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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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MAY 04 2007

FILE:

WAC 05 188 51782

Office: CALIFORNIA SERVICE CENTER

Date:

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:

[Redacted signature area]

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, California Service Center, and 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 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 submits a corrected notice of posting and asserts that the petitioner complied with the applicable regulatory requirements.<sup>1</sup>

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 June 22, 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:

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<sup>1</sup> 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 with certification of posting from [REDACTED], Chief Nursing Officer. On the copy of the notice of posting Ms. [REDACTED] stated that notice was posted on a bulletin board from May 12, 2005 to May 25, 2005. Since the petition and the accompanying

labor certification application were filed on June 22, 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 before the filing of the I-140. The director denied the petition on November 10, 2005.

On appeal, current counsel submits a copy of another notice of posting the certified position, signed by [REDACTED]. This notice states that it was posted in the petitioner's employee lounge from May 10, 2005 to May 21, 2005. Current counsel asserts that pursuant to a Service Center operational memorandum, dated December 22, 2004, titled "Guidance for Processing Pending Forms I-140 for a Schedule A/Group I or II Occupations..." signed by [REDACTED] (hereinafter Ohata Memo) that the perfected notice of filing should be accepted and that the petition should be approved.

It is noted that the Ohata Memo is merely guidance<sup>2</sup> and does not supercede 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 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-

- (1) 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.

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. In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from May 12, 2005 to May 25, 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 application.

It is further noted that neither the underlying record nor the notice provided on appeal indicate whether a bargaining representative is present at the petitioner's business. The petitioner answered "no" to question 24 of the ETA Form 9089, which asks if the notice of job posting was provided to the bargaining representative and which also provides an "n/a" alternative response. The copy of the posting indicates that the notice of job

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<sup>2</sup>See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

posting was either provided to a bargaining representative **or** posted in the appropriate location. (Emphasis added). The regulation at 20 C.F.R. § 656.10(d)(1)(i) and (ii) clearly requires that posting at an appropriate employee location may only occur if there is no bargaining representative.

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). 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 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 on appeal 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.)

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.