

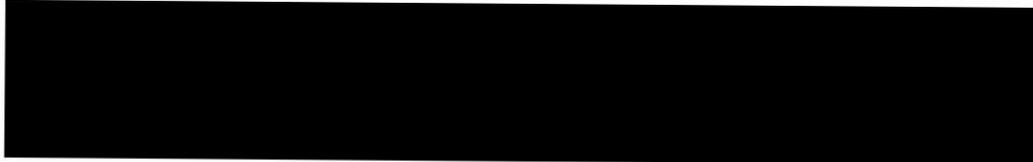
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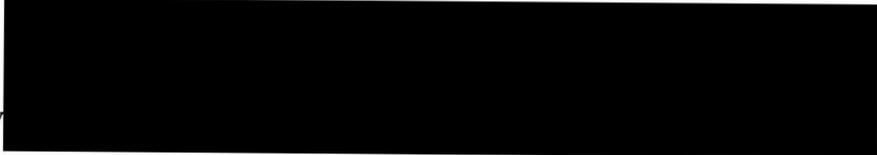


FILE: [REDACTED]
SRC 05 132 51654

Office: TEXAS SERVICE CENTER

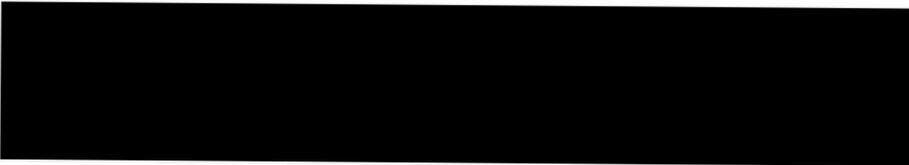
Date: JUN 05 2007

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, Texas Service Center, and was certified for review before the Administrative Appeals Office (AAO). The AAO will affirm the director's decision to deny the petition.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a staff nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I, pertinent to registered nurses. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and denied the petition accordingly.

On appeal, counsel asserts that the duration of the notice of posting the certified job opportunity should have been calculated beginning at the first date of the posting.¹

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 April 8, 2005.

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 DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL 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 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:

¹ 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.

- (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 regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

- (1) In applications filed under Section 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:
 - (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. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
 - (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 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.

* * *

- (3) The notice of the filing of an Application for Alien 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 signed by [REDACTED] on March 25, 2005. She is identified on the notice as the petitioner's human resources director. She states on the notice that it was posted from March 1, 2005 to March 15, 2005. Also provided with the initial filing is a letter, dated March 16, 2005, signed by [REDACTED], [REDACTED] states that the petitioner "has a bargaining representative and a copy of this notice was posted in a conspicuous location within the facility and remained unobstructed for the duration of posting for not less than ten (10) days." (Emphasis added).

It is noted that the regulation at 20 C.F.R. § 656.10(d)(1)(i) and (i) clearly requires that posting at an appropriate employee location may only occur if there is no bargaining representative. If there is a bargaining representative, then the regulation provides that the provision of a copy of the job notice to the bargaining representative may be documented by submitting a copy of the letter and a copy of the ETA Form 9089 that was sent to the bargaining representative. Although [REDACTED] indicates that there is a bargaining representative connected with the petitioner's hospital, it is also noted that the petitioner answered "n/a" on item 24 of the Form ETA 9089, which asks if a notice of filing of the job posting has been provided to the bargaining representative at least 30 days but not more than 180 days before the date the application is filed. Further, counsel has not mentioned this anomaly on appeal.

If there is a bargaining representative involved, then the petition must fail because the petitioner failed to provide a copy of the letter and the Form 9089, which was provided to the representative. The remainder of this review will be premised on the notice of posting the certified position as if there had been no bargaining representative involved.

Since the petition was filed on April 8, 2005 and the accompanying notice of filing the job opportunity was posted from March 1, 2005 to March 15, 2005, the director determined that the petitioner did not comply with the regulatory posting requirement because a minimum of 30 days had not elapsed from the end of the posting, March 15th and the filing of the I-140 on April 8, 2005. The director denied the petition on December 20, 2005.

On appeal, counsel maintains that the regulation does not specify that the thirty days begins to run at the end of the posting as the director claimed, but could be computed as beginning on the first day of the posting as long as it began "between 30 and 180 days before filing the application." Counsel also asserts that pursuant to a Service Center operational memorandum, dated December 22, 2004,² the submitted notice of filing should have been accepted and the petition should be approved, because this memorandum was still in effect at the time of initial posting. He also provides a copy of a subsequent interoffice memorandum, HQPRD70/8.5,³ which provides that cases filed after March 28, 2005, would have to meet the regulatory requirements. Counsel states that petitioner should have been given notice of the change of policy.

It is noted that both the Ohata Memo and the subsequent HQPRD70/8.5 are merely guidance⁴ and do not

² This memo is *Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations...* signed by Fujie O. Ohata. (hereinafter Ohata Memo)

³ *Current Processing of Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with U.S. Department of Labor (DOL) Notification/Posting Requirements and Guidance Effective March 28, 2005 pursuant to new DOL regulations at 20 CFR Part 656 Regarding the New Process for Blanket Labor Certification for Schedule A.*

⁴ See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

supersede existing statutory or regulatory provisions or constitute a legally binding precedent within the regulations at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a). The December 22, 2004 memorandum states that a petitioner need only provide evidence of compliance with the notification/posting requirement as of the date of the petitioner's response to a CIS-issued intent to deny, not the filing date of the I-140. That instruction is in error, as it conflicts with a plain language statutory requirement. Section 122(b) of IMMACT 90 states, in pertinent part:

The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that-

- a. no certification may be made unless the applicant for certification has, **at the time of filing the application, provided notice of the filing** (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations... .

(Emphasis added.) The statute clearly requires that notice of filing of a schedule A application be posted prior to the filing of the application – i.e., prior to the filing of the I-140 and the application for precertification under schedule A. Counsel's contention that the petitioner should have been given an opportunity to repost the notice to comply with the 30-180 day requirement would be contrary to the statute and may not be allowed. The petitioner ultimately bears the burden of proof to establish eligibility for the visa classification sought.

As quoted above, the plain meaning of the regulatory language shows that the regulatory notification requirement is not a single action but a period. An employer must provide evidence that it posted a notice of filing for at least 10 business days at least 30 days prior to filing the labor certification application. It is noted that the ETA Form 9089 interprets its own regulation in this manner. Question 25 of Part I of the Form 9089 asks the employer to confirm that if there is no bargaining representative, "has a notice of this filing been posted for 10 business days in a conspicuous location at the place of employment ending at [sic] least 30 days before but not more than 180 days before the date the application is filed?" In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from March 1, 2005 to May 15, 2005 failed to comply with the requirements of 20 C.F.R. § 656.10(d)(3)(iv) because it was not completely provided between 30 and 180 days before filing the application.

It is additionally noted that the petitioner's response to the director's request to provide evidence that it had published the notice of filing an application for permanent employment certification in its in-house media in accordance with normal procedures used by the petitioner when recruiting, within its organization, for positions similar to that which is the subject of the application as now required under 20 C.F.R. § 656.10(d)(1)(ii), did not comply with the regulatory requirement. Nor did it demonstrate which in-house media was used to distribute the notice of the application. The petitioner's response was dated November 22, 2005 and consisted of a website list of various nursing vacancies. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) clearly requires an employer to publish **the notice** in any and all in-house media and provide copies of all the in-house media, whether electronic or print, that were used to distribute **notice of the application**. (Emphasis added). A list of vacancies does not comply with the requirement that the notice of

the application for permanent employment certification must be published in any and all in-house media in accordance with the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

The AAO concurs with the director's denial of the petition. The petitioner failed to post the notice in compliance with regulations prior to the filing; therefore any subsequent effort by the petitioner to correct the dates of 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.)

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 director's decision to deny the petition is affirmed.