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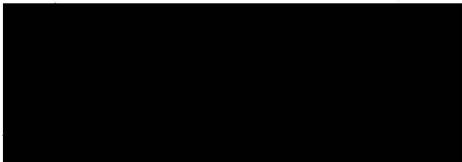


File: WAC-05-800-15416 Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner is a medical center, and seeks to employ the beneficiary permanently in the United States as a nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii). For the beneficiary to qualify, the petitioner must show that it has the ability to pay the beneficiary the proffered wage, and that the beneficiary meets the qualifications set forth in the certified labor certification.

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. 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.

Based on 8 C.F.R. § 204.5(a)(2) an applicant for a Schedule A position would file Form I-140, “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 [Citizenship and Immigration Services (CIS)].” 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced 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). Also, according to 20 C.F.R. § 656.10, 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 license to practice professional nursing in the [s]tate of intended employment, or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

Additionally, the petitioner must demonstrate its ability to pay the proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and

continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner submitted the Application for Alien Employment Certification, ETA-750, with the I-140 Immigrant Petition on December 17, 2004, which is the priority date. The proffered wage as stated on Form ETA 750A for the position of a nurse is \$17.81 per hour, 36 hours per week, which equates to an annual salary of \$33,340.32.¹ On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: April 13, 1942; gross annual income: \$190,000,000; net annual income: \$93,802,000; and current number of employees: 1,200.

The director issued a Request for Evidence (“RFE”) on May 17, 2005, requesting that the petitioner submit: evidence that the beneficiary met the ETA 750 educational and training requirements; evidence that the beneficiary passed the CGFNS, or NCLEX-RN exam; for the petitioner to submit the fully executed Forms ETA 750A&B in duplicate; evidence of the petitioner’s ability to pay and the required wage; and evidence that the position was posted for 10 consecutive days.

The petitioner timely responded. The director then denied the petition on August 3, 2005 on the basis that the petitioner failed to submit the ETA 750 Forms in duplicate, and further that the petitioner failed to post the position in accordance with 20 CFR § 656.20(g)(1). The petitioner appealed and the matter is now before the AAO.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal².

The record shows that the appeal is properly filed, timely and makes an allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel provides that the lack of posting notice and the lack of the duplicate ETA 750A and 750B Forms were the result of clerical error, and were referenced in the petitioner’s response to the RFE, but were inadvertently left out of the package. Counsel has submitted a copy of the posting notice, and a copy of the ETA 750A and 750B.

The petitioner is required to post the position in accordance with 20 C.F.R. § 656.20(g)(ii), which provides:

“(1) in applications filed under Sec. 656.22 (Schedule A) . . . the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

¹ The petitioner listed an overtime rate of one and one half the regular pay rate, and that overtime would vary per week.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(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 must be posted for at least 10 consecutive days. The notice must be clearly visible and unobstructed while posted and must 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."

(3) Any notice of the filing of an Application for Permanent 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 certification for the relevant job opportunity; and
- (iii) State any person may provide documentary evidence bearing on the application to the local Employment Service and/or the regional Certifying Officer of the Department of Labor

(8) If an application is filed under the Schedule A procedures at Sec. 656.22, . . . the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3)(ii) and (iii) of this section.

See also § 212 (a)(5)(A)(i) Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified . . . that

- (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. The required posting notice seeks to allow any person with evidence related to the application to notify the appropriate DOL officer prior to petition filing.

In the case at hand, the petitioner initially filed its I-140 petition on December 17, 2004. The petitioner did not submit the posting notice with the initial filing, or in response to the RFE, but instead provides that the absence was a result of clerical error. On appeal, the petitioner has provided a posting notice.³ The notice

³ We will exercise favorable discretion and accept this evidence on appeal. However, we note that the purpose of an RFE is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(8)

was posted subsequent to filing the petition from April 25, 2005 to May 5, 2005, and thus would not allow any effected parties or parties with information bearing on the application to notify the DOL prior to the petitioner filing the application, and accordingly could adversely impact U.S. workers. *See* the Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991). The statute clearly requires that notice of filing a Schedule A application be posted prior to filing the I-140 and labor certification forms with CIS.⁴

Accordingly, the petitioner has failed to meet the regulatory requirements, which require that the posting notice be completed prior to filing the Schedule A application. 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 not been met.

ORDER: The appeal is dismissed.

and (12). A petitioner's failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14). *See also* *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988), 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. Here, however, as noted above, we will exercise discretion and not strictly apply *Soriano*.

⁴ A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).