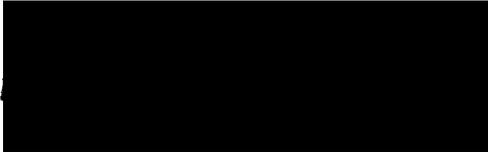


U.S. Citizenship
and Immigration
Services



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prevent clearly unwarranted
invasion of personal privacy**

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FILE: EAC-04-004-51708 Office: VERMONT SERVICE CENTER

Date: AUG 30 2005

IN RE: 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, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a nursing services agency that places registered nurses in hospitals and other institutions in the New York City metropolitan area. The petitioner states it was established in 1998, has 500 employees, and has a gross annual income of \$4,151,000 on its visa petition. It seeks to sponsor the beneficiary 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 denied the petition after determining that the mandatory notice of the filing of the Application for Alien Employment Certification was not properly posted. Thus, the director determined that the record did not establish that the beneficiary qualified for an occupation listed in Schedule A, Group I. at the time of the petition's filing.

On appeal, counsel submits a brief and a second posting notice.

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 filed an Immigrant Petition for Alien Worker (Form I-140) for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse on March 15, 2002. Aliens who will be permanently employed as professional nurses are listed on Schedule A as occupations set forth at 20 C.F.R. § 656.10 for 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. 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 [s]tate of intended employment.

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 Citizenship and Immigration Services (CIS) 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).

Under 20 C.F.R. § 656.20, the regulations require the following:

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).

With the initial petition, the petitioner submitted a posting notice entitled "Notice of Filing I-140 Visa Petition" that stated the notice was being posted pursuant to 20 C.F.R. [§] 656.20 (g). The notice further stated the wage for the position was \$40,000, and that the position would require the performance of all duties of a registered nurse. The notice finally stated that any person could provide documentary evidence bearing on the application, to the Bureau of Citizenship and Immigration Services, Vermont Service Center, [REDACTED] Vermont. In a cover letter on its letterhead dated August 20, 2003, the petitioner stated that the notice has been posted for ten consecutive days commencing on August 5, and ending on August 19, 2003. The petitioner identified the locations of the notice as the left and right side of a bulletin board.

On November 18, 2003, the director sent the petitioner a request for further evidence that primarily asked for further documentation of the petitioner's ability to pay the proffered wage. In particular, the director requested further evidence of the petitioner's ability to pay the proffered wage as of October 3, 2003, the date of filing, and continuing to the present. The director stated that the petitioner could submit a statement from a financial officer from the organization that established its ability to pay the offered wage, or could submit the petitioner's 2002 federal income tax return with all schedules and attachments. The director also requested further information with regard to the proffered job, and whether it was a newly created position. The director also stated that the financial statements submitted by the petitioner for the years ending on December 31, 2001 and December 31, 2002, were viewed as a compilation based primarily on the representations of the petitioner's management and that only limited reliance could be placed on the information presented in the petitioner's financial statement.

In response, the petitioner submitted its Form 1120S for 2002 that showed a net income of \$239,626.

On March 9, 2004, the director denied the petition. The director stated that the petitioner had submitted a posting notice that did not provide the name of the employer and did not state whom to contact if interested in the position. Thus, based on the deficient posting notice, the director determined that the petitioner did not establish that the beneficiary qualified for an occupation listed in Schedule A, Group I, and that the petitioner's petition was not otherwise supported by a certification by the Department of Labor, or by evidence that the alien's occupation was within the Labor Market Information Program.

On appeal, counsel states that the director, in the initial request of further evidence, did not refer to any clarification regarding the posting of the notice of the labor application. Counsel states that the director's request for further evidence dealt exclusively with the petitioner's financial information. Counsel submits a second posting notice and states the document is pursuant to Citizenship and Immigration (CIS) requirements. Counsel requests that the matter be reopened and the petitioner be approved based upon the new posting notice given that the director in his request for

further evidence failed to raise the issue of the notice posting. Counsel finally states: "It has always been the policy and perhaps the regulations of CIS/INS not to deny a petition where request for evidence to cure the lacking factor has been issued."

The posting notice submitted on appeal states the job description for the position, a revised salary of \$48,880, the work schedule of forty hours a week, and the license and certification requirements of the position, namely CGFNS certification or a valid New York State registered professional nurse license or passage of NCLEX.

The letter further states that qualified applicants can contact the petitioner, providing the petitioner's address, and that the notice is being provided as a result of filing an employment third preference I-140 petition for the position of registered nurse. Finally the posting notice states that any person may provide documentary evidence bearing on the application to the New York State Employment Certification office (address provided) and/or the New York Regional Certifying Office (address provided.)

The cover letter on the petitioner's letterhead, which accompanies the notice, is signed by the petitioner, and is dated March 29, 2004. The letter states that the notice has been posted for ten consecutive days commencing on March 19, 2004, and ending March 28, 2004, at two locations. The first location is identified as bulletin board, right side, and the second location is identified as bulletin board, left side.

Upon review of the record, the posting notice initially submitted with the petition and the second posting notice that counsel submits on appeal are both deficient. There is no documentation on either letter as to where the notice was posted, which does not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the facility or location of the beneficiary's employment. In the letter of employment, the petitioner only indicated that the beneficiary would be placed with the petitioner's major clients without identifying an exact location or locations with greater specificity. Neither posting provides any more specific information. The petitioner needs to prove it posted the notice where the beneficiary would work, and make it clear where that location will actually be.¹ Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If, as it appears, the petitioner merely posted the notice on its bulletin board at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.²

Furthermore, the cover letter for the notice submitted on appeal indicates that the posting of this notice was in August 2004. The initial I-140 petition was filed with the CIS on October 3, 2003. The posting of a job notice would have to be accomplished prior to the 2003 filing date of the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

¹ Although not addressed by the director, it is noted that since the actual location of employment is unknown, CIS cannot determine whether or not the salaries identified on the posting notices, namely, \$40,000 or \$48,880, represent the prevailing wage.

² See the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); see also Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

With regard to counsel's assertion that it has always been the policy and perhaps the regulations of CIS not to deny a petition where a request for evidence to cure the lacking factor has been issued, this statement is without merit. Even if counsel meant to say that CIS would not deny a petition where a request for evidence to remedy the missing information was not issued, this is neither regulatory guidance nor CIS internal policy. (Emphasis added.) When a petition does not meet the requirement for its approval, CIS may deny the petition with or without an RFE.

With regard to the instant petition, 20 C.F.R. § 656.20(g)(3),³ states in part, that any notice of the filing of an Application for Alien Employment Certification for a Schedule A occupation 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 initial posting notice submitted by the petitioner does not meet any of the three requirements outlined above. The notice does not indicate the name of any employer to whom the applicant for the position should report, and the notice states that the notice is being provided as a result of the filing and I-140 petition and an application for permanent resident status for a nurse, rather than an application for permanent alien labor certification for a nurse position. Finally the posting notice directs individuals who want to provide documentary evidence with regard to the application, to CIS offices in Burlington, Vermont rather than to the local employment service office or regional certifying officer of the Department of Labor, as stipulated in the regulations. While the second posting notice complies more fully with the regulatory guidance provided in 20 C.F.R. § 656.20(g)(3)(i),(ii), and (iii), as stated previously, it was not posted prior to the submission of the I-140 petition. *Matter of Katigbak*.

Therefore the director's decision with regard to the posting notice shall stand, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.

³ As in effect prior to March 28, 2005.