

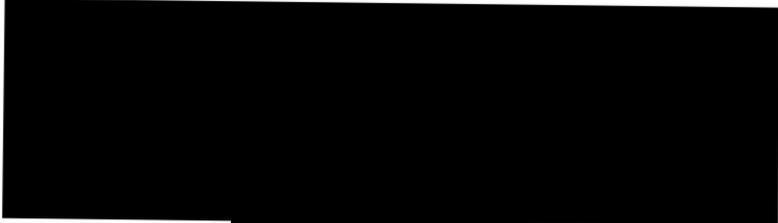
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U.S. Citizenship
and Immigration
Services

B6



FILE:

SRC 05 149 51515

Office: TEXAS SERVICE CENTER

Date: JUL 19 2007

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. 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 Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification. Specifically, the director stated that notice of the filing of the Application for Permanent Employment Certification was not posted between 30 and 180 days before filing the application, and, that petitioner has not established that it provided notice of the filing of the Application for Permanent Employment Certification at the actual job location (and not posted at the corporate headquarters or other office of the employer). Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 21, 2005 denial, the two issues in this case are whether the petitioner established that it properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's place of employment and whether it published notice of filing such application between 30 and 180 days before filing the application.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

On May 4, 2005, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. 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 U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall include:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or May 3, 2005. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$24.26 an hour or \$50,460.00 annually.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence in the record includes the following documents: letters from counsel dated April 29, 2005 and October 4, 2005; an explanatory letter from counsel dated April 29, 2005; the ETA Form 9089 signed by the employer, the petitioner herein, on April 27, 2005; a "Notice to Employees" for the job of registered nurse at the rate of pay at \$27.81 stating that the notice was posted between April 14, 2005 to April 25, 2005; a support letter from [REDACTED], Director of Human Resources dated April 13, 2005; a prevailing wage determination from the State of Georgia Department of Labor for the job registered nurse at the prevailing wage rate of \$18.92 as dated August 6, 2005; the beneficiary's license as a registered professional nurse from the State of Georgia, Georgia Board of Nursing; a CGFNS certificate issued August 3, 2005 stating that the beneficiary has fulfilled the requirements of the Commission on Graduates of foreign Nursing Schools; the beneficiary's marriage certificate; copies of web pages from the petitioner's website; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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

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

¹ 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).

electronic or print that was 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.

On appeal, counsel contends in pertinent part that “this 30 day waiting period serves no purpose and causes unnecessary delay in filing the I-140 petition.”² Counsel opines that the 30 day waiting period was intended for non-Schedule A occupations. Counsel provides no evidence, regulation or case precedent in support of his proposition. According to the “Notice to Employees, Registered Nurse” found in the record of proceeding, the notice was posted for the period April 14, 2005, to April 25, 2005. The petition was accompanied by an application for Schedule A designation, therefore the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS or May 3, 2005. The Notice was not posted between 30 and 180 days before filing the application (i.e. ETA Form 9089).

Further, counsel asserts that “we can assure USCIS that ... [the petitioner’s] Human Resources ... [department] posted the posting notice in the hospital where the beneficiary ... is employed and the posting notice was posted in the correct “conspicuous location at the place of employment.”

The record of proceeding and the Notice to Employees provides no evidence that the notice of filing the Application for Permanent Employment Certification was posted in the correct “conspicuous location at the place of employment.”

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO finds that the record reflects that the petitioner posted notice of filing an application for permanent employment certification from April 14, 2005 to April 25, 2005 which is a total of 12 days.

² According to the response to comments on this issue found in the Final Rule to this regulation commonly called PERM, the notice requirement is “primarily a medium to obtain documentary evidence bearing on the application.” *See* 69 Fed. Reg. 77339 (Dec. 27, 2004). There is no distinction found in the regulations between Schedule A and non-Schedule A occupations relative to the posting requirement.

The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." This office notes that April 16 and April 17 as well as April 23 and 24 of 2005 were two week-ends, Saturday and Sunday. Thus, the notice was posted for only eight consecutive *business* days. The regulation could have required that the notice of the application be posted "ten days." Instead, it mandates that it be posted "ten business days." The modifier "business" adds meaning to the regulation which is defined at 29 C.F.R. § 2510.3-120(e). This office finds that this posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii). 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).

Moreover, the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). Current regulations mandate that the petitioner provide evidence that it published notice of filing the application for permanent employment certification in its in-house media. Any assertion that the petitioner may satisfy this requirement by documenting for the record that it published an *announcement of the job vacancy* which is the subject of its application for permanent employment certification is misplaced.

The record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position of in-house publication for job vacancies or in any other of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulations. *See* 20 C.F.R. § 656.10(d)(1)(ii).

A prevailing wage determination (PWD) from the appropriate state work force agency ("SWA") was not submitted with the petition as originally filed. The petitioner received a prevailing wage determination as dated August 6, 2005 from the State of Georgia Department of Labor for the job registered nurse at the prevailing wage rate of \$18.92. (The petitioner filed the Form I-140 on May 3, 2005, the ETA Form 9089 signed by the employer, the petitioner herein, on April 27, 2005.)

Beyond the decision of the director, the petitioner is required by regulation to obtain a prevailing wage determination from the State workforce agency and then utilize the information obtained from the PWD in the ETA Form 9089 for Schedule A occupations. *See* the regulations at 20 C.F.R. § 656.40(c) and § 656.15(b)(1). Under the regulations, the petitioner as an employer is required to certify that it is offering the prevailing wage for the occupation, and, the regulations require an Immigration Officer to determine whether the employer and alien have complied with the regulation at 20 C.F.R. § 656.10, et seq.³ The ETA Form 9089 was prepared and submitted in this case without benefit of the prevailing wage determination that is contrary to the regulation.

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

³ *See* 69 Fed. Reg. 77336 (Dec. 27, 2004).

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.