

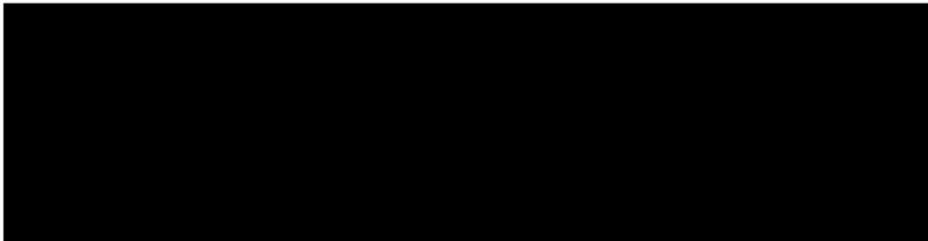
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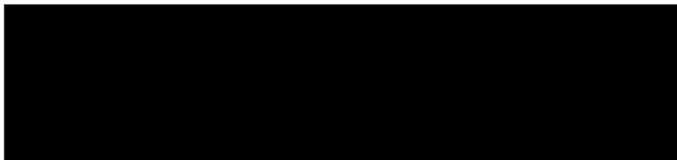
FILE: WAC 04 064 53592 Office: CALIFORNIA SERVICE CENTER Date: JUL 11 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification, in duplicate, accompanies the petition. The director determined that the petitioner had not established that it had posted the notice for 10 consecutive days prior to filing the petition, as prescribed by 20 C.F.R. § 656.20 (g)(1) and (g)(8), and denied the petition accordingly.

With the petition, counsel submitted a certificate on the petitioner's letterhead entitled, "Notice of Job Opening," regarding a Registered Nurse position, listing job duties; educational and licensure requirements, and 40 hours of work per week, with overtime as needed. The notice stated that the job paid a salary of \$20.00 per hour for regular hours and \$30 per hour for overtime. Under "Posting," the certificate indicates the petitioner posted the notice on December 20, 2002, and removed it on December 31, 2002, with no applicants responding to the notice. A statement along the bottom of the notice stated the posting was "in connection with a permanent alien labor certification application. Any person may provide documentary evidence bearing on this application to either the Alien Certification Office, California Employment Development Department, [a Sacramento address] or the U.S. Department of Labor, Region IX, ETA Certifying officer, [a San Francisco address]."

On December 8, 2004, the director denied the petition, finding that the evidence did not show the posting was in accordance with 20 C.F.R. 656.20(g) (1), because the rate was below the \$22.56 per hour (\$46,925 per year) rate for the year 2004 that the Department of labor had determined was the prevailing wage rate for the Sacramento, California area, which includes Placerville, which is in El Dorado County.

On appeal, counsel submits a brief and the following additional evidence:

- A copy of Service Contract Act (SCA) Wage Determination No. 94-2056 Rev. 13 for the Sacramento, California area that includes El Dorado County, issued July 30, 2002, showing \$20.50 is the Minimum Wage Rate for Registered Nurse I;

Counsel properly asserts that the wage should be determined under the SCA, under laws 41 U.S.C. § 351-358, and federal regulations 29 C.F.R. Part 4. Asserting that the year 2002 is the controlling year because of job posting occurred in December 2002, counsel asserts that the prevailing wage was \$21.05 an hour rather than \$22.56, as the director determined. Counsel also correctly asserts that under 20 C.F.R. 656.40(a)(2)(ii), the \$20 proffered wage meets the prevailing wage guideline because it is within 5 percent of \$21.05¹.

The regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification. Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." See 20 C.F.R. § 656.20(c) (2).

The prevailing wage rate is defined further by the regulations at 20 C.F.R. § 656.40 as follows:

Determination of prevailing wage for labor certification purposes.

¹ Ninety-five percent of \$20.50 prevailing rate is \$19.48, which is less than the \$20 wage proffered.

(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage rate as required by 656.21(b) (3), shall be determined as follows:

(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be...

Here counsel has established that the proffered position is covered by the McNamara-O'Hara Service Contract Act. A petition proffering the prevailing wage does not adversely affect the wages and working conditions of United States workers similarly employed results in an approved visa petition and an admissible beneficiary. In other words, a petition that offers a salary that meets the prevailing wage rate as determined by the Department of Labor (DOL) will be approved.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.