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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 23 2006
WAC 03 247 50842

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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:

SELF-REPRESENTED

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, Director
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 nursing registry. 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. § 656.10, Schedule A, Group I. The director determined that the petitioner had not established that it had filed the posting notice for the proffered position as prescribed by 20 C.F.R. § 656.20(g) and (g)(8). Thus the director determined that the petitioner had not demonstrated that the position qualified for Schedule A certification, and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 (Applications for labor certification for Schedule A occupations.) (b)(2) states that [the Application for Alien Employment Certification form shall include:] 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 § 656.20(g)(3) of this part.

The regulation at 656.20(g)(3) states:

Any notice of the filing of an Application for Alien Employment Certification shall:

- (i) State that applicants should report to the employer, not to the local Employment Service office;
- (ii) 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; and
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

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 Bureau of 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, Form I-140 was filed on August 29, 2003.

The petitioner submitted a "posting" certification, signed August 21, 2003, in the City of Orange, California, "at all of the offices of [the petitioner] for a period of ten (10) consecutive days." The accompanying "Notice of Available Positions" indicates "118 vacancies as registered nurses as of June 24, 2003, giving the name and address of a contact person in Orange County who would take an applicant's letter and resume.

On September 23, 2004, the Director, California Service Center, issued a decision in this matter. The director observed that the petitioner had not provided evidence that the beneficiary had posted the job opportunity notice in accordance with 20 C.F.R. §626.20(g)(1), which provides:

(1) In applications filed under Sections 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 director found that the notice of filing the petition was posted at the petitioner's administrative offices, and noted that CIS interprets 20 C.F.R. 656.20(g)(1) and the phrase "facility or location of the employment" to mean the place of physical employment, or the health care facilities where the beneficiary would work as a registered nurse. Accordingly, the director found that the notice had not been posted at the correct location. Since the notice must be posted at least 10 days prior to filing the petition, the director found that the problem could not be cured by revising the notice and re-posting it because that would "constitute a material change to the petition," citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971); and *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm., Examinations 1998). The director found that the petition was not, therefore, approvable on the date of filing and denied the petition.

With the petition, the petitioner submitted a document entitled "Notice of Available Positions." This notice was addressed to all employees of Westways Staffing Services, Inc., and stated there were 118 vacancies for the position of registered nurse as of June 24, 2003. The document further stated the general and specific duties of the position, along with minimum requirements, special requirements, pay rate, or conditions, and where to apply for the registered nurse position. The pay rate was noted as \$22.17 an hour, or a yearly salary of \$46,113.60. The petitioner also submitted a notice dated August 12, 2003, and signed by Harold Sterling (Mr. Sterling), RN, Chief Executive Officer. This notice, entitled "Employer's Certification Re Compliance with Job Posting Notice Requirement," stated the following:

I hereby certify that this notice was posted in a conspicuous place at all of the offices of Westways Staffing Services, Inc. for a period of ten (10) consecutive days. The job notice remained clearly visible and unobstructed during the entire period of posting.

The document further stated the general and specific duties of the position, along with minimum requirements, special requirements, pay rate, or conditions, and where to apply for the registered nurse position. The pay rate was noted as \$22.17 an hour, or a yearly salary of \$46,113.60. The petitioner also submitted a notice dated July 17, 2003, and signed by Harold Sterling (Mr. Sterling), RN, Chief Executive Officer. This notice, entitled "Employer's Certification Re Compliance with Job Posting Notice Requirement," stated the following:

I hereby certify that this notice was posted in a conspicuous place at all of the offices of Westways Staffing Services, Inc. for a period of ten (10) consecutive days. The job notice remained clearly visible and unobstructed during the entire period of posting.

On September 23, 2004, the director denied the petition. In his decision, the director stated that the petitioner had not submitted evidence that the job posting was posted in accordance with 20 C.F.R. § 656.20(g)(1), and that the petitioner had indicated in the certification that the notice was posted at the petitioner's administrative offices. The director further stated that Citizenship and Immigration Services (CIS) interprets the reference at 20 C.F.R. 656.20(g)(1)(ii) to mean the place of physical employment. The director further noted that in the instant petition, the place of physical employment would be the healthcare facilities where the beneficiary would perform services as a registered nurse. The director then determined that the record indicated that the notice of filing had not been posted at the correct location. The director also stated that the notice had to be posted at least ten consecutive days prior to filing with the appropriate information contained in the notice, and that any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date, and cited *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

The petitioner states in a letter dated October 19, 2004 eight reasons why the petitioner is not required to post its job notice at the hospital where the beneficiary will be employed. The reasons are summarized as follows:

1. Prior to September 23, 2004, the placement of the petitioner's job posting at its place of business was never questioned, and the petitioner has received more than six hundred twenty-five approvals on I-140 positions filed on behalf of registered nurses. The CIS requirement to file the posting notice started on September 23, 2004; however, the instant petition was filed on July 29, 2003.
2. The beneficiary was hired as an employee of Westways Staffing Services, Inc. on August 31, 2004, and the petitioner is her employer. [REDACTED] notes that the employer's proffered wage of \$22.17 exceeded the prevailing wage of \$21.31 for 2003 for Orange County, the beneficiary's specific geographical location in the job posting.
3. Although the beneficiary has worked at Orange Coast Memorial medical Center [REDACTED] [REDACTED] she is not an employee of OCMMC, but rather works there on a contractual basis.
4. The petitioner makes sure that all its employees are well aware of job openings. All the nursing staff is required to report for work in person or via telephone each work day or week so that they can be then assigned to a specific client hospital.

5. The petitioner posts the job posting in all of its places of business so that any qualified applicant for the job opportunity could be directed directly the petitioner, as the employer, or to the petitioner's employment interviewer.
6. The petitioner does not own the hospital facilities where its nursing staff is assigned. The petitioner has no right to post notices nor does the petitioner have access to hospital bulletin [REDACTED] added that the petitioner was in no position to post job notices at the client's hospital facilities, which could be a serious violation of the petitioner's staffing contract with the client hospital because there is a conflict of interest. [REDACTED] that the petitioner may only post such notices at the sole discretion of each client hospital.
7. [REDACTED] that although 20 C.F.R. 656.22 states that the job notice must be posted at the "facility or location of employment", the Board of Alien Labor Certification Appeals (BALCA) states that "the employer must document that it has posted a notice of the job opportunity at its place of business. [REDACTED] submits a copy of a page of the BALCA Deskbook in support of this interpretation."
8. [REDACTED] to *In the Matter of Bison Turf/Fun Co. Inc.* 90 INA 280, a BALCA decision and states that the BALCA in this decision confirmed that the job notice must be posted at the employer's place of business.

[REDACTED] states that in order to comply with the CIS requirement in the future, the petitioner has negotiated with its client hospitals and they have agreed to post the petitioner's job notices at their premises as of the date of Mr. Sterling's letter, and in the [REDACTED] that even though the petitioner posted the job notice at its business premises for the required number of days, and the regulations do not require the petitioner to post the notice at its client hospitals, the petitioner is willing to comply with the new CIS requirement in its next [REDACTED] requested that the instant petition be approved.

[REDACTED] submits the beneficiary's payroll summary for the period of December 29, 2003, to October 18, 2004. The first page of the summary indicates the beneficiary's total gross pay for this period is \$40,020.21. [REDACTED] submits an excerpt from the Department of Labor (DOL) OnLine Wage Library (OWL) that indicates the wage for a Level One registered nurse in Orange County is \$21.31 an hour, while the wage for a Level Two registered nurse would be \$28.44 an hour. [REDACTED] submits a copy of a one-year contract between the petitioner and Orange Coast Memorial Medical Center, from February 29, 2004, to February 28, 2005. Finally, as stated previously, [REDACTED] submits a page from the BALCA Deskbook that discusses DOL regulatory requirements for a posting notice. This latter document refers to the BALCA decision *Bison Fun/Turf Co. Inc.* 90-INA-280 (April 19, 1991) and the discussion in this decision as to why the posting requirement cannot be avoided based on use of a wider means of publication.

The record contains no indication that the petitioner's nurses are represented by collective bargaining. The Form ETA 750 states, at Item 7, Address Where Alien Will Work, "see Exhibit 2 (Petitioner's Notice of Available Positions). Exhibit two is the posting of the proffered position. That posting states that the "RN will report to Employer at its address at Orange County for daily or weekly assignments at various hospitals or facilities." The certification, attached to that posting, states that it was posted at the petitioner's offices for a period of ten consecutive days. The certification does not state the dates during which the notice was posted. The certification itself, however, is dated August 21, 2003.

The beneficiary will not be employed at the petitioner's offices but at some other location. The posting was not, then, posted at the place of employment as required by 20 C.F.R. § 656.20(g)(1). The petitioner has indicated that the beneficiary will work at "various hospitals and facilities," without identifying an exact location or locations with greater specificity. The petitioner needs to show it posted the notice where the beneficiary would work, and make it clear where that location will actually be. Because it is not clear that the posting notice was posted at the actual "facility or location of the employment," the petitioner cannot establish that it has complied with the notice requirements at 20 C.F.R. § 656.20(g)(1). If the petitioner merely posted the notice at its administrative office(s), the petitioner has not complied with this requirement. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations.¹ In the instant petition, it is noted those "similarly employed" would be nurses in the client hospitals.

With regard to the assertions of the petitioner's president, none of the eight reasons listed as reasons why the petitioner does not have to post its job notices at the beneficiary's actual place of employment, are persuasive. The fact that the petitioner's posting notice was not questioned until September 2004 does not support a positive finding as to the posting of the notice for the instant petition. The fact that the petitioner is the actual employer of the beneficiary is not in question; however, this fact would not negate the petitioner's responsibility to post the job notice at the actual place of employment so as to provide the U.S. workers that are "similarly employed" with an opportunity to comment on the posting. The fact that the petitioner has posted job notices in its administrative offices does not establish that the petitioner fulfilled the regulatory criteria for posting notices identified at 20 C.F.R. § 656.20(g)(1). The BALCA excerpt submitted by the petitioner that refers to *Bison Turf/Fun Co., Inc.* also does not appear relevant to the proceedings. The two mentions of *Bison Turf/Fun Co.* in the BALCA excerpt refer to posting requirements that cannot be avoided based on either company policy or the use of a wider means of publicizing available job openings. In addition, the petitioner does not state how the Department of Labor's (DOL) BALCA precedent decision would be binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Furthermore, as correctly noted by the director, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director's decision shall stand, and the petition will be denied.

The petitioner failed to demonstrate that a notice of the proffered position was posted in accordance with 20 C.F.R. § 656.20(g)(1).

The petition will be denied for the above stated reasons. 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.

¹ 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).