

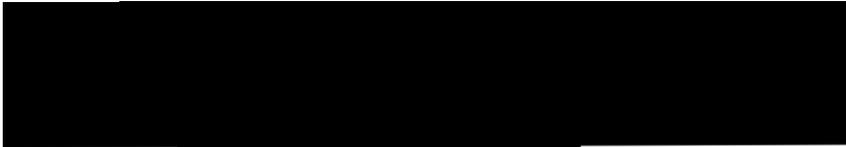


U.S. Citizenship
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File: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 26 2007
WAC-05-184-51308

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:



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, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital, and seeks to employ the beneficiary permanently in the United States as a registered nurse, a professional or skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 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.

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.”¹ 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 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 June 15, 2005, which is the priority date. The proffered wage as stated on Form ETA 9089 for the position of a nurse is \$29 per hour, 40 hours per week, which equates to an annual salary of \$60,320. On the I-140 petition filed, the petitioner listed the following information related to the petitioning entity: established: October 12, 1947; gross annual income: over \$300 million; net annual income: over \$10 million; and current number of employees: 809.

The petitioner additionally submitted documentation to show the petitioner's ability to pay, as well as documentation regarding the beneficiary's qualifications. The petitioner submitted a posting notice, which evidenced that the petitioner posted the position from May 24, 2005 to June 2, 2005, or eight business days.

The director denied the petition on October 19, 2005 on the basis that the petitioner failed to properly post the position 30 to 180 days prior to filing in accordance with 20 CFR § 656.10(d)(1)(ii), and also failed to meet the (d)(3)(iv) requirement of posting for ten consecutive business days. The petitioner appealed and the matter is now before the AAO.

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 appeal².

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, counsel provides that the posting was done properly in "each and every month starting with May 2005." Further, counsel provides that the petitioner "posts monthly notices" on its bulletin board, and on the hospital "intranet," which can be viewed daily by hospital employees. Counsel further provides that he agrees "that an I-140 denial is proper when posting is not timely made," but asserts that in the present matter "the posting was properly done, on several occasions, all within the statutory pre-I-140 time frame. The affidavit of posting only mentioned the most recent posting but that does not change the fact that the other postings were timely."

² 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In support, counsel provided an affidavit from the petitioner's representative, which stated that the notice had been posted for 10 consecutive business days in each of the last 12 months: date posted: May 5, 2005, which was removed on May 31, 2005; posted June 1, 2005 removed June 30, 2005; posted July 1, 2005 removed on July 29, 2005; posted August 1, 2005 removed on August 31, 2005; posted September 1, 2005 to September 30, 2005; posted October 3, 2005 to October 31, 2005; posted November 3, 2005 to November 28, 2005; and posted December 1, 2005 to December 30, 2005.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 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).

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 (Sheepherders), § 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; 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.

Fundamental to these provisions is the need to ensure that there are no qualified U.S. workers available for the position prior to filing. 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.

Accordingly, to be eligible for a Schedule A petition, as set forth above the petitioner would need to have posted the position pursuant to 20 CFR § 656.10(d)(3)(iv) 30 to 180 days prior to the June 15, 2005 filing, or in this case, between December 17, 2004 at the earliest, and completed by May 16, 2005 at the latest. Stated alternatively, this would mean that the last day of the posting must be at least 30 days prior to filing in order to provide sufficient time for interested persons to submit any documentary evidence to in response to the posting notice, or again in the case at hand, completed by May 16, 2005.

The initial notice submitted was posted from May 24, 2005 to June 2, 2005. The notice was deficient in that it was only posted for eight business days, and not the ten consecutive business days required by 20 C.F.R. § 656.10 (d)(1)(ii). Further, the notice, as noted in the director's decision was not completed 30 to 180 days prior to filing the application in accordance with 20 CFR § 656.10(d)(3)(iv). The notice additionally failed to list the address of the appropriate Department of Labor Certifying Officer where persons may provide evidence bearing upon the application. *See* 20 CFR § 656.10(d)(3)(iii).

Regarding the posting notices submitted on appeal, first, in accordance with 20 CFR § 656.10(d)(3)(iv) such evidence would not be accepted as the posting must have been completed prior to filing. Further, the petitioner must demonstrate eligibility at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Second, even if we were to accept such evidence on appeal, for the posting notice to be completed prior to filing, only the May 2005 posting would potentially be relevant, but that notice would be deficient for purposes of meeting the posting requirement as well. The posting submitted on appeal was initially posted on May 5. Ten consecutive business days would be reached as of May 18. As the I-140 petition was filed on June 15, 2005, the posting submitted on appeal would need to have been completed by May 16, 2005 to allow the requisite time period for interested parties to respond. All of the other posting notices are dated, and posted subsequent to the filing or priority date, and therefore could not be used as the petitioner must demonstrate eligibility at the time of filing.³ *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

³ Counsel additionally submitted a page on appeal from an AILA-SCOPS (Service Center Operations) meeting, "Q & A regarding Schedule A Posting Requirements (12/19/2005)," which provides that SCOPS instructed Service Centers not to deny Schedule A cases based on posting notices as SCOPS was "seeking a resolution for handling them." Posting is a regulatory requirement established for the protection of U.S. workers and cannot be contravened. *See* The Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990

Further, although not raised in the director's decision, the petitioner's filing was deficient in other aspects as well. 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).

A petitioner is required to obtain a prevailing wage determination from the relevant State Workforce Agency ("SWA") in compliance with 20 CFR § 656.40 prior to filing. Counsel only submitted the prevailing wage request on appeal, and not with the initial filing. The petitioner's wage request shows that it was submitted to the Employment Development Department (EDD), State of California, the relevant SWA, on October 19, 2005. The EDD made a determination on the wage request on November 4, 2005 subsequent to the petition's denial. Accordingly, the petition failed to meet Schedule A eligibility at the time of filing, which it must demonstrate. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 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). Further, the petitioner is required to submit the original Form ETA 9089 in duplicate. In the case at hand the petitioner submitted only one original Form ETA 9089. *See* 8 C.F.R. § 204.5(l)(3)(i), and 20 C.F.R. §656.15(a).

Based on the foregoing, the petitioner failed to meet the posting requirements as set forth in 20 C.F.R. § 656.10(d), both in terms of the length of the posting, and the time period in which the posting would need to be completed, and thus would not allow the proper time frame for effected parties or parties with information bearing on the application to notify the DOL, and accordingly could adversely impact U.S. workers. *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).

Accordingly, the petitioner has failed to meet the regulatory requirements regarding posting within a specified time period prior to filing the Schedule A application. 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.

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). Further guidance provided in letter, memo, or teleconference form would be akin to an unpublished decision, and accordingly is not binding. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel does not provide a published citation related to a director's approval of a Schedule A petition filed with a deficient posting notice.