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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 13 2005
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IN RE: Petitioner: [redacted]
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]

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.

for Robert P. Wiemann, Director
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 rehabilitation services company. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The director determined that the notice of filing the Application for Alien Certification was not provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

On appeal, counsel submits a brief.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a professional or skilled worker (physical therapist). Aliens who will be employed as physical therapists are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.10. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification (Form ETA 750 at Part A) in duplicate with the appropriate Bureau of Citizenship and Immigration Services office. The Application for Alien Employment Certification shall include:

1. Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form.

2. Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.20(g)(3).

In this case, Form I-140 was filed on April 17, 2003. With the petition counsel provided a "JOB POSTING." That posting conforms generally to the requirements of 20 C.F.R. § 656.20(g)(3), but gives not indication that it was posted or, if it was, where and for how long. Therefore, on August 18, 2003, the director requested that the petitioner submit, *inter alia*, evidence that notice of the position had been posted in accordance with 20 C.F.R. § 656.20(g)(3).

In response, counsel submitted an additional copy of the posting originally provided. This copy contains the handwritten inscription "Date Posted 04/14/03 Date Removed 05/09/03." That inscription is subscribed by Ikram Haq, the petitioner's administrator.

On October 6, 2003, the Director, Nebraska Service Center, denied the petition, noting that, according to the dates provided by the petitioner's administrator the job notice had not been posted for the requisite ten days when the petition was submitted.

On appeal, counsel argues that the governing law and regulations do not require that the posting period be complete prior to the filing of the Form I-140 petition.

The purpose of the instant visa category is to provide alien workers for shortage occupations. As part of the filing procedure the petitioner provides evidence that it has attempted to locate a U.S. worker for the position but has been unable. The petitioner is required, for that purpose, to provide notice of the position to its workers bargaining representative or, if they are not represented by collective bargaining, to post a notice of the vacant position where its employees will see it, and to leave the notice in a conspicuous place for ten days. 20 C.F.R. § 656.20(g)(3).

Posting the notice of the position and filing the petition for the alien worker contemporaneously is a clear attempt to frustrate the purpose of the visa petition. It makes plain that the petitioner is not attempting to fill the position with a U.S. worker.

Further, section 122(b) of the Immigration Act of 1990 states, in pertinent part,

Notice in Labor Certifications – The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that . . . 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 . . . .

Further still, the regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. [Emphasis supplied].

The regulations require that the notice be posted for at least ten consecutive days and evidence of such posting be submitted with the Application for Alien Employment Certification. Until the ten-day posting period is complete, the Form ETA 750 cannot be approved, nor can the alien petition that relies upon that Form ETA 750. The tolling of the ten-day posting period, after the Form ETA 750 and the Form I-140 alien worker petition have already been filed, does not render the Form ETA 750 or the Form I-140 approvable **on the date they were filed**. As they were not approvable when filed they may not subsequently be approved.

The requisite posting period was incomplete when the petitioner filed the Application for Alien Employment Certification and Form I-140. The petitioner has not complied with the instructions stipulated in the regulations. Consequently, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.