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U.S. Citizenship
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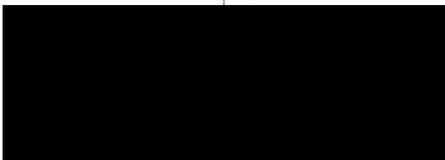
OFFICE: CALIFORNIA SERVICE CENTER

Date JAN 04 2005

IN RE: Petitioner: [REDACTED]
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:



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.

for Michael Valdez

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, a medical hospital, seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted an Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that petitioner had failed to establish that the notice of filing the Application for Alien Certification had been properly 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 additional evidence and asserts that the petitioner has demonstrated that the alien beneficiary qualifies for a blanket labor certification under Schedule A, Group I.

Section 203(b)(3)(A)(i) of 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.

In this case, the petitioner has filed an 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 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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 regulation at 8 C.F.R. § 204.5(d) provides that "[T]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation with the Department of Labor's Labor Market Information Pilot Program 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)]."

The regulations in Title 20 of the Code of Federal Regulations also provide specific guidance relevant to the requirements that an employer must follow in seeking certification under Group I of Schedule A. An employer must file an application for a Schedule A labor certification with CIS. It must include evidence of prearranged employment for the alien beneficiary signified 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).

The procedure to post the availability of the job opportunity to interested U.S. workers is set forth at 20 C.F.R. § 656.20(g)(1). It 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).

Under the regulation, the notice must be posted at the facility or location of the beneficiary's employment. The AAO holds this to mean the place of physical employment. If an application is filed under the Schedule A procedures, the notice must contain a description of the job and rate of pay, must state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, and must state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer. 20 C.F.R. § 656.20(g)(8); 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

In this case, the immigrant visa petition was filed on June 9, 2003. The ETA-750, accompanying the petition, did not designate a wage for the certified position, although in Part 5 of the preference petition, the petitioner stated that the beneficiary would receive \$2,000 per week, which amounts to \$50.00 per hour.

On December 17, 2003, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director instructed the petitioner to submit evidence that it had properly provided a notice of filing Form ETA-750, to the bargaining representative or had posted the job opportunity at the facility or location of the employment. The director further requested that the petitioner complete the omitted areas on the attached copy of the ETA 750 and resubmit the copy.

In response, the petitioner, through counsel, submitted a copy of the notice of the posting of the certified position. Counsel's transmittal letter indicates that it was posted at the petitioner's place of business. The job posting indicates that it was posted from January 29, 2004 until February 11, 2004. It also reflects that the proffered salary will be \$27.00 per hour. In the accompanying ETA 750, however, the proffered salary is stated as \$30.00 per hour.

The director denied the petition. The director concluded that the petitioner had failed to provide satisfactory evidence that it had properly posted the notice of filing of the ETA 750 and job opening as of the petition's

priority date.

On appeal, counsel asserts that the petitioner has shown that the beneficiary qualifies for a Schedule A, Group 1 designation because the petitioner has been filing job postings for a considerable period prior to the filing of the preference petition in this case. Counsel submits copies of what appear to be job posting printouts for registered nurse positions reflecting various dates from February 2002 to August 2003. Counsel also provides two copies of newspaper advertisements for available nursing opportunities at the petitioning business. The typed dates and names suggest that these advertisements ran in the *Fresno Bee* and the *San Luis Obispo Tribune* on April 13, 2003.

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*. (Emphasis supplied).

In this case, as noted above, the petition must contain 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).

The evidence submitted to the underlying record fails to establish that the job notice was properly posted for ten consecutive days as of the priority date of June 9, 2003, rather than more than six months later in 2004. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner also provided no evidence whether a bargaining representative was involved. Further, as the ETA 750A that was submitted in response to the director's request for evidence indicates, the proffered wage is supposed to be \$30.00 per hour, not \$27.00 per hour as indicated on the job notice that was posted in 2004, or the \$2,000 per week as suggested by the visa petition. The petitioner failed to clarify these discrepancies. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel's assertions and evidence provided on appeal are not persuasive. The copies of job posting printouts do not identify themselves as being jobs available at the petitioning business, do not state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, do not state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer, and do not contain any reference to a full-time job as a registered nurse that pays \$30.00 per hour as set forth in the ETA 750A submitted by the petitioner. The newspaper advertisements are similarly flawed. They advertise "nursing opportunities," rather than the certified registered nurse position. They also do not state that the notice is being provided as a result of a filing of an application for a permanent alien labor certification, do not state that any person may provide documentary evidence relevant to the application to the local DOL employment service office and/or to the regional DOL certifying officer, and do not confirm that they were posted at the employer's facility or location of employment for ten consecutive days. It is further noted that one advertisement contains no reference to a rate of pay and the other advertisement has a hand-written notation, running outside the margin, which states, "starting salary 27.00p.h." It cannot be concluded that this evidence, in any way, credibly

complies with the regulatory requirements set forth at 20 C.F.R. § 656.20(g)(1); 20 C.F.R. § 656.20(g)(8) and 20 C.F.R. § 656.20(g)(3)(ii) and (iii).

Based on a review of the record, as well as the evidence and arguments offered on appeal, the AAO concludes that the director did not err in denying this petition based on the petitioner's failure to credibly establish that it properly posted the position for a registered nurse.

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.