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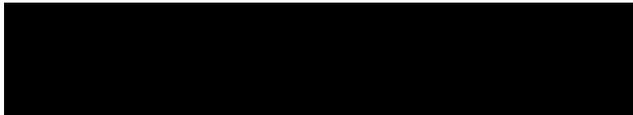
Office: NEBRASKA SERVICE CENTER

Date: MAR 29 2007

IN RE:

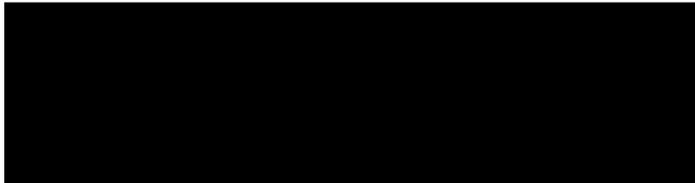
Petitioner:

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:



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

The petitioner is a 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. § 656.10, 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 January 8, 2007 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 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).

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 April 12, 2006.

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), 656.17 (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 appeal¹. The relevant evidence in the record includes two notices of job availability and two attestations.

With the initial filing the petitioner submitted a copy of the notice of posting with attestation of posting from [REDACTED] Director of Human Resources. The notice indicated that it was posted March 3, 2006 and [REDACTED] certified that the posting notice "has been posted on the employee bulletin board within the Human Resources Department of the hospital at [REDACTED] for at least 10 consecutive business days." [REDACTED] also confirmed that the hospital does not use any additional in house written or electric media in posting job availability other than the posting notice. The director noted that in order to comply with the regulations and per [REDACTED]'s attestation the notice must have been posted until at least March 16, 2006, however, the instant petition was filed on April 12, 2006, therefore, the notice was not provided between 30 and 180 days before filing the application.

On appeal, counsel asserts that the incorrect posting notice was sent with the initial filing due to his clerical mistake and submits another posting notice with its attestation. The newly submitted posting notice shows that it was posted from February 13, 2006 to February 24, 2006. Both counsel's brief and the letter of support dated January 22, 2007 from [REDACTED], Director of Human Resources, confirm that the posting notice was posted from February 13, 2006 to February 24, 2006. Accordingly, counsel asserts that the notice of filing was provided between 30 and 180 days before filing the application as required by the regulations. However, it is noted that a designated federal holiday, Washington's Birthday, fell on Monday, February 20, 2006, and thus, the notice was posted only for 9 business days. The above quoted regulation expressly requires that the notice must be posted for at least 10 consecutive business days. CIS interprets the "business days" referenced at 20 C.F.R. § 656.10(d)(1)(ii) as the plain meaning of the language as the days excluding weekends and holidays.² Therefore, the AAO determines that the petitioner failed to post the notice of the filing for at least 10 business days as required by the regulation at 20 C.F.R. 656.10(d). 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

Counsel also argues that with the newly submitted posting notice the director has approved another petition filed by the petitioner. 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), *aff'd*, 248 F.3rd 1139 (5th 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 assertions on appeal cannot overcome the director's decision and evidence that the petitioner has not posted the notice of filing in compliance with the requirements of the regulations.

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 The regulation at 29 C.F.R. § 2510.3-102(e) defines a business day as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government."

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.

It may be noted that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140. *Cf.* 8 C.F.R. §§ 103.2 (a)(7)(ii) (new fees will be required with any new petition), 103.2(b)(15) (withdrawal of a petition or denial of a petition due to abandonment does not preclude the filing of a new petition with a new fee). However, any new petition submitted by the petitioner would have to be supported by evidence sufficient to establish the petitioner's posting a notice of filing in compliance with the requirements of the regulations.

ORDER: The appeal is dismissed.