

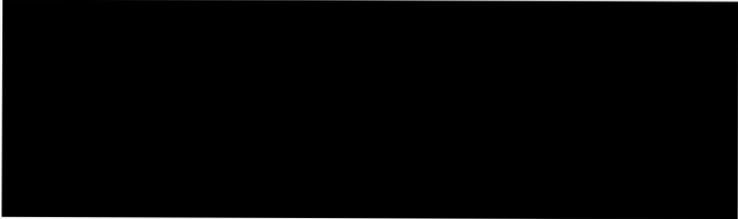
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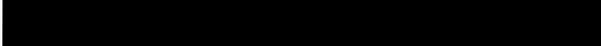


**U.S. Citizenship
and Immigration
Services**

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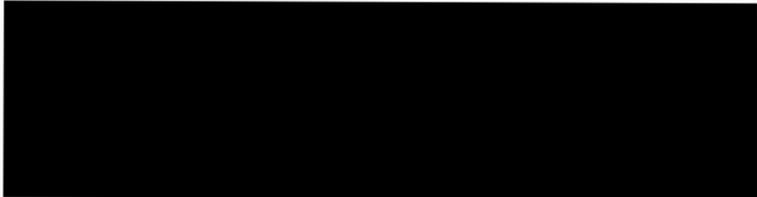


FILE: WAC-05-071-52190 Office: CALIFORNIA SERVICE CENTER Date: **MAY 17 2007**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded.

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 skilled nursing 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 beneficiary would not be employed as a permanent, full-time employee but would be employed temporarily on a 2-year term, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's August 16, 2005 denial, the only issue in this case is whether or not the petitioner offered permanent full time employment to the beneficiary.

Section 203(b)(3)(A)(ii) of 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 are members of the professions.

The regulation at 20 C.F.R. § 656.3 defines employment as permanent full-time work by an employee for an employer other than oneself.

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 appeal¹. The relevant evidence in the record includes a copy of an employment agreement signed between the petitioner and the beneficiary.

The instant petition indicates that the beneficiary would be employed in a permanent, full-time position in part 6 of the Form I-140. A letter dated December 21, 2004 submitted with the petition from [REDACTED] Chief Finance Officer (CFO) of the petitioner, also indicates that the petitioner is offering the beneficiary a permanent, full-time position as a staff nurse. The record of proceeding contains a copy of employment agreement signed between the petitioner and the beneficiary on September 20, 2004. The employment agreement states in pertinent part that:

1. **Duration of Agreement:**

This Agreement shall be effective for a period of two (2) years, commencing upon the employee's arrival in the United States and subject to the terms of this Agreement. This is renewable at the option of both parties.

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Fixed-term contracts were considered in *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). In *Smith*, a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third party clients. 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. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would

include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has established that it is the beneficiary's actual employer and is offering permanent, full-time employment. Its employment agreement with the beneficiary unequivocally states that it is the beneficiary's employer. The agreement at Covenants 7 and 8 reflects that the petitioner provides employment benefits, has the authority to hire and fire the beneficiary, and at all times controls the beneficiary's full-time work assignments. The petitioner indicated on Form I-140 that the position is a full-time, permanent position for a registered nurse and that the beneficiary will be employed 40 hours a week. The employment agreement indicates that the petitioner will employ the beneficiary for the term of two years. Two years, especially with renewable term, should be considered as a permanent instead of temporary position. The petitioner has also demonstrated that there is ample demand for its supply of qualified registered nurses. Thus, the petitioner has established that the position offered is a permanent full-time position and that the petitioner is the actual employer for the beneficiary.

The AAO concurs with counsel's assertions on appeal that the petitioner established that the beneficiary was offered and would be employed in a permanent full-time position. Therefore, that portion of the director's decision will be withdrawn.

However, beyond the director's decision and counsel's assertions on appeal, the AAO has identified another ground of ineligibility and will discuss whether or not the petitioner has properly posted a notice of filing for 10 days prior to the filing. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also 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 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 [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is January 13, 2005.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA-750 at Part A) in duplicate with the appropriate CIS office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.
2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

The regulation at 20 C.F.R. § 656.20(g)(1) provides, in pertinent part,

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).

The petitioner submitted a notice of filing of an application for alien employment certification for the instant beneficiary as evidence showing that the petitioner had properly posted a notice of filing as required by the regulations. However, the notice did not indicate the dates posted and removed. Therefore, the posting notice cannot establish that the petitioner has properly posted the notice of filing for 10 days prior to the filing date of January 13, 2005 as required by the regulations. On May 17, 2005, the director issued a request for evidence (RFE). In response to the director's RFE dated May 17, 2005, the petitioner submitted a new notice of filing. The new notice contains the title of position, a description of the job and rate of pay. The notice also shows that it was posted at the place of employment, it is being provided as a result of a filing an application for a permanent alien labor certification, and 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 as required by the regulation. At the bottom of the notice, [REDACTED] VP/CFO of the petitioner, attests that the posting was posted from June 20, 2005 to June 30, 2005 and signed his name on July 1, 2005. Therefore, the petitioner has not established that it posted the notice in compliance with 20 C.F.R. § 656.20(g)(1) and (g)(8) and posted for at least 10 consecutive days prior to filing on January 13, 2005 with either of notices. The notice must be posted at least 10 consecutive days prior to filing with the appropriate information contained in the notice, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition.

Section 122(b) of IMMACT 90 states, in pertinent part:

The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that -

(1) no certification may be made unless the applicant for certification has, ***at the time of filing the application, provided notice of the filing*** (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations... .

(Emphasis added.)

The statute clearly requires that notice of filing of a schedule A application be posted prior to the filing of the application - i.e., prior to the filing of the I-140 and the application for precertification under schedule A. If the petitioner was not already eligible when the petition was filed, subsequent development cannot retroactively establish as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Therefore, the petitioner must be denied.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent. 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 ground of denial in the director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.