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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER
WAC 05 029 50858

Date: FEB 01 2007

IN RE: Petitioner:
Beneficiary:

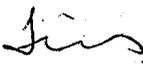


PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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

cc: [REDACTED]

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 case will be remanded for further investigation and entry of a new decision.

The petitioner, a skilled nursing facility, seeks to employ the beneficiary permanently in the United States as a registered nurse under the 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)(3). The director also found that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner asserts that it lacked the opportunity to respond to the director's Notice of Intent to Deny. It also claims that it has properly posted a notice of filing for the certified position and that it has established the ability to pay the proffered wage.

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.

The proffered wage as set forth on the ETA 750 A is \$28.50 per hour, annualized to \$59,280 per year. The regulation at 8 C.F.R. § 204.5(g)(2) provides:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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) further 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 [CIS]."

In this case, the I-140 was filed on November 8, 2004, which establishes the priority date. The proffered wage as set forth on the ETA 750A is \$28.50 per hour, which amounts to \$59,280 per year. The ETA 750B, signed by the beneficiary on November 2, 2004, does not indicate that the petitioner has employed the beneficiary.

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)(3). 20 C.F.R. § 656.22(a) and (b). (Emphasis added).

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 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).

The regulation at 8 C.F.R. § 103.2(b)(12) also 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).

Relevant to the petitioner's ability to pay the certified salary and the posting of the job opportunity, the petitioner provided two undated letters, both signed by [REDACTED] who is identified as the petitioner's chief financial officer on one of the letters. It merely states that the petitioner employs "more than 100 employees and we hereby certify that we are able to meet payroll when due."

In the other letter, Mr. [REDACTED] certifies that "we posted the attached job notice at our facility for at least 10 consecutive days." He further claims that it was posted in a clearly visible and unobstructed place where the U.S. workers could readily view it on their way to or from their place of employment. He also certifies that there is no bargaining representative involved. It is noted that there is no "attached job notice" accompanying this letter.

A Notice of Intent to Deny was issued by the director on June 27, 2005. It contains a detailed explanation of the reasons that the director found that the petitioner's evidence relating to its ability to pay the proffered wage and the notice of posting were inadequate. The director noted that a copy of the exact job posting had not been received. He also requested additional evidence of the petitioner's ability to pay the proffered wage, beyond the letter from the chief financial officer, pursuant to the provisions of 8 C.F.R. § 204.5(g)(2). The petitioner was afforded an additional 30 days to provide the additional documentation.

Finding that no communication had been submitted by the petitioner, the director denied the petition on August 29, 2005. He briefly summarized the reasons for the denial, determining that the petitioner had not submitted evidence that the notice was posted pursuant to 20 C.F.R. § 656.20(g)(1) or that the petitioner had established its ability to pay the proffered wage under 8 C.F.R. § 204(g)(2).

On appeal, the petitioner resubmits copies of the two [REDACTED] letters previously provided, and asserts that they are sufficient to show the petitioner's ability to pay the proffered wage and that it had provided appropriate notice of the job opportunity. It is noted that the most significant argument offered on appeal is that petitioner and /or the petitioner's counsel never received the Notice of Intent to Deny issued by the director on June 27, 2005.

This office notes that the Notice of Intent to Deny was not sent to the proper address of record. This notice may have been misdirected because the following address was used for the petitioner:

[REDACTED]

We find that the petitioner's assertions that it was never provided the opportunity to substantively address the director's bases for denying the petition to be credible. These bases were specifically described in the Notice of Intent to Deny and only briefly summarized in the director's denial. The director requested specific information from the petitioner in the notice of intent to deny, but the petitioner was never afforded the opportunity to provide such information. For this reason, and in the interest of fairness, the case will be remanded to allow the petitioner an opportunity to substantively address those issues.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision.