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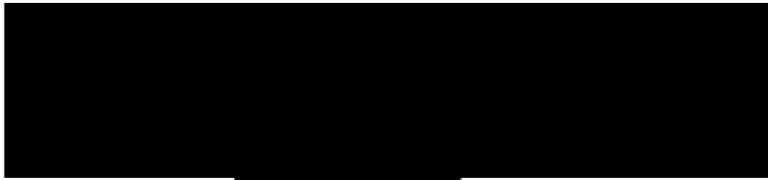
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File: [Redacted] WAC-06-013-52971

Office: TEXAS SERVICE CENTER Date:

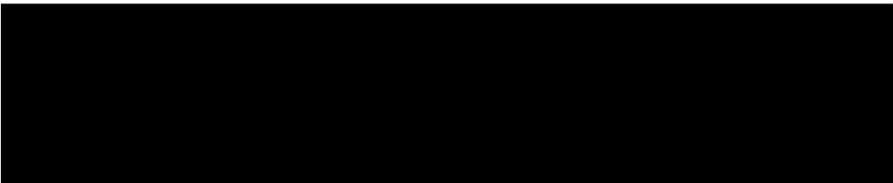
FEB 15 2008

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 Director, Texas Service Center (“Director”), denied the immigrant visa petition.¹ The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be sustained.

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

The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provide 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. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (“DOL”) 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) and (l)(3)(i) 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.”² 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. § 656.10(d). Also, according to 20 C.F.R. § 656.15, 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”).

¹ The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (“PERM”), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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 Permanent Employment Certification, ETA 9089, with the I-140 Immigrant Petition on October 17, 2005, which is the priority date. The petitioner listed the proffered wage on the Form ETA 9089 as \$1,057.20 per week for an annual salary of \$54,964, based on an hourly rate of \$26.43. On the Form I-140 petition filed, the petitioner listed the following information: established: July 1, 1980; gross annual income: \$1.79 billion; net annual income: \$641 million (for 2003); and current number of employees: 6,220.

On May 12, 2006, the director issued an RFE for the petitioner to submit: evidence that the beneficiary holds a full unrestricted permanent license to practice nursing in the state of intended employment, or that CGFNS issued the beneficiary a certificate, or that the beneficiary passed the NCLEX-RN exam; a copy of the wage determination issued by the state workforce agency ("SWA") having jurisdiction over the proposed area of employment; a copy of the notice with attestation of posting for at least ten business days, and copies of any and all in-house media, whether electronic or printed in accordance with the petitioner's normal procedures for recruitment of positions similar to that specified on Form ETA 9089. The petitioner responded.

On July 31, 2006, the director denied the petition on the basis that the petitioner failed to properly post the position at the listed work-site. Further, the record did not demonstrate that the petitioner published the notice internally using in-house media in accordance with normal internal procedures. Additionally, the petitioner failed to provide evidence that the beneficiary was either licensed in the state of intended employment,³ that he had a certificate issued by CGFNS; and/or that the beneficiary had passed the NCLEX-RN exam. Accordingly, the petition did not qualify for Schedule A certification, and was denied. The petitioner appealed and the matter is now before the AAO.

On November 19, 2007, the AAO director issued an RFE for the petitioner to provide evidence of whether it posted the position in question in any in-house media. The petitioner had not provided any evidence on appeal that it had posted the position through any in-house media. However, the petitioner's website reflected that it listed a number of open positions on its website, but the relevant listings did not provide that the vacancies were for positions to be filled through the labor certification process.

³ The petitioner had submitted a copy of the beneficiary's nursing license for the State of California dated February 3, 2006, which was issued after the priority date. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).⁴

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, related to the first basis for the petition's denial, the petitioner provides that the beneficiary had passed the requisite California State Nursing Exam by the priority date, but that California State was unable to issue the beneficiary's certificate as the beneficiary did not yet have a social security number.

The record of proceeding contains a letter dated June 14, 2005, which provides that the beneficiary passed the NCLEX-RN exam and that he had met all the other licensing requirements, with the exception of having a valid U.S. Social Security Number required to obtain a California State Nursing License. The regulation at 20 C.F.R. § 656.15 requires that the beneficiary must either 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"). As the letter demonstrates that the beneficiary passed the NCLEX-RN exam before the priority date, this ground for denial has been overcome.

The second issue related to the petition's denial was that CIS determined the posting notice was not posted at the place of employment.

One of the requirements to meet Schedule A eligibility is that the petitioner is required to post the position in accordance with 20 C.F.R. § 656.10(d), which provides:

- (1) In applications filed under § 656.15 (Schedule A), § 656.16 (Shepherders), § 656.17 (Basic Process); § 656.18 (College and University Teachers), and § 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the certifying officer as follows:

...

- (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 business 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.

⁴ 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).

...

(3) The notice of the filing of an Application for Permanent Employment Certification shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
 - (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
 - (iii) Provide the address of the appropriate Certifying Officer; and
 - (iv) Be provided between 30 and 180 days before filing the application.
- ...

(6) If an application is filed under the Schedule A procedures at § 656.15 . . . the notice must contain a description of the job and rate of pay and meet the requirements of this section.

Additionally, Section 212 (a)(5)(A)(i) of the Act states the following:

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.

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. *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 petitioner's posting notice provided that it was posted from April 7, 2005 to August 25, 2005 at the "Job Posting Bulletin Board." Form ETA 9089 listed the employer's address as " " and that the beneficiary's work address would be: " The visa petition indicated the same.

On appeal, counsel provides that the petitioner is a 791-bed medical center located on the campus of Loma Linda University. As a large facility, the petitioner has designated that notices be posted at " Street, the location of the Human Resources Department, and around the corner from " where counsel provides that the hospital is located. Further, counsel provides that employees and prospective applicants would normally go to see the Human Resources Department to view job vacancies, for

employment, assignment, re-assignment, transfer, or dismissal, and that this would satisfy the requirement that, “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.” Further, counsel provides that the Human Resource Department is near the Payroll Department, and that workers going to the Payroll Department could also view the notices. Counsel additionally provided a map exhibiting the proximity of [REDACTED] to [REDACTED].

In reviewing the map of the facility provided, the campus is comprised of a number of different buildings, with the hospital facility near, but in a different building than the hospital premises.

DOL has provided guidance to the PERM regulations and posting requirements through issuance of “Frequently asked Questions.” See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed January 8, 2008). DOL guidance related to posting notices provides:

If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.

The FAQ related to posting was issued in February 2006, subsequent to filing the instant petition.

If we look to guidance for the definition of facility or work-site, and whether a Human Resource Office located in a different building would qualify as part of the facility or work-site, the PERM regulation, and FAQs do not define facility or work-site. Since there is ambiguity concerning the meaning of “facility,” the AAO found a relevant DOL regulation that provides an indication of DOL’s intent concerning the definition of the word.⁵

Posting at the Human Resources Office would be a building within reasonable geographic proximity, and satisfy the requirement of 20 C.F.R. § 656.10(d)(ii) that the notice be posted “to the employer’s employees at the facility or location of the employment.” While the AAO is not applying the H-1A regulations to this case, we accept that the notice was properly posted at the petitioner’s facility.

Related to the final issue, the director provides that the petitioner failed to demonstrate that it posted the position in all in-house media.

⁵ DOL regulations at 20 C.F.R. § 655.302 related to the temporary employment of aliens H-1A nurses and “attestations by facilities using nonimmigrant aliens as Registered Nurses” defines “facility” as: “a user of nursing services with either a single site or a group of contiguous locations at which it provides health care services.” The definition continues to encompass:

Groups of structures, which form a campus or separate buildings across the street from one another are a single facility. However, separate buildings or areas which are not physically connected or in immediate proximity are a single health care facility if they are in reasonable geographic proximity, used for the same purpose, and share the same nursing staff and equipment.

20 C.F.R. § 656.10(d) provides:

(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 business 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. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). *In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.*

(Emphasis added).

In response to the AAO director's RFE, the petitioner provided that:

Nursing positions were not posted on our internal website, but instead, nurse positions were announced on our job posting bulletin board, outside the human resource offices and not at any other 'in-house' locations. The website . . . that you have reviewed is an external location for job postings meant for the general public.

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL FAQ's "Round 10" provide that "the regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question." See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed January 8, 2008). The FAQ response further provides that:

The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification . . . it is not required to mirror, word for word, the physical posting . . . In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer.

DOL's FAQ response notes that the posting contemplates internal notification of the petitioner's employees rather than external notification to the public at large. Further, the posting requirement relates to the employer's "*normal procedures used for the recruitment of similar positions in the employer's organization.*"

The petitioner provides that, "at the time of the submission, October 17, 2005, nursing positions were not posted on our internal website. Nurse positions were announced on our job posting bulletin board, outside the human resources offices and not at any other 'in-house' locations." The petitioner, therefore, asserts that it complied with 20 C.F.R. § 656.10(d) as the position was posted in accordance with its normal procedures.

The regulation at 20 C.F.R. § 656.10(d) contemplates that the petitioner post the notice internally to meet the employer's normal practices for hiring for the particular position. As the petitioner asserts that it did not post positions for nurses at that time through any in-house media, the petitioner has complied with its internal procedures at that time.

We find that the posting notice does meet the requirements of 20 C.F.R. § 656.10(d). Publication within an employer's in-house media would contemplate the petitioner posting the notice internally in compliance with its normal procedures, such as an electronic bulletin board or intranet, in addition to the physical paper posting. In this instance, the petitioner has persuasively established that it did not post the positions internally to its intranet site, and therefore, the petitioner has complied with its "normal practices."

Accordingly, based on the foregoing, the petitioner has overcome the reasons for the petition's denial. 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 been met.

ORDER: The appeal is sustained. The petition is approved.