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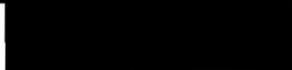
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **JUL 21 2008**

SRC-06-086-50668

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 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 blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 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 failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's March 8, 2006 denial, the main issues in this case are whether or not the petitioner has posted the notice of filing and submitted a valid PWD in compliance with the requirements of the regulations.

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 who 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 January 23, 2006.

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.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, the petitioner submits printouts of job postings from the Internet and an electronic PWD from the State of Florida. Other relevant evidence in the record includes printouts of job postings from *jobsience.com*, *careerbuilder.com*, *employerflorida.com* and *flhealthjobs.com*, and a copy of the Center for Healthcare Careers External Salary Calculation Worksheet from the petitioner.

The director determined that the job posting was posted on October 28, 2005 and the petitioner had not closed the job posting until the petition was filed on January 23, 2006, and therefore, the petitioner did not comply with the requirement that a notice of the filing of an Application for Alien Employment Certification must be provided between 30 and 180 days before filing the application. On appeal, the petitioner argues that the job posting was posted on October 28, 2005 and remained posted until the beneficiary was offered this position and hired on December 22, 2005. The regulation requires the petitioner post a notice of the filing for at least 10 consecutive business days between 30 days and 180 days before the filing. In the instant case, the petitioner posted on October 28, 2005, and the 10 consecutive business days ended on November 11, 2005, and thus, there were more than 30 days between November 12, 2005 and January 23, 2006, the filing date of the instant petition. However, the AAO finds that the director's determination that the petition does not comply with the regulation regarding the pertinent to notification requirements was proper.

It is noted that in Section I(e), number 24 and 25 of the Form 9089 the petitioner checked "NA" to the questions whether a notice of this filing was given to the bargaining representative for workers or posted for 10 business days between 30 days and 180 days before the date of filing. The regulation clearly requires that the petitioner post a notice of the filing to the employer's employees at the facility or location of the employment for at least 10 consecutive business days, and 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. The regulation even provides that appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 20 C.F.R. § 516.4 or occupational safety and health notices required by 20 C.F.R. § 1903.2(a). The postings in the record that the petitioner claims comply with the notification requirements were posted in different job listing websites. The record does not contain any evidence that the petitioner actually posted any notice of the filing for at least 10 business days in a conspicuous location at the place of employment. The petitioner did not submit a copy of such notice in the record. The website postings do not comply with the regulatory-required physical notice of the filing. In addition, the website postings in the record were not posted at the facility or location of the employment, which in this case is at 1300 Miccosukee Road, Tallahassee, FL 32308 as indicated in Part H of the ETA Form 9089 and Part 6 of the Form I-140. Furthermore, the website postings do not state that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; do not state that any person may provide documentary evidence bearing on the application to the Certifying Officer of DOL; and do not provide the address of the appropriate Certifying Officer as required by the regulation at 20 C.F.R.

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).

§ 656.10(d)(3). Therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10.

The regulation at 20 C.F.R. § 656.15(b)(1) requires an Application for Permanent Employment Certification form for Schedule A to include a prevailing wage determination in accordance with § 656.40 and § 656.41.

The regulation at 20 C.F.R. § 656.40(c) states:

Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a [State Workforce Agency (SWA)] PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In the instant case, the petitioner submitted a copy of a Center for Healthcare Careers External Salary Calculation Worksheet with the initial filing of the petition. Pursuant to the above regulation, a valid PWD must be issued by a SWA with jurisdiction over the location of employment. The AAO concurs with the director's determination that the petitioner failed to submit a copy of PWD issued by SWA having jurisdiction over the proposed area where the job opportunity is located. On appeal, the petitioner submits an electronic PWD issued by the State of Florida. The PWD was issued on March 22, 2006 and was valid to the end of the year. The record shows that the instant petition was filed on January 23, 2006. The PERM regulations expressly state that a Schedule A application must be filed with a prevailing wage determination and an employer must file their applications within the validity period specified by the SWA. In the instant case the petitioner did not file its schedule A application with a PWD, nor did the petitioner as the employer file its application within the validity period of the PWD issued by the State of Florida. Therefore, the petitioner failed to comply with the PERM regulation pertinent to the PWD validity period at the priority date.

Since the petitioner failed to post the notice in compliance with regulations prior to the filing, and since the petitioner failed to obtain and submit a valid PWD with its initial filing, any subsequent effort by the petitioner to correct the notice of posting and PWD 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. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.) The director's decision must be affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence

that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case 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 establish the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the priority date is January 23, 2006. On the petition, the petitioner claimed to have 3,500 employees and submitted a letter from [REDACTED], Chief Financial Officer (CFO) of the petitioner, to establish the petitioner's ability to pay the proffered wage. However, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from the CFO. CIS records indicate that the petitioner has filed over 75 Form I-140 petitions with CIS. In addition, the petitioner has also filed 34 Form I-129 nonimmigrant petitions. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine the salary requirements relating to the 36 I-140 petitions filed by the petitioner in 2006 assuming that they were filed for registered nurses and offered the same level of the proffered wage as the instant petition, the petitioner would be need to establish that it has the ability to pay combined salaries of \$1,937,894.40.² Given that the number of immigrant and nonimmigrant petitions, we cannot rely on a letter from the CFO referencing the ability to pay a single beneficiary.

Therefore, the AAO declines to rely on the CFO's letter and will examine the other regulatory-prescribed financial documentation in determining the petitioner's continuing ability to pay prevailing wages to all beneficiaries of the pending and approved petitions. However, the record does not contain any evidence to establish the petitioner's ability to pay for the relevant years. Without such evidence, the AAO cannot determine whether the petitioner established its continuing ability to pay all the proffered wages. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

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.

Calculation is based on the prevailing wage of \$25.88 listed in Part F of the ETA Form 9089 times 40 hours per week and 52 weeks per year.