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

U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 10 2005

EAC-03-206-51603

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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 hospital and medical center firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse.

The petitioner asserts that the beneficiary qualifies for 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).

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 or seasonal nature, for which qualified workers are not available in the United States.

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is July 3, 2003, which is the date the instant petition was received by CIS.

With the petition, the petitioner submitted supporting evidence. On the petition, the petitioner claimed to have been established in 1889, and to currently have 6,600 employees. In the item for the petitioner's gross annual income the petitioner wrote "not for profit." The item on the petition for the petitioner's net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 1, 2003, the director stated,

> Submit evidence that notice of filing the Application for Alien Employment Certification (Form EETA-750, parts A&B) was provided to the bargaining representative of the employees o to the employees. This is required by 20 CFR 656.20(g)(1) for persons seeking Schedule A labor certifications. The evidence to submit must be one of the following:
>
> 1.) A copy of the letter from the employer to the bargaining representative(s) [if any] of the 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.
>
> 2.) If there is no bargaining unit, copies of the job offer notice that was posted at the facility or employment location.

(RFE, August 1, 2003, at 1).

In response, counsel submitted a copy of a letter dated September 30, 2003 to an executive vice president of [redacted] from the petitioner's vice president for human resources. The petitioner's submission in response to the RFE was received by the director on October 24, 2003.

In a decision dated March 17, 2004 the director determined that the evidence did not establish that the job was posted ten days prior to filing the petition. The director also stated the following:

> The evidence of record does not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I (Title 20, code of Federal Regulations, part 656), and your petition is not otherwise supported by a certification by the Department of Labor, or evidence that the alien's occupation is within the Labor Market Information Pilot Program.

(Director's decision, March 17, 2004, at 2).

The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the beneficiary qualifies for an occupation listed in Schedule A, Group I, because she holds a registered nurse license from the State of New York. Counsel also states that notice of the job opportunity was provided to the appropriate bargaining unit representative by a letter dated June 23, 2003, more than ten days prior to the filing of the petition, but that a copy of that letter submitted to the director in response to the RFE bore the date September 30, 2003, which was a date automatically generated by the computer word processor used to prepare the copy, which was printed out on September 30, 2003. Counsel states that a copy of the letter with the proper date of June 23, 2003 is being submitted on appeal.

A petitioner must establish the elements for the approval of the petition at the priority date. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). However, the instant petition is governed by the prior regulations. The citations below are to the Department of Labor regulations as in effect prior to the PERM amendments.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

> (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
>
> (b) The Application . . . 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 § 656.20(g)(3) of this part.

(c) An employer seeking labor certification under Group I of Schedule A shall file, as part of its labor certification application, documentary evidence of the following:

. . .

(2) An employer seeking a Schedule A labor certification as a professional nurse (Sec. 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment. Application for certification of employment as a professional nurse may be made only pursuant to this Sec. 656.22(c), and not pursuant to Sec. Sec. 656.21, 656.21a, or 656.23 of this part.

The record contains a copy of a Registered Professional Nurse license issued to the beneficiary on October 24, 2002 by the [redacted] The license bears the signature of the President of the University and Commissioner of Education. The license also bears the signatures of the Deputy Commissioner, Office of the Professions and of the Executive Board Secretary, State Board for Nursing. The record also contains a copy of a New York State Registration Certificate of the beneficiary, showing her registration as a registered professional nurse for a registration period ending September 30, 2005. The registration certificate is not dated, but the record order in the instant petition indicates that the copy of the registration certificate was among the documents submitted initially with the petition, which therefore establishes that the registration certificate was issued prior to the date of the filing of the I-140 petition.

In her decision, the director did not specify the reason for her finding that the record did not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I. But in any event, the copies of the beneficiary's license and registration certificate discussed above are sufficient to establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I, as a registered nurse.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 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 regulation at 20 C.F.R. § 656.20(g)(3) states:

Any notice of the filing of an Application for Alien 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 labor certification for the relevant job opportunity; and
>
> (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

> If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay . . . .

In counsel's transmittal letter dated July 2, 2003 submitted with the I-140 petition, counsel lists nine documents or categories of documents. No letter to the bargaining unit representative is mentioned among the documents listed, and no such letter was submitted with the I-140 petition.

As noted above, in response to the RFE, the petitioner submitted a copy of a letter dated September 30, 2003 to an executive vice president of [redacted] from the petitioner's vice president for human resources. The content of that letter is sufficient to satisfy the notice requirements of the regulation at 20 C.F.R. § 656.20(g)(3) and (g)(8). The point at issue in the instant appeal concerns the date on which the letter was sent. The date of September 30, 2003 is after the priority date of July 3, 2003. Therefore if the September 30, 2003 date accurately reflects the date on which the letter was sent, the letter would fail to establish that proper notice was given to the appropriate bargaining unit prior to the filing of the I-140 petition.

In his brief, counsel states that the correct date of the letter sent to the bargaining unit representative was June 23, 2003. Counsel states that a copy of the letter was inadvertently omitted from the documents submitted initially with the I-140 petition on July 3, 2003. Counsel further states that in response to the RFE requesting proof of notice to the bargaining unit representative or proof of posting, the petitioner printed out another copy of the letter which had been sent on June 23, 2003, but that the word processing unit used to print out the copy automatically placed the date of September 30, 2003 on that copy. Counsel states that the erroneous date was overlooked by counsel's office when the copy was submitted to the director in response to the RFE.

On appeal counsel submits a copy of the letter to the bargaining unit representative with the date of June 23, 2003, along with another copy of the letter with the date of September 30, 2003. On appeal counsel also submits a copy of a transmittal letter dated September 30, 2003 to counsel's office from an administrative assistant of the petitioner. The transmittal letter states "Enclosed for your files is a copy of a letter to the bargaining representative from [the petitioner] in behalf of [the beneficiary's] immigration petition." (Letter from administrative assistant, September 30, 2003, at 1). The content of the transmittal letter from the administrative assistant is silent concerning the date when the letter was sent to the bargaining representative.

Counsel's explanations in his brief on the sequence of events described above are not fully supported by evidentiary documents. For example, no affidavit is submitted from the administrative assistant who counsel claims had filed a photocopy of the letter to the bargaining unit representative dated June 23, 2003 and who allegedly later printed another copy of that letter with the incorrect date of September 30, 2003. The

assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, the relevant facts include the following. No copy of a letter to the bargaining unit representative was among the documents submitted initially with the I-140 petition. Counsel's transmittal letter for the I-140 petition and supporting documents does not mention a copy of any letter to the bargaining unit representative. In response to the RFE, the petitioner submitted a copy of a letter to the bargaining unit representative dated September 30, 2003. After a denial of the petition, the petitioner's submitted for the first time on appeal a copy of a letter to the bargaining unit representative dated June 23, 2003.

In view of the foregoing facts, the evidence in the record is insufficient to establish that the petitioner sent a letter to the bargaining unit representative prior to the July 3, 2003 priority date.

In her decision, the director erred in finding that the evidence failed to establish that beneficiary qualifies for an occupation listed in Schedule A, Group I. The record order indicates that copies of the beneficiary's New York state license and registration certificate were submitted for the record prior to the director's decision. Those documents are sufficient to establish that the beneficiary qualifies for an occupation listed in Schedule A, Group I. Concerning the issue of notice to the bargaining unit representative, the director correctly found that the evidence then in the record failed to establish that such notice was given prior to the priority date in the instant petition.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail to overcome the decision of the director.

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.

This decision in the instant appeal is without prejudice to the filing of a new I-140 petition for the same beneficiary, supported by all required documentation.

ORDER: The appeal is dismissed.