U.S. Department of Homeland Security
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 2 6 2006

SRC-05-024-51497

In re: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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 employment-based preference visa petition was initially approved by the Acting Director, Texas Service Center ("director"). Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare provider. The petitioner seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification, *inter alia.*

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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 petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, "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).

Pursuant to regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The prearranged employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification 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). Also, according to 20 C.F.R. § 656.10, aliens who will be permanently employed as professional nurses must have (1) passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination, or (2) hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The petitioner must post the position pursuant to 20 C.F.R. § 656.20(g)(3), and 20 C.F.R. § 656.22(a) and (b). The notice must be clearly and visibly posted for ten consecutive calendar days, and must be posted where the employer's U.S. workers can readily read the posted notice. The notice must contain a description of the position, and the position's rate of pay. Further, the notice must state that it is provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity pursuant to with 20 C.F.R. § 656.20(g)(3)(ii); and 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. 20 C.F.R. § 656.20(g)(3)(iii).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on November 3, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a registered nurse is an hourly wage of $18.50, for an annual salary of $38,480 based on 40 hours per week, with a listed overtime rate of $27.75 per hour. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: 1917; gross annual income: not listed; net annual income: not listed; and current number of employees: 260.

On March 29, 2005, the director stamped the application approved. Subsequent to approval, on June 2, 2005, the director issued a NOIR, which allowed the petitioner 30 days to provide evidence that it had posted the position in compliance with Schedule A and Department of Labor provisions that require notice of the position be posted for ten consecutive days at the place of employment. *See* 20 C.F.R. § 656.20(g)(3).

On July 21, 2005, the director issued a Notice of Revocation[1] based on the petitioner's failure to timely respond to the NOIR, and provide evidence that the position was posted in compliance with 20 C.F.R. § 656.20(g)(3), and 20 C.F.R. § 656.22(a) and (b). The petitioner appealed and the matter is now before the AAO.

On appeal, the petitioner contends that it submitted a response to the NOIR, which was sent on June 28, 2005 by U.S. Postal Express to the CIS post office box address. In support, the petitioner provides a copy of the U.S. Post Office Express envelope mailer. The record of proceeding before us does not contain the petitioner's response or any evidence that CIS received the petitioner's response.[2] However, we shall examine the documentation that the petitioner submitted on appeal related to the issue of posting.

The petitioner submitted the following documentation on appeal:

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[1] Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

[2] We note that the record of proceeding does clearly contain the stamped envelope related to the appeal that the petitioner filed, but not the envelope or any evidence that the petitioner submitted any response to the NOIR.

1. Notice listed "Job Posting: February 2004." Positions listed included registered nurses; MHT; and Nurse Manager.

2. Notice listed "Job Posting: January 2004." Positions listed included registered nurses; MHT; and Recreation Therapist.

3. Notice listed "Job Posting: December 2003." Positions listed included registered nurses; MHT; and Marketing Account Manager.

The notices of job postings submitted do not comply with 20 C.F.R. § 656.20(g)(3), and 20 C.F.R. § 656.22(a) and (b), as the posting do not contain information related to the position's job duties, the position's rate of pay, and critically does not contain the language that the posting was related to an application for permanent alien labor certification. The notices did not state that individuals may provide documentary evidence bearing on the Schedule A labor certification application to the appropriate DOL Certifying Officer holding jurisdiction over the location where the alien beneficiary will be physically working.

4. Ad placed in the Dallas Morning News for March 21, 2004, listing positions open for a Nurse Manager; RN; MHT; Licensed Masters Level Therapist; PRN Recreation Therapist; and PRN Switchboard Operator. The ad contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

5. Copy of ad placed in the Dallas Morning News on January 25, 2004 listing positions open for a Recreation Therapist, RN, MHT; PRN UR Coordinator. The ad contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

6. Copy of ad placed in the Dallas Morning News on December 14, 2003 listing positions open for a RN, MHT; Floor Technician; PRN Housekeeper; Security Guard. The ad contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

7. Copy of ad placed in the Dallas Morning News on December 7, 2003 listing positions open for a RN, MHT – PRN; Floor Technician PRN. The ad contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

The ads above do not meet the requirements of 20 C.F.R. § 656.20(g)(3), and 20 C.F.R. § 656.22(a). The newspaper ads were not internally posted for ten days. Further, the ads do not identify job duties, do not contain pay information, and do not provide that any person may provide documentary evidence to the appropriate DOL Certifying Officer in response to the posting. Prior advertisement is not required for a Schedule A position. However, the abbreviation of the recruitment process does not negate the requirement that the position be posted internally for ten days.

8. A listing of ads to be placed for Sunday, February 8, 2004, "we have immediate openings for the following positions: FT Masters Level Therapist; FT Recreation Therapist; FT Admissions Counselor; RN; MHT; PRN; FT Floor Technician." The ad contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

9. A listing of ads to be placed for Sunday, December 7, 2003, "we have immediate openings for the following positions: Marketing Account Manager; RN; MHT-PRN; Floor Technician." The ad

contains that the employer offers 401K and medical/dental/life insurance, and an address where resumes may be faxed.

The ad listings are similarly deficient in that they do not meet the requirements of the in-house posting for ten days. The ad listings do not identify job duties, do not contain pay information, and do not provide that any person may provide documentary evidence to the appropriate DOL Certifying Officer in response to the posting.

None of the ads or postings submitted fit the criteria specified to be compliant with posting notice regulations as set forth in 20 C.F.R. § 656.20(g)(3), and amount to good and sufficient cause for the director to properly revoke the petitioner's approval. As the petitioner has failed to provide evidence that it has complied with posting notice requirements, the director properly revoked the petition's approval. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.