

U.S. Citizenship
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Services



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FEB 25 2008

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
EAC 06 069 51558

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska 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 nursing home. 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. The director also concluded that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage. Therefore, the director denied the petition.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner's petition was consistent with the applicable requirements and that the petition should be approved.¹

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 January 3, 2006, 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.² 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.

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.

² It is noted that the petitioner's ETA Form 9089s submitted with the petition were not duplicates in that one specified "6+ months" experience required for the position and the other required "12+ months."

- 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 January 3, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$28.00 an hour or \$58,240 per year. Included in the requirements for the certified position are an associate degree in nursing and a minimum of 6 + months experience in the job offered. As noted above, the other ETA Form 9089 contained a requirement of 12+ months experience.

Relevant evidence in the underlying record relating to the notice of the job posting is an unsigned notice of filing which reflects the requirements of a full-time position of registered nurse at \$28.00 per hour. 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 (Shepherders), . . . 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 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.

The record reflects that the notice states that it was "to be posted on the place of employment's bulletin board for not less than 10 consecutive business days. The date posted is specified as November 12, 2005. The date removed is stated as November 27, 2005. Thus the petitioner posted notice of filing an application for permanent employment certification at its facility from Saturday, November 12, 2005 through Sunday, November 27, 2005.

Citing the DOL regulation at 29 C.F.R. § 2510.3-120(e), which defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government," and noting that November 24, 2005 was a holiday, the director denied the petition, concluding that the notice was posted for only nine consecutive business days. The director also found that the petitioner had failed to submit evidence of its ability to pay the proffered wage at the time of filing the I-140.

On appeal, counsel submits a letter from the petitioner's financial officer, [REDACTED] confirming the petitioner's ability to pay the proffered wage as an employer of over 270 employees which, when considered with the biographical documentation provided to the underlying record, appears to satisfy the requirements of 8 C.F.R. § 204.5(g)(2).³

Relevant to the notice of posting the availability of the certified position, counsel submits copies of other notice of postings that the petitioner has posted as well as a letter from [REDACTED], the petitioner's administrator. [REDACTED] states that he has held this position since June 4, 2006, but is familiar with current and past vacancies and affirms that notices of filing are frequently posted on their facility bulletin board due to the shortage of registered nurses. Copies of five of these notices posted from August 18, 2005 to November 22, 2005 are included on appeal as a means of illustrating how the petitioner complied with the posting requirement.

The AAO notes first, that the posting provided with the petition 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) in that it was not posted for ten consecutive business days as found by the director. Further, the DOL's FAQs found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>. specifically advise how to calculate the timeframes for various posting and filing requirements relating to labor certification procedure including the notice of filing at issue in this matter. The guidance contains, in pertinent part, the following question and answer:

Time Frames

³ That regulation provides that where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

5. How do I count days to establish recruitment timeliness and time period as outlined by the regulation?

. . . As another example, the regulation requires a Notice of Filing posting for a time period of ten consecutive business days. If the order is posted on Monday, April 30, 2007, Monday is day 1, Friday, May 4th, is day 5; the following Monday, May 7th, is day 6; and Friday, May 11th day 10. May 11th, is the last day of this time period and is therefore defined as the event and is not counted when calculating the 30 day restriction prior to filing timeline. To calculate the 30 day timeline, May 12th, is day 1, May 13th, day 2, May 23rd, day 12; May 31st, day 20; and June 10th, is day 30. The application can be filed on June 10, 2007.

Based on the above, the plain meaning of the regulatory language reflects that the 10 consecutive business day notification requirement is not a single action but a period which, according to the above discussion, represented a change from the previous provisions by including only Monday through Friday as part of the calculation of 10 consecutive business days. To interpret it in the same manner by counting weekends because a particular employer is open for business on weekends is not consistent with the provisions of the regulation which do not include any reference to an individual employer's hours of operation. It is further noted that the published comments to the final rule at 69 Fed. Reg. 77326, 77338 (Dec. 27, 2004) noted that the notice requirement had been a statutory requirement since the passage of the Immigration Act of 1990. In the opinion of DOL, the primary purpose of Congress in promulgating the notice requirement was to "provide a way for interested parties to submit documentary evidence bearing on the application for certification rather than to provide another way to recruit for U.S. workers. See 8 U.S. C. 1182 note." Concluding that because the provision of notice of the job opportunity was a statutory requirement, DOL noted that it did not believe that exceptions to the notice requirement could be based on the occupation involved in the application.

Regarding the copies of notice of job opportunities for registered nursing positions that were submitted on appeal, it is noted that they do not describe the same vacancy as set forth in the Form 9089 submitted with the I-140 in this case. None of these notices apprise any interested U.S. worker of the certified job opportunity in this case because the minimum period of relevant experience is specified as "12+ months" rather than the lesser 6+ months described on the Form 9089 in this matter. They are not an acceptable substitute for the notice that was submitted to the underlying record as the one representing this job opportunity for a registered nurse. 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)).

Beyond the decision of the director, it is further noted that all notices of job openings submitted in this matter, including those provided on appeal, are defective in that they advise that the minimum requirements for the position include either a "NYS Registered Nurse License or passing of CGFNS Examination, or passing of NYCLEX-RN Examination." The applicable requirements for Schedule A registered nurses were amended as of the implementation of the PERM regulations on March 28, 2005. Pursuant to 20 C.F.R. § 656.15(c)(2), the beneficiary must possess either a *Certificate* (not merely evidence of passing the examination) from the Commission on Graduates of Foreign Nursing Schools (CGFNS), a full and unrestricted (permanent) license to practice nursing in the state of intended employment, or documentation that that she has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). (Emphasis added.)

It is additionally noted that the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification for a registered nurse 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). 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.

Finally, the record also fails to reflect that the petitioner has submitted evidence of the beneficiary's qualifying experience of 6 + months of experience in the job offered in accordance with the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) which requires documentation of relevant training or experience through letters from trainers or employers giving the name, address, and title of the trainer or employer and the description of the training received or the experience of the alien.

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).

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

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ORDER: The appeal is dismissed.