

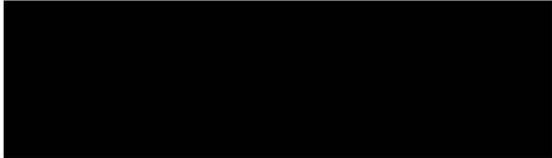


U.S. Citizenship
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FILE: WAC 05 071 52261 OFFICE: CALIFORNIA SERVICE CENTER

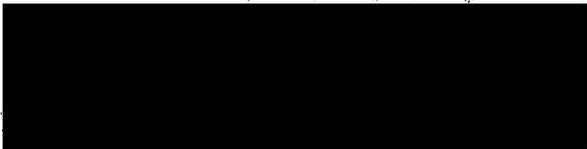
Date: FEB 02 2007

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

The petitioner, a skilled nursing hospital, 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 the petitioner had not established that the job offer represents a permanent position and denied the petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated that the position offered is for full-time permanent employment and 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)]."

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.¹ An employer

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

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 regulation at 20 C.F.R. § 656.3 Definitions, states that "Employment" means permanent full-time work by an employee for an employer other than oneself. The burden of proof in the labor certification process is on the employer. See *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997).

In this case, the immigrant visa petition was filed on January 13, 2005. On Part 6 of the I-140, the petitioner claims that the job is full-time and permanent. The certified position of staff nurse is further described on the ETA 750A as paying \$26.00 per hour with a 40 hour work-week and varying overtime.

On May 17, 2005, the director instructed the petitioner to submit additional evidence pertinent to the petition's eligibility. In addition to requesting evidence related to its ability to pay the proffered wage, and additional evidence showing 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 requested a copy of the contract between the petitioner and the beneficiary.

In response, the petitioner, through counsel, submitted the requested evidence pertinent to the director's instructions, also providing a copy of an employment agreement, dated August 25, 2004, between the petitioner and the beneficiary. The agreement provides that the offer is for "full-time, regular employment" contingent upon the beneficiary passing the qualifying examination and that the "agreement shall be effective for a period of two (2) years, commencing upon the employee's arrival at the hospital. This is renewable at the option of both parties."

Item 3 of the employment agreement additionally provides that the beneficiary "shall receive a salary of \$27.00 per hour as a Registered Nurse."

The petitioner additionally provided a letter, dated December 21, 2004, signed by the petitioner's chief financial officer, [REDACTED], relevant to the petitioner's ability to pay the proffered wage. He states that the petitioner has been in operation since 1984 and receives gross income of approximately 17 million dollars per year. He further states that the petitioner is "offering the above-named beneficiary, a permanent, full-time position as a Staff Nurse, at the salary rate of \$26.00 per hour."

The director denied the petition. Based on the copy of the agreement provided to the record, the director concluded that the petitioner was not offering permanent full-work, but would be employing the beneficiary temporarily for a 2 year-term.

On appeal, counsel provides copies of three media articles discussing the nationwide shortage of nurses, as well as the worsening deficit of registered nurses in California in the years through 2030. Counsel cites the description of the position on the I-140, the submitted letter from the petitioner, the ETA 750, and the notice

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.

of posting as supporting the petitioner's assertion that the position offered to the beneficiary is full-time and permanent.

As noted by counsel, it is the nature of an employer's needs rather than the nature of the duties to be performed that primarily determines whether a visa classification is deemed "permanent" or "temporary." In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), a case involving a temporary help service, the petitioner sought to utilize the H2-B program to employ machinists temporarily to be outsourced to third party clients. In finding that the nature of the petitioner's need for the job to be performed must be reviewed in order to ascertain the temporary or permanent aspect of the job offer, the commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. Similarly, in *North American Industries, Inc. v. Feldman*, 722 F. 2d 893 (1st Cir. 1983), the petitioner had employed the beneficiary on a non-immigrant visa. Prior to its expiration, the petitioner applied for a permanent labor certification. After receiving the certification, the petitioner sought a permanent employment-based visa classification on behalf of the beneficiary. In overturning the former Immigration and Naturalization Service (INS) decision to deny the preference petition because the beneficiary would be performing the same job for which he had been accorded H-2 status, the court noted the INS position taken in *Matter of Artee*, and found that the congressional intent underlying the visa classification was that the emphasis was to be placed on a prospective employer's need for workers. "If that need was determined to be on a permanent basis-because of a permanent shortage of employable persons-then the position would qualify for a sixth-preference classification under 8 U.S. C. § 1153(a)(6)."

In this case, there is an employment contract for two years that is renewable at the option of both parties. The existence of such an employment contract is not on its own conclusive of the "permanent" classification of the position. It does carry with it the expectation of the continued employment relationship upon the option of the parties. In conjunction with the other evidence in the record such as the affirmations made in the I-140 that the proffered position is permanent, similar affirmations on the ETA 750, Mr. ██████████ letter endorsing the petitioner's need for a full-time, permanent staff nurse, and the evidence of a critical shortage of such jobs, it is reasonable to conclude that the employer in this case has no present intention to terminate the relationship upon expiration of the contract. Thus, the petitioner has established that the position offered is for a permanent full-time job as a staff nurse. The director's decision to deny the petition on this basis will be withdrawn.

Beyond the decision of the director, it is noted that 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.

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).

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 director's request for additional evidence advised the petitioner that its notice of posting needed to conform to 20 C.F.R. § 656.20(g)(3)(i) by instructing applicants to report to the employer and not to the local Employment Service office. This point in the director's request for evidence is incorrect. The regulation at 20 C.F.R. § 656.20(g)(3)(i) is not applicable to posting notices related to petitions filed under the blanket labor certification provisions of 20 C.F.R. § 656.10, Schedule A, Group I. *See* 20 C.F.R. § 656.20(g)(8). This office finds that the petitioner's proof that it properly posted notice, (the document labeled Exhibit 2 as submitted with the Form I-140), is sufficient to meet all regulatory requirements for posting notice under Schedule A labor certification provisions.

The case will be remanded, however, because the rate of pay of \$26.00 per hour declared on the Form ETA 750 and contained in the petitioner's notice of posting initially submitted with the I-140, is different from the rate of pay of \$27.00 per hour, which according to the employment agreement made with the beneficiary and submitted into the record, is the actual rate of pay for the position. The regulations mandate that the posted notice in Schedule A cases, such as the instant case, include the accurate rate of pay for the proffered position. *See* 20 C.F.R. § 656.20(g)(8). This issue was not addressed by the director or the petitioner. As the petitioner has not had an opportunity to address this discrepancy, the case will be remanded to permit the petitioner to provide additional evidence or information related to this issue.

The previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation consistent with the foregoing and request any additional and updated evidence from the petitioner pursuant to the requirements of blanket labor certification, outlined at 20 C.F.R. § 656.10, Schedule A, Group I, as the director may deem necessary. 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. If the resulting decision is adverse to the petitioner, the matter will be certified to this office for review.