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U.S. Citizenship
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B6



FILE: [REDACTED]
SRC-06-020-51837

Office: TEXAS SERVICE CENTER

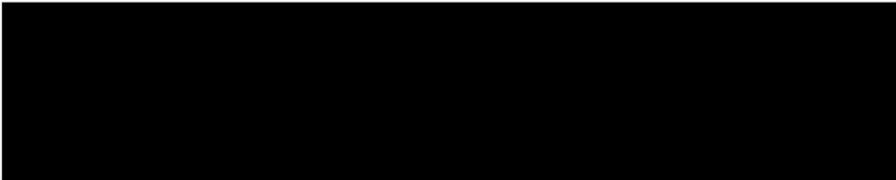
Date: JUN 26 2007

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 for ten consecutive business days at the beneficiary's intended place of employment. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes specific allegations of error in law or fact. 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 December 9, 2005 denial, the only issue in this case is 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.

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 October 25, 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 October 25, 2005. See 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$22.65 an hour or \$47,112 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: the posting notice, and two attestations pertinent to the posting dated October 7, 2005 and November 28, 2005 respectively. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification at its facility.

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.

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).

With the initial filing the petitioner submitted a copy of the notice of posting and an attestation of posting from [REDACTED], Nurse Recruitment Coordinator dated October 7, 2005. In the October 7, 2005 attestation of posting, [REDACTED] certified that the notice “was posted on our premises for a least ten consecutive business days.” The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(ii). CIS interprets the “facility or location of the employment” referenced at 20 C.F.R. 656.20(g)(1)(ii) to mean the place of physical employment. In the instant case, the October 7, 2005 attestation is on letterhead of Baptist Health South Florida located at 8900 North Kendall Drive, Miami, FL 33176 and signed by [REDACTED] on behalf of Baptist Hospital of Miami. A letter from [REDACTED], Controller of Baptist Health South Florida, Inc. (BHSF) verifies that BHSF is the parent of a system of hospitals and other facilities which includes Baptist Hospital of Miami, South Miami Hospital, Doctors Hospital, Homestead Hospital and Mariners Hospital. The ETA Form 9089 Section H Job Opportunity Information clearly indicated that the beneficiary would work at Doctors Hospital located at 5000 University Drive, Coral Gables, FL 33146. The Form I-140 indicated at Item 4 that the beneficiary will work at the address in Coral Gables, FL. Therefore, the place of physical employment would be the Doctors Hospital in Coral Gables, FL where the beneficiary would perform services as a registered nurse. The petitioner must post the notice of filing at Doctors Hospital in Coral Gables, FL. The attestation of posting from [REDACTED] as Nurse Recruitment Coordinator of Baptist Hospital of Miami that “Notice of Filing of the Application for Alien Employment Certification was posted on our premises for a least ten consecutive business days” is not sufficient to verify that the petitioner has posted the notice in the place of the beneficiary’s physical employment, i.e. Doctors Hospital at 5000 University Drive, Coral Gables, FL. In response to the director’s notice of intent to deny (NOID) dated November 16, 2005, [REDACTED] submitted another attestation of posting. November 28, 2005 attestation of posting is on the letterhead of Doctors Hospital and signed as Nurse Recruitment Coordinator of Doctors Hospital. She further certifies that it was posted in a conspicuous place within the location where the petitioner’s employees can readily read the posted notice on their way to or from their place of employment. This is a location where the beneficiary is actually going to be physically employed and providing services and not at the petitioner’s corporate headquarters or other office. The AAO concurs with counsel’s assertion on appeal and finds that the petitioner has properly posted the notice in a correct place for the instant petition.

However, [REDACTED] second attestation of posting submitted in response to the director’s NOID states that the notice “was posted on our premises for at least ten consecutive business days ending at least 30 days but not more than 180 days before the date of filing of the above reference petition.” On appeal counsel argues that neither the director’s NOID nor pertinent regulations request the “actual dates of the notice being posted.” However, the regulation clearly requests that the notice be posted for at least 10 consecutive business days and be provided between 30 and 180 days before filing the application. Without actual dates of the notice being posted, CIS cannot determine whether or not the petitioner has posted the notice for at least 10 consecutive business days excluding weekends and holidays, and that the posting was conducted during a period between 30 days and 180 days before filing the application. CIS cannot solely rely upon the petitioner’s assertions that the notice was posted at least 10 consecutive business days between 30 days and 180 days before filing the 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, 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. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

On appeal, counsel submits “AILA InfoNet Doc. No. 05122162 (posted December 21, 2005)” which printed American Immigration Lawyers Association (AILA)’s information from a CIS service center regarding holding adjudication of Schedule A cases. Counsel’s reliance on the AILA minutes is misplaced. Counsel does not provide a published citation for CIS headquarters’ policy relating to no longer denying schedule A cases on the posting issues only. 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).

Beyond the director’s decision and counsel’s assertions on appeal, the AAO will discuss whether or not the petitioner published such notice in its in-house media in accordance with 20 C.F.R. § 656.10(d)(1). 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 the director quoted, the regulations require that 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. *See* 20 C.F.R. § 656.10(d)(1). Although the attestation from the petitioner copies the pertinent part of regulation and states that “[t]he notice was also published for the same period of time in any and all in house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar position in this organization”, the petitioner did not submit such a copy of its in-house media publishing for the position. Therefore, 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, as 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 in its 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).

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, eligibility would not be established where the petitioner published notice of its application for employment certification on or after this date.

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.

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.