

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: WAC 05 800 16536 OFFICE: CALIFORNIA SERVICE CENTER

Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary:



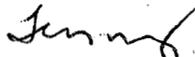
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


for Robert P. Wiemann, Chief
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 center, seeks to employ the beneficiary permanently in the United States as a staff 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)(1).¹

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 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.

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)]."

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation became effective March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition was filed prior to March 28, 2005 and is governed by the prior regulations. The Title 20 citations in this decision are to the Department of Labor regulations as in effect prior to the PERM amendments.

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)(1), 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 December 27, 2004. On May 17, 2005, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. The director requested 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 informed the petitioner that it would accept a perfected notice of filing as of the date of response to the notice for requested evidence, pursuant to a Service Center operational memorandum, dated December 22, 2004, titled "Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations..." signed by Fujie O. Ohata. (hereinafter Ohata Memo). The director further requested that the petitioner submit Parts A & B of the ETA 750 requesting Schedule A designation, evidence of the petitioner's ability to pay the certified wage, a copy of beneficiary's licensure credentials, and evidence that the beneficiary possesses the requisite formal education as set forth on the ETA 750.

In response, the petitioner, through counsel, submitted the requested evidence pertinent to the director's instructions, but failed to provide evidence that it had properly provided a notice of filing.

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. Counsel explains that a clerical oversight had caused the petitioner to fail to submit a copy of the notice of posting the position in response to the director's earlier request for evidence and submits a copy of a notice of posting the job opportunity with the appeal.

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)(1), 20 C.F.R. § 656.22(a) and (b). The AAO will not consider such evidence submitted on appeal and finds that the director's grounds for denying the petition were appropriate. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document(s) in response to the director's request for evidence issued on May 17, 2005. Under the circumstances, the AAO need not and does not consider the sufficiency of this evidence provided for the first time on appeal. Since the petitioner has made no other argument on appeal, this appeal will be dismissed.

Beyond the decision of the director, it is noted that the [REDACTED] is merely guidance² and does not supersede existing regulatory provisions or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must be published in bound volumes or as interim decisions. The petitioner ultimately bears the burden of proof to establish eligibility for the visa classification sought. Here, the evidence submitted fails to establish that the job notice was properly posted for ten consecutive days as of the priority date of December 27, 2004, rather than more than four months later from April 25th to May 5, 2005. It is also noted that the ETA 750 A, which is supposed to be submitted with the Immigrant Petition for Alien Worker (I-140) is dated June 20, 2005, six months after the I-140. 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). It cannot be concluded that

²See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

this evidence 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 establish that it properly posted the position for a staff nurse under the blanket labor certification provisions of 20 C.F.R. § 656.10, Schedule A, Group I.

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.