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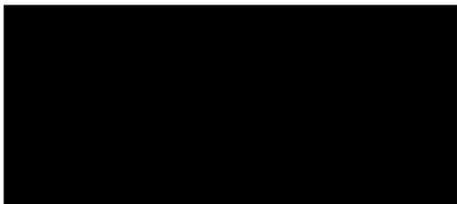
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm.3000
Washington, DC 20529



U.S. Citizenship and Immigration Services

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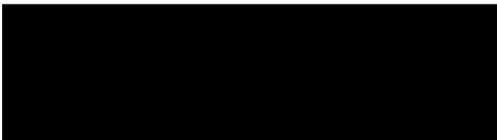


FILE: SRC 05 088 51215

Office: TEXAS SERVICE CENTER Date:

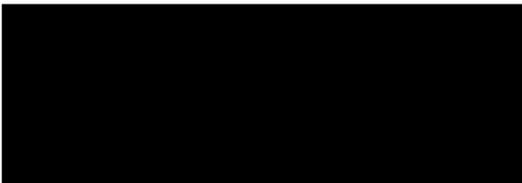
AUG 24 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant To § 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 Director, Texas Service Center, has certified a petition for an employment-based immigrant visa petition to the Administrative Appeals Office (AAO) for review. The director's decision will be withdrawn. The petition will be approved.

The petitioner is an acute care facility. 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, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The original Notice of Job Availability accompanying the ETA 750 included the petitioner's posting date of December 13, 2004 and notice removal date of December 20, 2004. As such it was noncompliant with 20 C.F.R. §656.20(g)(1)(ii), which states, "The notice shall be posted for at least 10 consecutive days."

On February 12, 2005, the director issued a Notice Of Intent To Deny (NOID), to which she attached a request for copies of, among other items, the Notice of Job Availability for Schedule A, Group I (nurses) that the petitioner was to have posted in compliance with 20 C.F.R. §§656.22(b)(22)(b) and 652.20(g). The NOID, however, did not specifically state that the petitioner's job posting did not meet the requirements of 20 C.F.R. § 656.20(g)(1)(ii) or state that the posting was to have been for 10 consecutive days.¹

In response to the NOID, counsel submitted "corrected copies" of the Notice of Job Availability listing a December 13, 2004 posting date and a December 28, 2004 removal date.² Counsel also submitted a March 2, 2005 letter from the petitioner's recruitment manager, [REDACTED] which states, "These notices were actually posted on 12/13/04 and removed on 12/28/04."

The director states that current CIS policy is controlling over a contrary policy set by *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971):

Matter of Katigbak does not allow for a petitioner to present a new set of circumstances in order to satisfy requirements for the benefit being sought. In this case, the job notices were only posted for seven consecutive days at the time of filing this visa petition. However, under current [CIS] policy the petitioner has been afforded an opportunity to correct a prior set of circumstances.

While indicating that CIS policy as set forth in the December 23, 2004 memorandum is more applicable to these set of facts than *Katigbak* is, the director suggests the CIS policy may only be limited to documents

¹ CIS Interoffice Memorandum, December 23, 2004, by Fujie O. Ohata, Director, Service Center Operations, entitled, "Guidance for processing Pending Forms I-140 for a Schedule A/Group I or II Occupations Missing Evidence of Compliance with DOL Notification/Posting Requirements," attaches a sample NOID form that includes the verbatim language of the regulation requiring posting for 10 consecutive days.

² A supplement to the petitioner's ETA 750A listed five job location sites where the notice was posted. Counsel's letter of March 2, 2005, explains why he was submitting corrected copies of the job notice: "The ones we provided with the original petition had the incorrect dates on them. The copies provided here have the correct dates. We have also provided a letter from the petitioner explaining the correct dates of posting."

regarded as “missing” rather than out of compliance, as initially submitted, with the Schedule A posting regulations.³ The director states:

As a further note, it is unclear whether the above [Policy] memorandum only applies to job posting notices that were never included in the original filing of the visa petition or if it extends [as here] to previously submitted job posting notices that fail to comply [with] 20 CFR 656.22(b)(2) and 652.20(g) regulations; the title ‘missing evidence’ suggests that previously submitted notices may be excluded from this policy.

Counsel has not challenged the director’s recommendation nor has he submitted any additional evidence subsequent to the certification of the petitioner’s case, in spite of the director’s serving notice upon counsel of the opportunity, within 30 days of receipt of the notice, to submit “a brief or other written statement for consideration by the reviewing authority.”

The issue in this case is whether the petitioner was qualified for the proffered position at the time of filing. More specifically, the petitioner must show that, despite the fact that the information accompanying the posted notice submitted with petition indicated that the posting was not in compliance with the regulations, the petitioner had actually complied with the regulations⁴. If the notice actually was posted for only those dates shown on the initial notice, the petition would not be eligible for Schedule-A processing at the time of filing, which would compel the director to deny the petition. In such an instance, the regulations, published precedent and the law, specifically section 122(b)(1) of the Immigration Act of 1990 (Public Law 101-649), would compel denial. If, on the other hand, the record contains conflicting information that a petitioner can resolve with competent and objective evidence, the petitioner would still be able to demonstrate that it met the requirements for Schedule-A processing at the time of filing. See *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). In this case, the petitioner is asserting that it actually did post the notice for more than the required 10 consecutive days and that the information on the posting notice indicating that the posting lasted only seven days was simple error.

Bearing this in mind, we will review whether counsel resolved the notice’s inconsistencies in the record via competent and objective evidence so that the preponderance of the evidence shows that the petitioner had correctly posted the job notice at the time of filing.

In response to the director’s NOID, the petitioner’s administrator submits a letter and new posting notices. She asserts in her letter that the actual posting lasted until December 28, 2004, rather than until December 20. She submits “corrected” notice which show that the posting period to 15 consecutive days. By counsel’s assertion and by implication in the letter from the petitioner’s administrator, the petitioner is stating that the initial notice submitted to CIS contained an error that needed to be corrected by a new notice. As noted above, her earlier statement that the notice was posted for only seven days appears on the original notice above a statement that the

³ We note that in general a CIS interoffice memorandum cannot supersede a published precedent decision. The limited exceptions to this principle include instances when statutory or regulatory amendments or more recent published precedent render the precedent moot. This case does not involve such instances.

⁴The director’s reference to *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988) is correct because there are inconsistencies in the record. First, counsel submitted a posting notice showing it had only been posted for seven days, while the same submission contained language stating that the notice must be posted for a minimum of 10 consecutive days. Second, after acknowledging that the dates of the initial posting do not show compliance with the pertinent regulation, the petitioner submitted a posting certificate that was in compliance.

regulations require posting the notice for at least 10 consecutive days. Given the proximity of the two statements and the action taken by the petitioner's administrator in recertifying the job posting, we find that the preponderance of the evidence shows that the most likely explanation was simple error on the part of the petitioner in dating the termination of the posting. As such, the petitioner's response to the NOID effectively resolves the ambiguity regarding the termination of the posting. The AAO finds that the petitioner had properly posted prior to filing the instant petition, despite the fact that the petitioner misdated the termination of the posting⁵.

A petitioner seeking approval of an employment-based immigrant visa petition has the burden of proving that he or she meets the requirements for Schedule A processing under 20 C.F.R. § 656.10, Schedule A, Group I. 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 petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here the petitioner has met this burden.

ORDER: The appeal is sustained. The petition is approved.

⁵ We note again that had the petitioner posted an incorrect notice, either by content or the duration of posting, the petition would not be eligible for the benefit sought. See *Katigbak*, Id.; see also section 122(b)(1) of the Immigration Act of 1990 (Public Law 101-649).