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U.S. Citizenship
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Services

B6

FILE: [REDACTED]
LIN-06-184-52047

Office: NEBRASKA SERVICE CENTER

Date: **AUG 06 2007**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

The petitioner is an acute care hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for Schedule A, Group I labor certification pursuant to 20 C.F.R. § 656.5(a). The director determined that the petitioner had not established that it had properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's intended place of employment. The director also concluded that the petitioner had not shown that it had published notice of filing such application in its in-house media in accordance with normal procedures used by the petitioner when recruiting, within its organization, for registered nurses. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 7, 2006 denial, the two issues in this case are whether the petitioner established that it properly posted notice of filing an application for permanent employment certification for ten consecutive business days at the beneficiary's place of employment and whether it published notice of filing such application in its in-house media in accordance with procedures which it normally uses for recruiting registered nurses.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

On May 19, 2006, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, for classification of the beneficiary under section 203(b)(3)(A)(i) of the Act as a registered nurse. Aliens who will be permanently employed as registered nurses are identified on Schedule A as set forth at 20 C.F.R. § 656.5 as being aliens who hold occupations for which it has determined there are not sufficient U.S. workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of U.S. workers who are similarly employed.

An employer shall apply for a labor certification for a Schedule A occupation by filing an ETA Form 9089, Application for Permanent Employment Certification, in duplicate with the appropriate Citizenship and Immigration Services (CIS) office. Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall 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 prescribed in § 656.10(d).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Given that the instant matter was accompanied by an application for Schedule A designation, the priority date for this petition is the date the ETA Form 9089 was properly filed with CIS on May 19, 2006. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is \$27.00 an hour or \$56,160 annually.

The AAO takes a *de novo* look at issues raised in the denial of the petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.¹

Relevant evidence in the record includes the following: an employment opportunity and job **posting certification** from Vice President, Human Resources dated April 7, 2006, a statement of Nurse Recruiter of the petitioner, regarding use of in-house media and a list of open RN positions printed out from the petitioner's website. The record does not contain any other documentation relevant to the issue of whether the petitioner properly posted notice of filing an application for permanent employment certification at its facility or whether it published such notice in its in-house media in accordance with those procedures used to announce the availability of vacancies similar to that which is the subject of the application for permanent employment certification in this matter.

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...

(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 must 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.

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).

According to the regulation at 20 C.F.R. § 656.10(d)(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 record reflects that the petitioner posted notice of filing an application for permanent employment certification at its facility from Monday, February 20, 2006 through Friday, March 3, 2006. The director noted that Monday, February 20, 2006 which fell during the posting period was a Federal holiday, and thus, the notice was posted for only nine consecutive business days.

On appeal counsel asserts that since the petitioner's medical center is open 365 days a year, it does not observe holidays and it is even open on Saturdays and Sundays. Counsel states that the petitioner was open on February 20, 2006. Thus, counsel asserts that hospitals or medical centers like the petitioner should be given more flexibility regarding the requirement on "posting regulation" because in reality they are open everyday of the year, that is, the day to day operations include Saturdays and Sundays, and holidays.

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 Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor 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. One of the new changes in the PERM regulation is that a notice of filing must be posted "ten business days" instead of "ten days" under the prior to March 28, 2005 regulation. The new PERM regulation mandates that it be posted ten business days. The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." The regulation expressly provides that a business day is not defined on whether the petitioner operates on that day, but defined as any day other than Saturday, Sunday or Federal holiday. Therefore, this office concurs with the director's decision that the petitioner posted the notice of filing for nine business days prior to the priority date, and thus the posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Moreover, the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). As stated by the director in his denial, current regulations mandate that the petitioner provide evidence that it published notice of filing the application for permanent employment certification in

its in-house media. Any assertion that the petitioner may satisfy this requirement by documenting for the record that it published an *announcement of the job vacancy* which is the subject of its application for permanent employment certification is misplaced.

On appeal counsel asserts that the petitioner published the notice of filing in its in-house media as well as the physical location within the facility where the notice was posted. Counsel submits prints-out from the petitioner's website for a list of open registered nurses positions. However, the record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position in its website or in any other of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulations. *See* 20 C.F.R. § 656.10(d)(1)(ii). There is a difference between a job vacancy announcement and notice of filing an application for permanent employment certification.

The petitioner must establish eligibility at the time the Form I-140 was filed. *See* 8 C.F.R. § 103.2(b)(12). Thus, this deficiency would not be overcome were the petitioner to publish notice of its application for employment certification at this date.

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, the petitioner has not met that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.