

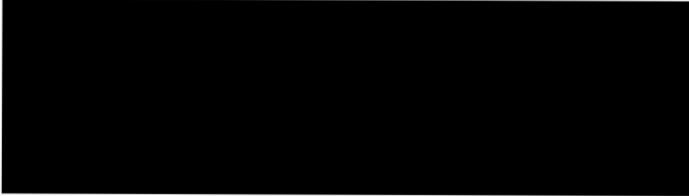
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 044 51716 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



APR 04 2006

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently 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 determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification stated that applicants should report to the employer, not to the local Employment Service office; 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, 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 according to the regulation at 20 C.F.R. § 656.20(g)(3).

According to the petitioner, it has been in operations since 1952. The hospital employs 1,376 personnel and its net annual revenues are \$181 million.

On appeal, counsel submits a brief.

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 has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, 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 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22 (Applications for labor certification for Schedule A occupations.) (b)(2) states that [the Application for Alien Employment Certification form shall include: 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.

The regulation at 20 C.F.R. § 656.20(g)(3) states that:

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. § 656.22(c)(2) states:

An employer seeking a Schedule A labor certification as a professional nurse (§ 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.

In a memo dated December 20, 2002, the Office of Adjudications of the CIS issued a memo instructing Service Center to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

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 U.S. Citizenship and Immigration Services 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).

In this case, the Form I-140 petition was filed on December 4, 2003. On November 1, 2004, the Director, California Service Center, issued a decision in this matter. The director stated that the advertisements submitted, "... do not conform to the requirements of the notice of filing" as recited above.

The director found that the petitioner failed to comply with the regulation at 20 C.F.R. 656.20(g)(3). The director found that petitioner failed to state in the notice of filing that applicants for the proffered position should report to the employer and not to the local employment office; that the notice was being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and, that any person may provide documentary evidence bearing on the application to the to the local state Employment Service Office and/or the Regional Certifying Officer of the Department of Labor. The director found that the petition was not, therefore, approvable on the date of filing and denied the petition.

The regulation at 20 C.F.R. 656.22(e) states in part:

An Immigration Officer shall determine whether the employer and alien have met the applicable requirements of Sec. 656.20 of this part, of this section, and of Schedule A . . .

(2) The Schedule A determination of INS [CIS] shall be conclusive and final. The employer, therefore, may not make use of the review procedures at Sec. 656.26 of this part.

On appeal, counsel asserts as follows:

The Service's determination states that the posting information provided did not properly post notice of the position. However, Sutter was not required to post, but pursuant to 20 CFR 656.20(g)(1)(i) to provide notice to its bargaining representative of the employer's employees in the occupational classification for which certification is sought, and Sutter in fact did both.

The regulation at 20 CFR 656.20(g)(1)(i) and (ii) states.

(g)(1) 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).

According to counsel's explanatory letter in this matter dated November 30, 2004, the petitioner stated, "a notice ... was provided to the California Nurse's Association Representative with a copy of the posted notice for the RN [registered nurse] position described in the attached application." According to counsel, "... [the petitioner's] application was filed with a copy of a letter addressed to the labor representative of the California Nurse's association copying the Chief Nurse Executive of [REDACTED] and Chief Labor/Employee Relations Officer."

Counsel has submitted "a sample of one of many postings placed at [REDACTED] for open RN positions" that was attached to the petition. In the record of proceeding there is a letter dated June 26, 2003 addressed to the Labor Representative of the California Nurses Association at Sacramento, California copied to the Chief Nurse Executive of [REDACTED] and the Chief Labor/Employee Relations Officer. Although not identified as such, no proof was submitted that the Chief Nurse Executive of [REDACTED] and Chief Labor/Employee Relations Officer are bargaining representatives of the petitioner's workforce. Together with this letter in the record of proceeding are photocopies of Internet Web pages that detail a position for a registered nurse position at the petitioner's facility. There is no indication that the pages are part of the "sample" mentioned above, or that the Web pages were posted along with the regulatory notice for the subject position. There are no

attachments indicated on the letter dated June 26, 2003. There is no identification of the bargaining representative(s) (if any) in the record of proceeding of the employer's employees in the occupational classification (i.e. registered nurse) at the petitioner's facility.

The letter dated June 26, 2003, addressed to the Labor Representative of the California Nurses Association at Sacramento, California states in pertinent part:

* * *

As you know, the [REDACTED] has expanded efforts for RN's to include candidates from outside the United States. We have successfully recruited a new hire RN from the United Kingdom and anticipate arrival in the Spring of 2004.

Per INS regulations, organizations with employees cover by collective bargaining are required to notify their respective labor representative. This letter will serve as the formal written notification of [REDACTED]'s foreign recruitment and employment activities.

If you have any question regarding this letter, please give me [the human resources director] a call.

* * *

The above letter did not state the following required notices under the aforementioned regulations. The notice of filing the Application for Alien Certification failed to state that applicants should report to the employer, not to the local Employment Service office; failed to 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, failed to state that any person may provide documentary evidence bearing on the application to the local state Employment Service Office and/or the regional Certifying Officer of the Department of Labor according to the regulation at 20 C.F.R. § 656.20(g)(3).

Beyond the decision of the director, this office notes the letter is written in the past tense, "... [the petitioner] has successfully recruited a new hire RN from the United Kingdom and anticipate arrival in the Spring of 2004" Since the notice to what the petitioner contends is the bargaining representative is that the position has already been filled, there cannot be applicants for the proffered position. The regulations at 20 CFR 656.20, either for an employer with or without a bargaining representative, have been circumvented by the petitioner's recruitment procedures. This office finds the evidence insufficient to show that notice according to 20 CFR 656.20 was posted prior to the date the I-140 was filed.

Counsel asserts that "The variances in the posting and notice to the union were not substantive, were *de minimus* ... [and they] would not prevent any applicant from applying for the position" This is an admission by the petitioner that the regulations were not followed, and, it is against counsel's contention in this matter that it is in compliance with the above regulations. The regulations are imperative. "...[T]he employer shall document that notice of the filing of the Application for Alien Employment Certification was provided ... to the bargaining representative" In this case, the petitioner "... recruited a new hire RN from the United Kingdom ..." and then informed whom the petitioner contends is the bargaining representative of its prior decision. The regulations above recited are substantive, and, had the petitioner followed them, the position would not have been foreclosed to other applicants.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th 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).

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.