

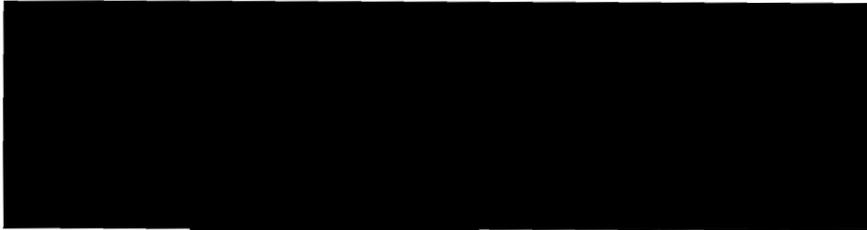
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



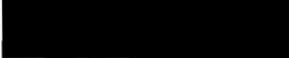
U.S. Citizenship and Immigration Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 09 2007**

EAC-05-125-51510

IN RE:

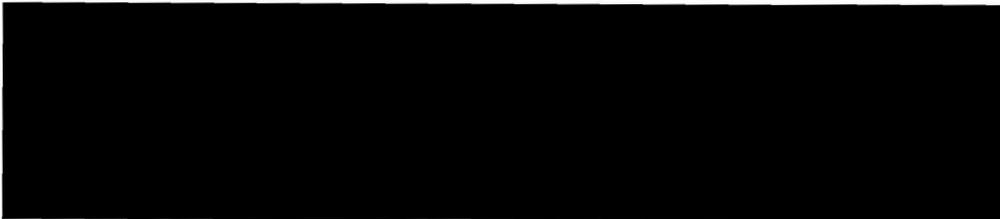
Petitioner:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a hospital. 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. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) was submitted in response to the director's request for evidence (RFE) dated November 30, 2005. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and the director also determined that the petitioner had failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific 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.

As set forth in the director's March 29, 2006 denial, the issues in this case are whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations and whether or not the petitioner has filed the petition with a valid PWD under the requirements of the regulations.

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

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "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." 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). Here, the priority date is March 28, 2005.

Counsel asserts that the petition should be considered as a "pre-PERM" case based on minutes of an American Immigration Lawyers Association (AILA)/DOL-ETA Liaison Meeting (AILA minutes) held on March 17, 2005. Per the AILA minutes DOL follows the "postmark rule" and assigns a filing date by the date the Form ETA 9089 is postmarked or sent by Federal Express regardless of date of arrival. Therefore, counsel asserts that a priority date is assigned by postmarking date, not by receipt by CIS and the current Schedule A petition should be evaluated under pre-PERM regulations because the current petition was postmarked on March 25, 2005, before PERM's enactment on March 28, 2005. Counsel's reliance on the AILA minutes is misplaced. See 8 C.F.R. § 103.2(a)(7)(i).² Counsel does not provide a published citation

¹ While the instant appeal is pending with the AAO, the petitioner filed another I-140 immigrant petition (LIN-06-173-51632) on behalf of the instant beneficiary with the Nebraska Service Center on May 9, 2006 and the petition (LIN-06-173-51632) was approved by the Nebraska Service Center on November 16, 2006.

² The regulation at 8 C.F.R. § 103.2(a)(7)(i) states in pertinent part that: "*General.* An application or petition

relating to the acceptance of late filings by CIS that supersedes 8 C.F.R. § 103.2(a)(7)(i), 20 C.F.R. § 656.15(a), and 8 C.F.R. § 204.5(d). Counsel does not state how answers by a DOL representative at an AILA/DOL-ETA Liaison Meeting are applicable to the instant petition before the Department of Homeland Security's CIS or AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of 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 also argues that timely filing is determined by postmark referring to a memorandum from William Yates, Associate Director for Operations for USCIS on April 30, 2001 regarding filing petitions or applications under Section 245(i) (Yates' April 30, 2001 memo). However, counsel does not provide any evidence to show that Yates' April 30, 2001 memo applies to the filing of Schedule A immigrant petition under PERM regulations and that Yates' April 30, 2001 memo supersedes 8 C.F.R. § 103.2(a)(7)(i), 20 C.F.R. § 656.15(a), and 8 C.F.R. § 204.5(d).

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. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM. *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 record shows that the instant petition was filed on March 28, 2005 and CIS's regulations and DOL's regulations expressly state that the effective date is March 28, 2005. The new procedures must be applied to the instant case and the petitioner must meet all requirements set forth by PERM.

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 appeal.³ The relevant evidence in the record includes two notices of job offer availability and a prevailing wage determination from Maryland Department of Labor, Licensing and Regulation.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

- (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
- (b) *General documentation requirements.* A *Schedule A* application must include:

received in a [CIS] office shall be stamped to show the time and date of actual receipt and, unless otherwise specified in part 204 or part 245 or part 245a of this chapter, shall be regarded as properly filed when so stamped, if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted.”

³ 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).

- a. An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
- b. Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Sheepherders), . . . 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:

- (i) To the bargaining representative(s) (if any) of the employer's employees...
- (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 the 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 the 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.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

The notice of the filing of an Application for Permanent Employment Certification must:

- i. State 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.

With the initial filing the petitioner submitted a copy of the notice of posting and an attestation of posting from [REDACTED] SPHR, Director Workforce Recruitment & Staffing [REDACTED] In the attestation of posting, [REDACTED] certified that "copies of this job offer Notice were poste at e employment location

pursuant to 20 CFR 656.20(g)(1).” The notice indicates the date posted: April 3, 2001, date removed: permanent posting, and results: multiple openings as of March 6, 2005. It is not clear whether the notice was posted for at least 10 consecutive business days at the facility or location the beneficiary will be actually performing duties, i.e. [REDACTED] Maryland, between 30 days and 180 days before filing the application. In response to the director’s RFE dated November 30, 2005, the petitioner submitted another notice of job offer availability with an attestation of posting from [REDACTED] Acting Director Workforce Recruitment and Staffing ([REDACTED]). In the attestation of posting, [REDACTED] certified that “copies of the above Notice were posted at the employment location pursuant to 20 CFR 656.10 et seq. from June 1, 2005 through September 30, 2005.” The notice indicates the date posted: June 1, 2005, date removed: see below, and results: multiple openings remain. The regulation at 20 C.F.R. § 656.10(d)(3) requires that the notice must be posted between 30 and 180 days before filing the application. The record shows that the instant petition with labor certification application was filed on March 28, 2005 and the notice was posted 64 days **after** filing the application. Therefore, the petitioner failed to submit evidence that the notice was properly posted in accordance with 20 C.F.R. § 656.10. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, 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 regulation at 20 C.F.R. § 656.15 states in pertinent part:

- (c) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
- (d) *General documentation requirements.* A *Schedule A* application must include:
 - (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(c) states:

Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

The petitioner did not submit a prevailing wage determination (PWD) with the initial filing. In response to the director’s RFE date November 30, 2005, the petitioner submitted a PWD from Maryland Department of Labor, Licensing and Regulation (Maryland DLLR). The PWD was determined on July 5, 2005 and was valid for at least 90 days but not more than a year from the date of the determination. That means the PWD from Maryland DLLR for the instant case was valid from July 5, 2005 to July 4, 2006. The PWD was not valid at the time the petitioner filed the petition on March 28, 2005. The regulation at 20 C.F.R. § 656.40(c) expressly requires that employers must file the applications within the validity period of PWD specified by the SWA. However, the petitioner did not submit a valid PWD with its filing and therefore, failed to meet the requirements of the valid PWD under the PERM regulations. Since the petitioner failed to obtain a valid PWD in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the PWD 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.)

Therefore, counsel's assertion on appeal cannot overcome the director's decision. The record reflects that the petitioner failed to post the notice in compliance with regulations prior to the filing and failed to file the instant petition within a valid period of a prevailing wage determination as required by the regulation.

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.