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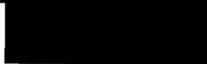
U.S. Citizenship
and Immigration
Services

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BC



FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 14 2007

SRC 06 022 51577

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:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] is an acute health care 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. § 656.5, Schedule A, Group I. 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.

The record shows that [REDACTED] has filed the appeal. She submitted a G-28, Notice of Entry of Appearance as Attorney or Representative, identifying herself in item 4 by stating that "I am the recruiter." Other evidence in the record indicates that she operates "[REDACTED]" and prepared the I-140, Immigrant Petition for Alien Worker. The regulation at 8 C.F.R. § 103.2(a)(3), relating to representatives authorized to file appeals, provides in pertinent part:

Representation. An applicant or petitioner may be represented by an attorney in the United States as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

The regulation at 8 C.F.R. § 1.1(f) defines an attorney as a person who is a member of good standing in any state bar. The regulation at 8 C.F.R. § 292.1(a)(4) provides that an accredited representative is a person "representing an organization described in § 292.2 of this chapter who has been accredited by the Board." There is no indication in the record that either [REDACTED] or her organization may be considered as an attorney or an accredited representative, and may not represent this petitioner in this case. For that reason, the petitioner will be treated as representing itself.

On Part 3 of the notice of appeal, Ms. [REDACTED] states that the date of the job posting was entered incorrectly due to a clerical error. Mr. [REDACTED] claims that the correct dates should have been July 18-31, 2005 as evidenced by the attached "Job Posting List" provided by the petitioner, and that the petitioner posts registered nurse positions continuously.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.

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."

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.

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 October 28, 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) 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 proscribed 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 20 CFR 516.4 or occupational safety and health notices required by 20 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 with certification of posting from [REDACTED] Vice President, Human Resource. On the copy of the notice of posting Ms. [REDACTED] stated that notice was posted internally on the hospital's bulletin board from November 1-12, 2005 and that no qualified applicants had been found. Since the petition and the accompanying labor certification application were filed on October 28, 2005, the director determined that the petitioner did not comply with the regulatory posting requirement in that a minimum of 30 days had not elapsed between the completion of the posting notice and the filing of the I-140.

On appeal, in addition to Ms. [REDACTED] statement that a clerical error had been made and that the real posting dates were from July 18-31, 2005, the petitioner has provided a copy of the [REDACTED] "Job Openings List," as of November 22, 2005. This list itemizes various registered nurse openings within its operations, along with the designated shifts, and a list of dates. Some of the dates are highlighted and show dates such as "7/18/2005" and "August 9, 2005."

As quoted above the plain meaning of the regulation 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. Without finishing the 10 business days posting period, the employer cannot fulfill the obligation of notification. In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from November 1-12, 2005 failed to comply with the requirements of 20 C.F.R. § 656.10(d)(1)(3)(iv) because it was not provided between 30 and 180 days before filing the I-140.

It is further noted that the job posting signed by Ms. [REDACTED] failed to provide the address of the appropriate Certifying Officer in accordance with 20 C.F.R. § 656.10(d)(1)(3)(iii). 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.)* Moreover, Ms. [REDACTED]'s statements carry little evidentiary weight as to when and how the posting was made as she appears to be a third party independent contractor and not the person who certified the posting. Additionally, the mere listings of registered nurse openings do not comply with any of the specific requirements of 20 C.F.R. § 656.10(d)(3) in

that it doesn't inform any otherwise available U.S. workers that the notice is provided as a result of filing an application for permanent alien labor certification; doesn't state that any person may provide documentary evidence relevant to the application to the Certifying Officer of the Department of Labor and doesn't provide the address of the appropriate Certifying Officer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Similarly, the record fails to indicate that the petitioner 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). 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).

As stated above, the print-out from the petitioner's job listings of current openings submitted on appeal is not the notice in connection to filing an application for permanent alien labor certification that the employer should post. Nor does it show that the in-house media was used to distribute the notice of the application. 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). Therefore, the petitioner failed to provide evidence that the notice was published in any in-house media as required by 20 C.F.R. § 656.10(d)(1)(ii).

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 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.