U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 02 241 54743 Office: VERMONT SERVICE CENTER Date: MAR 28 2005

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 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 nursing care and rehabilitation 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)(3).

On appeal, counsel submits a brief.

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.

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 skilled worker (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. § 656.10. 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.

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 Bureau of Citizenship and Immigration Services 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).

In this case, Form I-140 was filed on July 12, 2002. On February 1, 2003, the director requested that the petitioner submit, *inter alia*, evidence that notice of the position had been posted in accordance with 20 C.F.R. § 656.20(g)(3).

In response, counsel submitted a document entitled "POSTING." That document gives various information about the proffered position as required by 20 C.F.R. § 656.20(g)(3).

Counsel also submitted a letter, dated April 8, 2003, in which he stated that the posting was placed on a bulletin board from January 10, 2003 to February 3, 2003, and that it remains posted there.

On June 6, 2003, the Director, Vermont Service Center, denied the petition. The director noted that the priority date in this matter is July 12, 2002, and that no evidence in the record indicates that the job notice was posted in accordance with 20 C.F.R. § 656.20(g)(3) prior to that date.

On appeal, counsel submits another copy of the posting. In his brief, counsel states that the posting was placed on the petitioner's bulletin board not only on the dates previously stated, but also from June 17, 2002 to July 22, 2002. Counsel states that the notice was therefore timely posted.

If the record were posted according to counsel's amended statement, it would, in fact, have been posted for at least ten days prior to the priority date. Counsel does not state, though, that he personally witnessed the posting, nor does he give any other basis for his assertion of location where the notice was posted and the dates during which it remained. In any event, the assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record still contains no evidence of the location the job notice was posted, the period during which it remained posted, or that it was posted at all. The evidence of record is insufficient to demonstrate that the notice was posted in accordance with 20 C.F.R. § 656.20(g)(3).

Further even if, on appeal, counsel had submitted competent evidence of the alleged posting, this office would not consider that evidence for any purpose. The February 1, 2003 Request for Evidence solicited evidence that the job notice was posted in accordance with 20 C.F.R. § 656.20(g)(3). The evidence submitted in response to that request was insufficient to show compliance.

Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, this Board will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obiagbena*, 19 I&N Dec. 533 (BIA 1988).

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.