10 consecutive days from "5-21-03 to 5-30-03."

The director denied the application based on the petitioner's failure to provide acceptable evidence that the position had been posted in accordance with 20 C.F.R. 656.20(g)(3). The director determined that the job posting had not occurred prior to the December 16, 2002, date of filing of the petition.

On appeal, counsel merely states that the job posting was posted in accordance with 20 C.F.R. § 656.20(g)(1)(ii). Counsel submits a copy of the regulations at 20 C.F.R. § 656.10 and a copy of *Cornejo-Barreto v. W.H. Seifert,* 218 F.3d 1004 (9th Cir. 2000), but submits no further assertion of their relevance to this determination.[1]

The AAO concurs with the director's conclusion. The regulation at 8 C.F.R. § 204.5(d) provides that the priority date of a petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation shall be the date that the completed signed petition is properly filed with CIS. In this case, that date is December 16, 2002. Thus the regulations authorize CIS to determine the petitioner's compliance with the procedures set forth for Schedule A, Group I occupations. *See* C.F.R. §§656.22(a) and (e), §656.20(c), and 8 C.F.R. §§204.5(a)(2).

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.*

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[1] *Cornejo-Barreto v. W.H. Seifert* is a 9th Circuit case involving a Mexican citizen's extradition to Mexico. The court held that APA review may be had in a case where a fugitive, claiming protection under the Torture Convention, petitions for judicial review of a agency decision to extradite him. It is not immediately apparent how this case's holding applies to the instant matter.

(Emphasis supplied); *See also, Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). In this case, the job posting notice was posted several months after the filing of the petition. The regulations require that the notice be posted for at least ten consecutive days. Evidence of such posting should be submitted with the Application for Alien Employment Certification establishing that an attempt to provide notice to any interested U.S. applicant has been completed. As the petitioner has not submitted evidence that the job offer posting had occurred as of the filing date of the Application for Alien Employment Certification and Form I-140, the petitioner has not established eligibility as of the priority date of the petition. It is further noted that 8 C.F.R. § 656.20(8) requires that a notice of the job filing under Schedule A procedures must contain a description of the job and the rate of pay. The job posting contained in this record fails to include the rate of pay. Consequently the petition may not be approved.

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.