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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE:

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Office: TEXAS SERVICE CENTER

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JUN 05 2009

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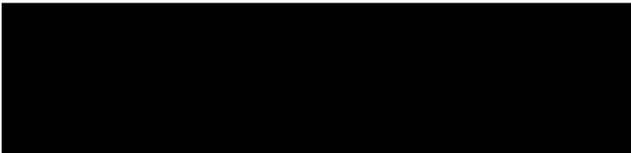
Petitioner:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

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 blanket labor certification pursuant to 20 C.F.R. § 656.5(a), Schedule A, Group I.¹

The director determined that the petition in this matter could not be approved because it was not filed within the validity period of the accompanying Prevailing Wage Determination (PWD) according to the regulation at 20 C.F.R. § 656.40(c), and that the Job Notice posting is not in compliance with 20 C.F.R. § 656.10(d)(3) as it does not provide the address of the appropriate U.S. Department of Labor (DOL) certifying office. Therefore, the director determined that the employer had not met the applicable requirements of 20 C.F.R. § 656.10, *et seq.* for the Schedule A, registered nurse occupation.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The regulation at 8 C.F.R. § 204.5 (1)(3) states in pertinent part.

Initial evidence –(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage

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. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. The petition and the blanket labor certification were accepted by U.S. Citizenship and Immigration Services (USCIS) on March 7, 2006. This citation and the citations in this discussion are to the DOL PERM regulations.

² The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

occupations in the Department of Labor's Labor Market Information Pilot Program...

Issues in this case are:

- Whether or not the Job Notice posting was in compliance with 20 C.F.R. § 656.10(d)(3) and provided the address of the appropriate U.S. Department of Labor (DOL) processing office.
- Whether or not the petitioner had filed the petition within the validity period of the accompanying Prevailing Wage Determination (PWD)³ according to the regulation at 20 C.F.R. § 656.40(c).

The posting notice dated January 30, 2006, directed interested parties to submit evidence bearing on the Application to the "the Local Employment Service Office and/or the Regional Certifying Officer of the Department of Labor" for the job in Modesta, California. According to the director, the correct office was with the office at DOL Region VI, U.S. Department of Labor/ETA, San Francisco, California, and that the petitioner should have listed this address.⁴

The regulations at 8 C.F.R. § 204.5(l)(2) and 8 C.F.R. § 203(b)(3)(A)(i) of the Immigration and Nationality 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 these paragraphs, 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)(ii).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 a 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 upon the regulations 8 C.F.R. § 204.5(a)(2) and 8 C.F.R. § 204.5(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

³ The PWD submitted with the petition is valid for ninety days from the determination date of November 16, 2005 to February 14, 2006. The instant I-140 petition was filed on March 7, 2006 which is after the validity period of the PWD.

⁴ This address is also in error which will be addressed below.

qualifies as a shortage occupation within DOL'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 [USCIS]." See 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 Permanent Employment Certification, ETA Form 9089 to the bargaining representatives 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 unrestricted license to practice professional nursing in the State of intended employment, or (3) that the alien has passed the National Council Licensure Examination for Registered Nurses ("NCLEX").

Posting according to 20 C.F.R. § 656.10(d)

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.
- (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 [emphasis added]; 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 correct address for a California job location is the United States Department of Labor, Employment and Training Administration, Chicago National Processing Center, Railroad Retirement Board Building, 844 N. Rush Street, 12th Floor, Chicago, Illinois, office and not the local “Employment Service Office” or the Regional Certifying office of DOL listed by the petitioner on the posting notice.⁵

⁵ *See* http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf as accessed February 23, 2009.

Thus, the Job Notice posting is not in compliance with 20 C.F.R. § 656.10(d)(3) as it does not provide the address of the appropriate U.S. Department of Labor (DOL) National Processing office. The sample documents counsel has submitted on appeal do not negate the petitioner's responsibility under the regulation to provide on the notice of filing the correct address of the appropriate DOL certifying officer for its location in accordance with 20 C.F.R. § 656.10(d)(3).

Submission of a Prevailing Wage Determination (PWD) in accordance with 20 C.F.R. § 656.40(a)

The regulation at 20 C.F.R. § 656.40(a) states in pertinent part:

Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

The regulation at 20 C.F.R. § 656.15(b)(1) requires that the petitioner submit a valid PWD in accordance with sections 656.40 and 656.41. In the subject case the Form ETA-9089, Section F submitted with the petition did not list the PWD expiration date although it did state that the determination date was November 16, 2005. As the PWD would have expired in 90 days, the wage would not have been valid at the time of filing on March 7, 2006.

On appeal counsel submitted another PWD with a determination date of December 12, 2005. Counsel asserts on appeal "Due to excusable neglect and haste, a wrong Prevailing Wage Request was submitted, and we are enclosing a correct and updated Request, the same request we have submitted with other I-140 petitions filed for the petitioner." The PWD submitted on appeal is for the same petitioner, the same position, the same job location, and lists the same education and experience requirements. Additionally, the prevailing wage request notes that it was filed on behalf of multiple aliens. The PWD dated December 12, 2005, lists the same \$29.00 per hour rate of pay. As the PWD determination date was December 12, 2005, and the petition was filed on March 7, 2006, the PWD would have been valid at the time of the filing. Under these limited circumstances, we will accept the PWD submitted on appeal as it was clearly obtained prior to filing. It contains the same content as the prior PWD submitted. Accordingly, the petitioner overcame this issue on appeal.

However, as noted above, the Job Notice posting is not in compliance with 20 C.F.R. § 656.10(d)(3) as it does not provide the address of the appropriate U.S. Department of Labor (DOL) National Processing office. Therefore, the petition in this matter can not be approved.

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 not been met.

ORDER: The appeal is dismissed.