

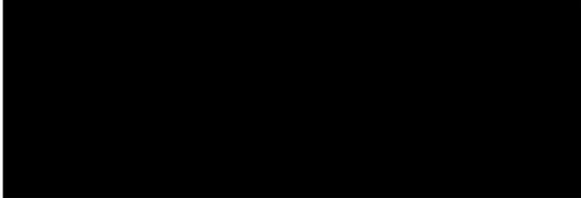
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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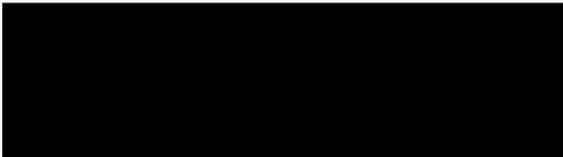
FILE: WAC 03 160 51148 Office: CALIFORNIA SERVICE CENTER Date:

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 dismissed.

The petitioner is a staffing service (i.e. a nursing registry). It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined that the evidence submitted does not demonstrate that the notice of filing the Application for Alien Certification was made according to the regulation at 20 C.F.R. § 656.20(g)(1), *et seq.*

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3) of the Act as a registered nurse. Aliens who will be employed as nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, 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 20 C.F.R. § 656.10(a)(2) specifies that professional nurses are among those qualified for Schedule A designation if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states:

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

In a memo dated December 20, 2002, the Office of Adjudications of the Citizenship and Immigration Services (CIS) issued a memo instructing Service Center to accept a certified copy of a letter from the state of intended employment stating that the beneficiary has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN) and is eligible to receive a license to practice nursing in that state in lieu of either having passed the CGFNS examination or currently having a license to practice nursing in that state.

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 U.S. Citizenship and Immigration Services 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).

In this case, the Form I-140 petition was filed on April 30, 2003. Accompanying the petition were, *inter alia*, the following documents: a labor certification application (U.S. Department of Labor Form ETA 750 A/B); a cover letter from counsel dated December 20, 2002; a support letter from the petitioner; a Commission on Graduates of Foreign Nursing Schools (CGFNS) certificate; the beneficiary's diploma; school transcripts; an education evaluation; a nursing license issued to the beneficiary by the Republic of the Philippines; an education evaluation report; a copy of the petitioner's job posting and employment certification; and a letter from the petitioner certifying its ability to pay the proffered wage.

The director issued a request for evidence on May 12, 2004.

In response to the above, by letter dated August 2, 2004, the counsel submitted, *inter alia*, an explanatory letter, and, copies of the petitioner's job offer and contract of employment with the beneficiary.

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification.

The director determined that the posting information provided by the petitioner (posting is a necessary step to obtaining labor certification) did not demonstrate that the petitioner properly posted notice of the position at the "facility or location of employment"¹ according to the requirements of 20 C.F.R. § 656.20. Specifically the

¹ The regulation at 20 CFR § 656.20(g)(1)(i) and (ii) states:

director found that the beneficiary would be working at healthcare facilities that have a contractual relationship with the petitioner. The certification of posting stated that the notice was posted at all the offices of petitioner, but not healthcare facilities where the beneficiary would be working.

Therefore on December 21, 2004, the director denied the petition, and on January 20, 2005, the petitioner appealed.

On appeal, counsel submits a brief. According to counsel's appeal statement and his brief "... the petitioner need only provide evidence of compliance with the posting/notification requirements as of the date of the response to the Notice of Intent to Deny, not the filing date of the I-140."

On appeal counsel has submitted, *inter alia*, CIS form I-797C; the Form I-292B filed in this matter; the director's decision dated December 21, 2004; a copy of a webpage accessed on December 30, 2004 concerning postings for Schedule A applications from the CIS' Service Operations section; a partial copy of another CIS decision that references a memorandum² dated December 22, 2004, from ██████████ Director, Service Center Operations entitled "Guidance for Processing Pending Forms I-140 for Schedule A/Group I or II Occupations;" an agreement for supplemental staffing services between the petitioner and a hospital dated March 6, 2004; and a new Notice of Posting (Posting dates, January 5, 2005 to January 15, 2005) with a certification dated February 10, 2005.

The purpose of the Form ETA 750 and supporting materials is to demonstrate that the petitioner sought a U.S. worker for the position but was unable to locate one and that the beneficiary is qualified for the proffered position pursuant to the same criteria to which the petitioner subjected U.S. workers in its search.

(g)(1) 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 [emphasis added].* 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).

² Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from ██████████ Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The purpose of requiring an employer to post notice of the vacant position is to provide U.S. workers with a meaningful opportunity to compete for the proffered position and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of an alien in the proffered position. See 20 C.F.R. § 656.10.

Further, 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 Form I-140 and the application for pre-certification under Schedule A. The AAO must follow the statute.

In the instant case, to the contrary, the petitioner selected an alien worker to employ, filed the petitions, and subsequently sought to comply with the posting notice requirements.

The petitioner has not demonstrated that the petition was approvable when submitted and pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). It may not be approved. 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.