

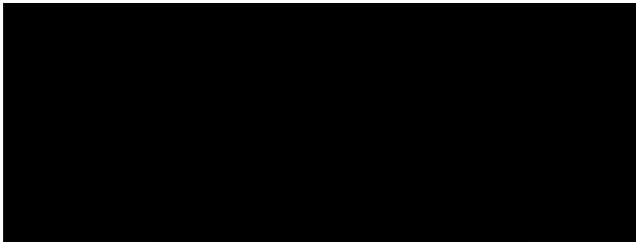
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U.S. Citizenship  
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 02 2006

LIN-03-136-52545

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, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decisions of the AAO and the director will be withdrawn, and the petition will be approved.

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 professional or skilled worker. The petitioner is a nursing care facility. 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 the Application for Alien Employment Certification (ETA-750) with the Immigrant Petition for Alien Worker (I-140). The director determined that the 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)(1) and denied the petition accordingly. The AAO affirmed the director's decision, interpreting the statute and the intent behind the regulatory language as a requirement for the employer to have performed its obligatory notification of a bargaining representative or posting of the job opportunity as of the priority date of the application, not at some time subsequent to the filing date.

On motion, counsel asserts that internal posting of the offered position was not material to the beneficiary's eligibility as a registered nurse at the time of filing the petition and evidence of subsequent posting should have been considered as curing any defects in the original petition rather than characterized and rejected as posting an entirely new set of facts.

The content of counsel's motion does not satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) because the petitioner is not providing new facts with supporting documentation not previously submitted.

The content of counsel's motion does, however, satisfy the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3) because counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. As discussed above, counsel's assertion that the AAO misplaces reliance on *Matter of Katigbak*,<sup>14</sup> I&N Dec. 45, 49 (Comm. 1971) and a Citizenship and Immigration Services (CIS) interoffice memorandum entitled "USCIS Instructs on Postings for Schedule A Applications dated December 22, 2004" may constitute the AAO's error in applying law or policy. Therefore, the motion to reconsider is granted. The AAO will review the complete record including this motion and make a new decision.

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 registered nurse. Aliens who will be employed as registered 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 priority date of any petition filed for classification under section 203(b) of the Act "shall be the

date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [CIS].” 8 C.F.R. § 204.5(d). Here, the priority date is March 21, 2003.

The regulations set forth 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).

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).

CIS had been interpreting the plain reading of the statute and the intent behind the regulatory language as a requirement for the employer to have performed its obligatory notification of a bargaining representative or posting of the job opportunity as of the priority date of the application, not at some time subsequent to the filing date until its recent memorandum.

On appeal, counsel asserts that the petitioner need only provide evidence of compliance with the posting/notification requirement as of the date of the response to a notice of intent to deny (NOID), not the filing date of the I-140, according to the language in a CIS interoffice memorandum on December 22, 2004. The memorandum relied upon by counsel was superseded by another memorandum. On June 15, 2005 William R. Yates, Associate Director of Operations, issued an Interoffice Memorandum entitled “Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A” (Yates June 15, 2005 memo). This memo states in pertinent part that:

In light of the prolonged period of time in which many Schedule A petitions have been awaiting adjudication for cases filed with [CIS] prior to March 28, 2005, where a petitioner has failed to provide evidence of compliance with the posting requirements at the time of filing the Form I-140, adjudicators should issue a request for evidence (RFE) that requests evidence of compliance with DOL’s notification requirements in the form of a notice of posting that conforms to the conditions noted above. If all posting requirements are met and the notice has been posted the requisite 10 days prior to the date of the RFE response, the posting will be considered timely for adjudication purposes.

(Emphasis in the original.)

In the instant case, the petition was filed on March 21, 2003, prior to March 28, 2005. On July 25, 2003 the director issued a RFE requesting the petitioner to submit a copy of the notice provided to the bargaining representative or posted at the location of the employment by October 17, 2003. In response to the RFE, the petitioner submitted a posting notice which was posted from August 11, 2003 to August 24, 2003. The

posting notice meets all posting requirements set forth at DOL regulations. Therefore, the AAO concurs with counsel's argument that the posting notice in the instant case should be considered timely, and thus complied with CIS requirements.

Therefore, counsel's assertion on motion to reconsider overcomes the director's decision on September 16, 2003 and the AAO's decision on February 22, 2005. The evidence submitted in the record is sufficient to establish that the petitioner did qualify for Schedule A, Group I exemption from certification of the Form ETA 750 with evidence that the employer had provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees under regulations.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The motion to reconsider is granted. The decisions of the director on September 16, 2003 and of the AAO on February 22, 2005 are withdrawn. The petition is approved.