U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC-05-159-53013 Office: CALIFORNIA SERVICE CENTER Date: APR 2 8 2007

IN RE: Petitioner:
Beneficiary: [redacted]

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.

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 convalescent 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. § 656.5, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 application 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.

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 27, 2006 denial, the single issue in this case is whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations. The director noted that the petitioner failed to post the rate of pay required under the statutory determination set by the State Workforce Agency (SWA).

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 May 18, 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:

(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 (Sheepherders), 565.17 (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 takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all

pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. The relevant evidence in the record includes a prevailing wage determination and three posting notices.

With the initial filing the petitioner submitted a copy of the notice of posting which indicated that it was posted from March 8, 2005 to March 28, 2005 (March 28, 2005 notice). The notice also stated that the rate of pay was $1,020.00 per week ($25.50 per hour or $53,040.00 per year). In response to the request for evidence (RFE) issued by the director on September 19, 2005, the petitioner submitted a prevailing wage determination (PWD) by the California Employment Development Department (EDD) and another notice of filing posted from November 21, 2005 to December 5, 2005 (December 5, 2005 notice). The director determined that the wage of $1,020 per week the petitioner posted in the March 28, 2005 notice is not the prevailing wage determined by the EDD in California and the December 5, 2005 notice was not posted prior to the date of filing the instant petition. Therefore, the director denied the petition. The AAO concurs with the director's decision. The PERM regulation which was effective as of March 28, 2005 expressly requires that the rate of pay the petitioner offered must equal or exceed the prevailing wage determined by the SWA, in this case, the California EDD and the notice of the filing must be provided between 30 and 180 days before filing the application. In the instant case, the prevailing wage determined by the California EDD was $26.80 per hour ($1,072 per week or $55,744 per year). The pay rate of $1,020 per week posted by the petitioner in the March 28, 2005 notice does not meet the regulatory requirement. Although the December 5, 2005 notice stated the pay rate of $1,080 per week ($27.00 per hour) which was greater than the prevailing wage of $26.80 per hour determined by the EDD, the notice was posted six months after the filing instead of prior to the filing. Therefore, the December 5, 2005 notice does not meet the regulatory requirement that the notice must be provided between 30 and 180 days before filing the I-140 petition and the Form ETA 9089 application.

On appeal the petitioner through its counsel submits a third notice of filing with the pay rate of $28.78, which appears to have been posted from April 11, 2006 to April 25, 2006 (April 25, 2006 notice). The notice contains a description of the job and rate of pay. The notice also includes the address of an appropriate certifying officer to whom any person could provide documentary evidence bearing on the application. However, as discussed above, similarly with the December 5, 2005 notice, the April 25, 2006 notice was posted almost one year later than the filing of the I-140 petition and the Form 9089 application, therefore, it does not meet the applicable regulatory requirement and is not acceptable.[2]

On appeal counsel asserts that the new regulation should not be applied to this case because the Government Printing Office (GPO) did not publish the updated regulations on its website until at least June 30, 2005. However, the record shows that the instant petition was filed on May 18, 2005 and PERM expressly states that the effective date is March 28, 2005. Almost five months before the petitioner filed the instant petition, DOL published the PERM regulation on December 27, 2004 and almost two months before the petitioner filed the instant petition, the new PERM regulation was effective on March 28, 2005. PERM applies to the instant case and the petitioner must meet all requirements set forth by PERM. Counsel's reliance on the BALCA Deskbook

[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).

[2] A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

and the preamble to the regulations published in the Federal Register on December 27, 2004 is misplaced. Counsel does not explain how the BALCA Deskbook and the preamble supercede the regulations themselves.

Section 212(a)(5)(A) of the Act provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified that there are not sufficient workers who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and that the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. The plain reading of the statute means that the determination or certification by the Secretary of Labor must be done before filing an immigrant petition. For pre-certified Schedule A applications, although the Secretary of Labor has certified generally and nationally that there are not sufficient workers who are able, willing, qualified and available for registered nurse positions and that the aliens' employment in the position of registered nurse will not adversely affect the wages and working conditions of U.S. workers in similar positions, the petitioner must prove such unavailability for the job offer that the petitioner seeks for the beneficiary before it files the application with the Department of Homeland Security. The posting notice is a very important part of such evidence for the job offer. Therefore, the statute clearly requires the posting of the notice before filing the application. Counsel's assertion that the posting notice can be done after filing is misplaced and unsupported by legal authority. The AAO finds that the director correctly applied relevant laws and regulations and properly determined that the petitioner failed to comply with the regulatory requirements of the posting notice because it failed to post the notice before filing the Form ETA 9089 application.

In addition, the AAO finds that the petitioner did not provide any documentary evidence concerning the posting of the notice in any in-house media as now required under 20 C.F.R. § 656.10(d)(1)(ii) with the initial filing and in response to the director's RFE. Nor does counsel submit any copies of in-house media used to distribute notice of the application on appeal. The regulation at 20 C.F.R. § 656.10(d)(1)(ii) clearly requires an employer 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. 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).

Therefore, counsel's assertion on appeal cannot overcome the director's decision and evidence submitted does not establish that the petitioner has posted the notice of filing in compliance with the requirements of the regulations.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss another issue demonstrating ineligibility for the benefit sought, namely whether or not the petitioner filed the instant petition within a valid period of a prevailing wage determination as required by the regulation. 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).

As quoted previously, the regulation at 20 C.F.R. § 656.15 requires that for a Schedule A application the petitioner must submit an application for permanent employment certification form, which includes 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 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 PWD from the California EDD. The PWD was determined on December 8, 2005 and the PWD indicates that its validity period is 90 days from the date of the determination, and therefore, the PWD was valid from December 8, 2005 to March 8, 2006. The record shows that the instant petition was filed on March 28, 2005. The PERM regulations expressly state that a Schedule A application must be filed with a PWD 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 specified by the California EDD. Therefore, the petitioner failed to comply with the PERM regulation in pertinent to the PWD validity period at the priority date.

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.