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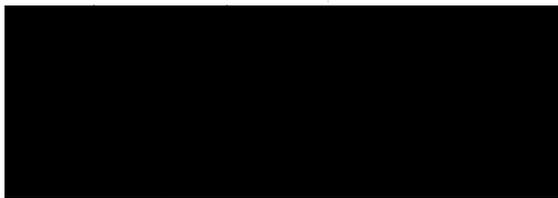
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
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U.S. Citizenship  
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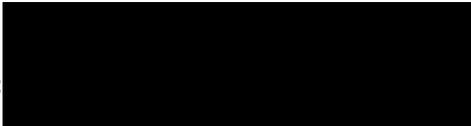


FILE: EAC 03 221 55201

Office: VERMONT SERVICE CENTER

Date: JAN 04 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*

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner 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. The petitioner is a hospital health care staffing firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner states that the beneficiary qualifies for a blanket labor 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). The director determined that the petitioner had not established that the alien beneficiary possesses the credentials required to be eligible for blanket labor certification.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that it has demonstrated that the beneficiary possesses the requisite credentials to be eligible for classification under the blanket labor certification provisions of 20 C.F.R. § 656.10, Schedule A, Group 1.

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.

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)]." In this case, the priority date is July 23, 2003.

The petitioner has filed an I-140 for the alien's 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.

Additionally, according to 20 C.F.R. § 656.22(c), 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 (permanent) license to practice professional nursing in the state of intended employment. A third criteria has also been added. On October 2, 2002, the Department of Labor advised the Service, now CIS, that because many states accept passage of the National Council Licensure Examination for Registered Nurses (NCLEX-RN), a state licensing examination, it planned to pursue conforming amendments to the regulations at 20 C.F.R. 656.22(C)(2) and advised the Service that it may favorably consider an I-140 petition for a foreign nurse for Schedule A labor certification if a certified copy of a letter from the state of intended employment is submitted showing that the alien has passed the NCLEX-RN and is eligible to be issued a license to practice nursing in that state. *See* Memorandum from

Thomas Cook, Acting Associate Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards* (December 20, 2002).

The 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).

The ETA 750A accompanying the petition states that the position of registered nurse pays \$20.00 per hour, requires two years of college culminating in an associate or baccalaureate degree. It also indicates that the petitioner's address is in Baltimore, Maryland. In response to Item 7, requiring an address where the alien beneficiary's services will be rendered, it states, "[v]arious HCCA International hospital clients in the United States."

With the petition, the petitioner initially submitted an unexecuted copy of a letter of intent between the petitioner listing a Nashville, Tennessee address, and [REDACTED] of Marriottsville, Maryland. It

projected that the petitioner would supply [REDACTED] with fifty registered nurses, but this number would be subject to revision within a range of 25%. The letter of intent does not name any specific nurse. The petitioner also supplied a copy of an unexecuted employment agreement and blank addendum referencing itself as the "employer," giving the Nashville address and an unnamed alien as the "employee." Counsel's transmittal letter, submitted with these documents, states that the petitioner is located in both Baltimore and Nashville. Counsel refers to the unexecuted letter of intent as a sample of the agreement between the petitioner and the facility at which the nurse will be working and the employer/employee agreement as a sample contract.

With the petition, the petitioner also submitted copies of various corporate documents filed with the state of Tennessee, as well as evidence related to its ability to pay the proffered wage. The petitioner further provided a copy of a "[n]otice of job opportunity" for registered nurses, which indicates that it was posted from June 16, 2003 until July 1, 2003. Finally, the petitioner provided copies of the beneficiary's academic and professional credentials from the Philippines, including a copy of a document indicating that the beneficiary has been licensed as a registered nurse by the state of Georgia.

On October 20, 2003, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director advised the petitioner that the evidence only showed that the beneficiary was licensed in Georgia. The director instructed the petitioner to provide evidence that the beneficiary was licensed to practice nursing in Maryland or to provide evidence that the beneficiary had passed the CGFNS Examination or to submit a certified copy of a letter from the state of intended employment, which confirms that the beneficiary has passed the NCLEX-RN and is eligible to be issued a license to practice nursing in that state.

In response, counsel submitted a copy of an undated letter indicating that the beneficiary was an applicant for licensure in Georgia and had passed the NCLEX-RN given on February 3, 2003.

In denying the petition, the director found that the ETA 750 reflected that the beneficiary would be employed in Maryland. The director noted that the evidence did not indicate that the beneficiary was already licensed as a registered nurse in Maryland. As the petitioner had not submitted evidence in the form of a letter from the state of intended employment confirming not only passage of the NCLEX-RN, but also the beneficiary's eligibility to be licensed in Maryland, the director denied the petition.

On appeal, counsel initially asserts that the beneficiary does not need a letter from the Maryland licensing board confirming her eligibility to practice there, because she has already passed the NCLEX-RN and has fulfilled the other applicable requirements such as her registered nursing education and test of English competency needed for licensure in Maryland. Counsel provides a copy of a website printout of the Maryland Board of Nursing criteria for licensure endorsement. It includes such requirements as 1,000 hours of nursing practice in the five years preceding the application or the satisfactory completion of a Board approved refresher course for an active license, verification from the state of original licensure that the license has not been revoked in that or any other state, and the possibility of being requested to provide additional information if the applicant is a graduate of a school outside the United States.

Although the AAO cannot find that the director necessarily erred in attempting to follow the guidance of the December 20, 2002 memo in requesting verification from the state of intended employment that the beneficiary is eligible for licensure in that state, particularly where eligibility may depend on additional specific information required by a particular state such as Maryland, the AAO does not agree that the ETA 750A indicates that the beneficiary would be employed in the state of Maryland.

As mentioned previously, the ETA 750A fails to specifically designate a geographical location where the beneficiary will perform the proffered position. This affects other issues that support the petition's denial. This position is offered as an alternative argument by counsel on appeal. She asserts that the petitioner does not need to produce a letter from the Maryland licensing authority because "it is very likely that [the beneficiary] will not be working in Maryland," although the petitioner is located in Maryland. Counsel states that healthcare staffing firms have a difficult time in identifying the actual location of proposed nursing employment because of the length of delay in processing an immigrant visa petition.

It remains that the petitioner must demonstrate that a Schedule A foreign nurse possesses the required credentials. This means either that the evidence must show that she has passed the CGFNS Examination, or that she holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment, or that she has passed the NCLEX-RN and is eligible to be licensed in the state of intended employment as shown by a letter from that state. In this case, the ETA 750A only identifies the location of employment as "[v]arious HCCAA International hospital clients in the United States." Therefore, the AAO concludes that the petition fails not only because the petitioner has failed to demonstrate that the beneficiary has the requisite state licensure credentials (unless the state is Georgia) for the state of intended employment, based on the failure to clearly designate the state of intended employment, but the petition fails because the evidence fails to satisfy that the proffered wage of \$20.00 per hour meets the prevailing wage rate, and fails to satisfy the regulatory requirements for posting the job notice.

In this case, as discussed above, it is not possible to determine the correct prevailing wage rate since the petitioner failed to designate a specific geographic location of the beneficiary's employment. The only hint appears in counsel's original cover letter where she mentions the sample contract between the petitioner and a Maryland health care facility where the alien will be working. This cannot be considered as probative of the location of employment when viewed against the ETA 750A, signed by the petitioner, as well as counsel's assertion on appeal indicating that the alien would likely not be employed in Maryland. The petitioner's determination of the prevailing wage reflecting that the rate of pay posted for the certified position of registered nurse is also not persuasive because the Department of Labor's Online Wage Library describing prevailing wages for specified occupations is based on geographic location.<sup>1</sup>

The employment of aliens in Schedule A occupations seeking blanket labor certifications must not adversely affect the wages and working conditions of United States workers similarly employed. *See* 20 C.F.R. § 656.10. The regulations governing blanket labor certifications do not contain language that certifies the employment of alien registered nurses, anywhere in the United States, at any wage or salary, would not adversely affect the wages and working conditions of U.S. workers similarly employed. That determination is left to CIS's jurisdiction under 20 C.F.R. § 656.22(e), which gives CIS the authority to review whether a petitioner has satisfied labor certification requirements pursuant to 20 C.F.R. § 656.20. The regulations at 20 C.F.R. § 656.20(c)(2) state

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<sup>1</sup> The Department of Labor maintains a website at [www.ows.doleta.gov](http://www.ows.doleta.gov) which provides access to an Online Wage Library (OWL). OWL provides prevailing wage rates for occupations based on the location of where the occupation is being performed geographically. If a proffered position sets forth basic responsibilities of a nurse under supervision, does not specify an advanced level of training or experience or supervisory duties, it is a Level I position. The position, not the beneficiary's qualifications is the focal point of the analysis. *See* TEGL No. 5-02, published by the Department of Labor.

that the labor certification application must clearly show that the wage offered meets the prevailing wage rate.<sup>2</sup> Thus, a petition that fails to establish that its proffered wage does not adversely affect the wages and working conditions of U.S. workers similarly employed will not be approved. Since the petitioner failed to specify a specific geographical location where the alien beneficiary will perform the position's duties, it is impossible to evaluate whether the proposed wage offer of \$20.00 per hour meets the prevailing wage rate as established by the Department of Labor. Therefore, the petitioner has failed to meet its evidentiary burden to show that the proffered wage will not adversely affect the wages and salaries of similarly employed U.S. workers.

Similarly, the evidence contained in the record does not demonstrate that the petitioner complied with the job posting requirements for Schedule A labor certification applications. As mentioned above, the prevailing wage rate of \$20.00 per hour set forth in the ETA 750A is problematic due to the failure to designate a specific geographical employment location. For the same reason, the salary of "\$17.00-\$20.00 per hour," as stated in the petitioner's posted notice of job opportunity, cannot be considered as accurate unless the specific location of the job is known. It is also noted that the regulations at 20 C.F.R. § 656.20(g)(8) and 20 C.F.R. § 656.20(g)(3)(ii) and (iii) also require that a petitioner advise interested persons that documentary evidence bearing on the application may be provided to the local employment service office and/or the regional certifying officer of the Department of Labor. In this case, the petitioner's notice advises interested persons that documentary evidence may be provided to either the Employment Security Administration in Phoenix, Arizona or the Department of Labor office in San Francisco, California. As the geographical location of the job has not been designated on the ETA 750A, this begs the question why the petitioner has posted a job opportunity at an unknown location of the job, yet informs any interested persons to provide relevant documentary evidence to offices in Arizona and California.

Under the regulation at 20 C.F.R. § 656.20(g)(1)(ii), *supra*, the employer must show that it has posted the job opportunity at the facility or location of the beneficiary's employment. Because the petitioner has not identified the actual physical location of the beneficiary's employment, the petitioner has not established that it has complied with the regulatory requirements. By merely posting the notice at its administrative office, the petitioner has not complied with the requirement. The purpose of the posting regulation is to provide a meaningful opportunity for U.S. workers to compete for the position and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. It is also noted that the petitioner has failed to indicate whether it provided notice to an appropriate bargaining representative.

The AAO also concludes that the evidence in the record fails to establish that the petitioner offered permanent employment to this alien beneficiary as of the priority date of the petition. As noted above, the petitioner does not directly provide medical services, but merely acts as a nurse staffing agency. The unexecuted sample letter of intent does not establish that the petitioner had a pre-existing contract at a third-party worksite to provide the specific beneficiary's services as a registered nurse. As such, the evidence does not support the conclusion that a realistic job offer of permanent full-time employment existed for this particular beneficiary as of the priority date of July 23<sup>rd</sup>, 2003.

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<sup>2</sup> 20 C.F.R. § 656.40(2)(i) provides if the position is in an occupation not covered by the [REDACTED] Act or the [REDACTED] D'Hara Service Contract Act, the prevailing wage may be the average rate of wages determined by adding the wages paid to similarly employed workers and dividing by the total of such workers, or within 5 percent of the average rate of wages.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprise, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

As suggested in the director's denial, the evidence contained in the record fails to establish that the beneficiary possesses the requisite licensure for a specific state of intended employment. The AAO additionally concludes that the record fails to establish that the proffered wage meets a prevailing wage for a specific geographical area of intended employment, fails to show that a proper job offer posting had occurred as of the visa priority date, and fails to demonstrate that a specific contract with a medical service provider existed to support a permanent job offer for this alien beneficiary. Consequently, the petition may not be approved. 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 AAO finds the evidence inadequate to establish the alien beneficiary's eligibility for an employment-based visa under section 203(b)(3)(A)(i) of the Act. 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.