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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN-05-186-50201 Office: NEBRASKA SERVICE CENTER Date: MAR 12 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (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 facility. 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. § 656.5, 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.

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 July 29, 2005 denial, the main 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 provide the notice of the filing between 30 and 180 days before filing the application as required by the regulation at 20 C.F.R. § 656.10(d). The director also stated that the record did not contain a prevailing wage determination from the state workforce agency (SWA) with jurisdiction over the area of intended employment.

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 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 31, 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 notice of filing, certification of posting and a prevailing wage determination.

With the initial filing the petitioner submitted a copy of the notice of posting with certification of posting from [redacted], Sr., Director of HR & Recruitment. In the certification of posting [redacted], Sr. certified that the notice was given to company employees at the location of employment via posting for at least 10 consecutive days from May 2, 2005 to May 13, 2005. [redacted] also confirmed that there is no bargaining representative of the employees in the occupational classification of the specific job opportunity involved. The director noticed that in Section e, number 25 of the Form 9089 the petitioner indicated that the notice was posted for a period of at least 10 business days ending at least 30 days before but not more than 180 days before the date of filing. Since the petition and the accompanying labor certification application were filed on May 31, 2005, the director determined that the petitioner did not comply with the requirement. On appeal, counsel asserts that the application was filed on June 3, 2005 based on the notice date of the I-140 filing. However, the record clearly shows that CIS received and stamped the instant petition on May 31, 2005. Further, the receipt notice counsel relies upon also clearly indicates the receipt date is May 31, 2005. Counsel argues that even if May 31, 2005 is the filing date, the 30-day rule is still satisfied counting from May 2, 2005, the first day posted, to May 31, 2005, the date of filing. As quoted above the plain meaning of the regulation language shows that the regulatory notification requirement is not a single action but a period. An employer must provide evidence that it posted a notice of filing for at least 10 business days at least 30 days prior to filing the labor certification application. Without finishing the 10 business days posting period, the employer cannot fulfill the obligation of notification. The regulation requires the employer to provide evidence it posted the notice for 10 business days between 30 days and 180 days before the filing of the labor certification application. Therefore, counsel's interpretation is misplaced. Counsel also asserts that Part I, Section e, Number 25 of the Form 9089 containing the reference to the posting of 10 business days *ending* at least 30 days but not more than 180 days before the date of filing is an "overreaching amplification and interpretation of the regulation." However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Therefore, the AAO concurs with the director's decision that the petitioner failed to provide the notice of the filing between 30 and 180 days before filing the application as required by the regulation at 20 C.F.R. § 656.10(d), and accordingly the decision of the director will be affirmed.

In addition, the petitioner also failed to demonstrate that the notice was posted in a correct place. The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1)(ii). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.10(d)(1)(ii) to mean the place of physical employment. In the instant case, the petitioner is headquartered in Louisville, Kentucky and the Form ETA 9089 Section H Job Opportunity Information clearly indicated that the beneficiary would work at

[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).

[redacted] Center at [redacted] The Form I-140 indicated at Item 4. "Address where the person will work if different from address in Part 1" under Part 6 the same place and address in Schofield, Wisconsin. Therefore, the place of physical employment would be the [redacted] Center in Schofield, Wisconsin where the beneficiary would perform services as a physical therapist instead of the petitioner's headquarters office in Louisville, Kentucky. The petitioner must post the notice of filing at [redacted], Wisconsin. The certificate of posting from [redacted] Sr. indicated that the notice "was given to company employees at the location of employment via posting ... in a conspicuous location outside the Human Resources Office where other notices, as required by the U.S. Department of Labor and other government agencies, are posted." [redacted], Sr. is the director of Human Resources and Recruitment of the petitioner and signed the Form I-140 Immigrant Petition and Form ETA 9089 Application for Permanent Employment Certification. His address as an employer contact person in Section D of Form ETA 9089 is [redacted] same as the petitioner's headquarters office. The certification of posting from [redacted], Sr. is on the letterhead of the petitioner with its headquarters address in Louisville, Kentucky. The record does not contain any evidence showing that [redacted], Sr.'s Human Resources Office is located in Louisville, Kentucky, nor was any evidence showing the notice was posted at Kennedy Park Med. & Rehab. Center in Louisville, Kentucky. Therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10(d)(1)(ii). Since the petitioner failed to post the notice in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the notice of posting 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, and cited *Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)*

The AAO has found an additional ground of ineligibility with the prevailing wage determination. 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 director correctly pointed out that the petitioner did not submit a prevailing wage determination with the petition. The regulation at 20 C.F.R. § 656.15(b) 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 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 submits a prevailing wage determination (PWD) from Wisconsin Department of Labor. The PWD was determined on August 24, 2005 and the PWD indicates that this prevailing wage is valid for filing applications and attestations for 180 days from the date of the determination, and therefore, the PWD was valid from August 24, 2005 to February 20, 2006. The record shows that the instant petition was filed on May 31, 2005. 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 prevailing wage determination, nor did the petitioner as the employer file the petition within the

validity period specified by Wisconsin Department of Labor. Therefore, the petitioner failed to comply with the regulatory requirements with respect 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.