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U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 133 53885 Office: NEBRASKA SERVICE CENTER Date: **MAR 31 2008**

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center. 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.

On appeal, the petitioner, through counsel, maintains that the petitioner's posting of notice of the certified position 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 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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.²

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 April 3, 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

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 The petitioner claims the professional classification on Form ETA 9089, Part I, a.1.

permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is April 3, 2006.

The sole issue on appeal in this matter is whether the petitioner posted the notice of the certified position in compliance with the applicable regulations found at 20 C.F.R. Part 656.

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 sec. 656.40 and sec. 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 sec. 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.

(Emphasis added.)

* * *

(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 pre-PERM procedure to post the availability of the job opportunity to interested U.S. workers was set forth at 20 C.F.R. § 656.20(g)(1). Relevant to the notice provided to the bargaining representative or, if no bargaining representative, to the employer's employees, the regulation provided in pertinent part:

- (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 days*. The notice shall be clearly visible and unobstructed while posted and shall 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, but are not limited to, 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).

(Emphasis added.)

With the initial filing, the petitioner submitted a copy of the notice of posting with certification of posting from [REDACTED] Vice-President of Human Resources. On the copy of the notice of posting Ms. [REDACTED] stated that notice was posted on the medical center's employee bulletin board from February 10, 2006 to February 23, 2006.³

³ In an attached certification, [REDACTED] also stated that the petitioner did not have any in-house media used for recruitment of similar positions.

The director denied the petition on September 21, 2006.⁴ Citing guidance from a DOL advisory to CIS and a DOL regulation found at Title 29 of the Code of Federal Regulations, he determined that ten consecutive business days meant that Monday – Friday should be defined as business days and that Saturday, Sunday or any day designated as a holiday by the federal government were not business days. The director determined that the petitioner failed to comply with the current posting requirement found at 20 C.F.R. § 656.10(d) given that the petitioner’s notice of the job opportunity was posted during a period which included February 20, 2006, a federal holiday, as well as February 11, 12, 18, and 19, which all fell on weekends.

On appeal, counsel contends that because the DOL regulations and DOL’s Frequently Answered Questions (FAQs)⁵ are silent as to the definition of a “business day,” then a commonsense application individualized as to the nature of the petitioner’s business should be utilized. He asserts that as the petitioner is a hospital and open 24 hours a day, seven days a week, it should be considered to be in compliance with the posting requirement by posting the notice of the job opportunity commencing February 10, 2006, to February 23, 2006. Counsel adds that the director erred in relying on other DOL regulations relevant to the Employee Benefits Security Administration, which do not apply in this matter.

Counsel’s assertions are not persuasive. Although the definitions found at 20 C.F.R. § 656.3 do not include one for a “business day,” the comments published as part of the final rule relating to the implementation of the PERM system and section 656.10(d) state in pertinent part:

Two commenters observed the NPRM proposed the period the notice must be posted be increased from 10 consecutive days to 10 consecutive business days. One commenter indicated this increase was reasonable because it would maximize viewing by U.S. workers. This commenter also noted the notice requirements had been expanded to require posting in any and all in-house media, whether electronic or printed, but the proposed rule did not specify for how long. The commenter suggested the additional in-house media ‘advertising’ be required for 10 days. We agree and the final rule provides that notice provided by posting to the employer’s employees at the facility or location of employment must be posted for 10 consecutive business days. . . .

69 Fed. Reg. 77326, 77339 (Dec. 27, 2004)

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 including the notice of filing at issue in this matter. The guidance contains, in pertinent part, the following question and answer:

Time Frames

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,

⁴ The director erroneously cited the pre-perm regulation referring to 10 consecutive days rather than 10 consecutive business days.

⁵ These may be found online at <http://www.foreignlaborcert.doleta.gov/faqs.cfm>.

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 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. Similarly, we find no provision that permits the notice requirement to be based on a particular petitioner's business hours.⁶

In this matter, the AAO concurs with the director's decision that the petitioner's notice of posting the certified position from February 10th to February 23, 2006 failed to comply with the requirements of 20 C.F.R. § 656.10(d)(1)(ii) because it was not posted for 10 consecutive business days. If it had been posted in compliance with the regulation, and Friday, February 10, 2006, was day 1, then Monday, February 13th would have been day 2; Friday, February 17th would have been day 6; and Friday, February 24, 2006 would have been day 10. The AAO concludes that the petitioner did not provide notice of posting the job opportunity for 10 consecutive business days.

Beyond the decision of the director,⁷ it is noted that the job posting signed by Ms. Linscheid failed to provide the address of the appropriate Certifying Officer in accordance with 20 C.F.R. § 656.10(d)(1)(3)(iii). The notice of posting listed the USCIS Service Center with its address and/or the local employment service office as the locations where interested persons may submit documentary evidence bearing on the application. The

⁶ In this conclusion we rely only on those regulations or published guidance relating to the DOL's alien labor certification procedures. We note that the Board of Alien Labor Certification Appeals case of *In the Matter of HealthAmerica*, BALCA, 2006 PER 1, October 18, 2006, provided by counsel, was based on a conclusion that a DOL FAQ rendered advice imposing rules not supported in the PERM regulations and erroneously denied an applicant's motion for reconsideration. In this case, we find that DOL's FAQ explanation of how to calculate the provision relating to the posting of the notice of the job opening for 10 consecutive business days is consistent with the language of the regulation at 20 C.F.R. § 656.10(d)(1)(ii).

⁷ 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).

appropriate address of the certifying officer is required by regulation and mere mention of a local employment office is insufficient.⁸ Since the petitioner failed to post the notice in compliance with regulations prior to the filing, the petition is not approvable. 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)).

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.

⁸The address is found online in the DOL's FAQ. It states that the address is the U.S. Dept. of Labor, Employment and Training Administration, Chicago National Processing Center, Railroad Retirement Board Bldg., 844 N. Rush Street, 12th Fl., Chicago, Illinois, 60611.