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U.S. Citizenship  
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BC

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 23 2007  
SRC-06-014-51623

IN RE: Petitioner: [REDACTED]  
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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare professional contractor. 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 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 November 22, 2005 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.

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.

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 October 19, 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)(1)(ii) provides, in pertinent part,

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 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<sup>1</sup>. The relevant evidence in the record includes notice of job opportunity/filing.

The notice indicated that date of the posting was August 15, 2005 and the certification accompanying the notice of filing was signed by [REDACTED] v. Director of Immigration and Licensure of the petitioner on October 18, 2005 in Savannah, Georgia. [REDACTED] stated in her certification that:

I hereby certify that the above notice:

1. Has been continuously posted for more than ten business days.
2. Was posted between 30 days and 180 days prior to the filing of the petition based on this posting.
3. Was posted on the employee bulletin board at our offices.

The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements because the posting was posted at its headquarters office in Savannah, Georgia instead of the place of employment, Albuquerque, New Mexico.

On appeal counsel asserts that the petitioner is a staffing company, and the facility or location of employment for the petitioner is its headquarters.

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). After consultation with DOL, 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 Savannah, Georgia. The Form I-140 indicates at Item 4. Address where the person will work if different from address in Part 1 under Part 6 "Current Intended assignment: St. Joseph's Healthcare System, Albuquerque, New Mexico." The prevailing wage determination submitted by the petitioner to support the petition is for Albuquerque, New Mexico, not for Savannah, Georgia. Therefore, as the director correctly determined, the place of physical employment would be the healthcare facility in Albuquerque, New Mexico where the beneficiary would perform services as a registered nurse instead of the petitioner's headquarter's office. The petitioner must post the notice of filing at St. Joseph's Healthcare System in Albuquerque, New Mexico and all other possible facilities where the beneficiary would perform the duties as a registered nurse.

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<sup>1</sup> 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).

The August 15, 2005 posting notice indicates that the notice was posted in the petitioner's business office, and therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10. 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. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

Counsel also argues that the director has recognized the petitioner's method of posting as correct and submits a copy of an request for evidence issued by the director on November 2, 2005 for another petition. However, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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

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.