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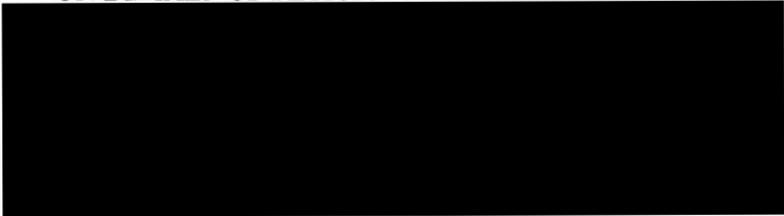
IN RE:

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 Director, California Service Center denied the instant employment-based preference visa petition. That matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner has been represented by counsel since it filed the visa petition and through filing the appeal. Subsequently, a different attorney submitted a letter dated August 3, 2006 in which he stated that he now represents the beneficiary. That attorney asked that all future correspondence in this matter be sent to him. With that letter he submitted a Form G-28 Notice of Entry of Appearance executed by the beneficiary.

The beneficiary is not an affected party in this immigrant visa petition proceeding. 8 C.F.R. § 103.3(a)(1)(iii). The record does not demonstrate that the petitioner consented to be represented by the new attorney or to have its correspondence sent to him. All representations will be considered, but the decision in this matter will be furnished only to the petitioner and its counsel of record.

The petitioner is a hospital/medical center. 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. The director determined that the evidence submitted does not demonstrate that notice of filing the Application for Alien Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.10(d). The director also found that the Form I-140 visa petition was not filed within the validity period of the Prevailing Wage Determination (PWD) as required by 20 C.F.R. § 656.40.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. This section also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In this case, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for classification under section 203(b)(3)(A)(i) of the Act as a skilled worker (registered nurse). Aliens who will be employed as registered nurses are listed on Schedule A. Schedule A is a list of occupations found at 20 C.F.R. § 656.5. The Director of the United States Employment Service has determined that an insufficient number of United States workers are able, willing, qualified, and available to fill the positions available in those occupations, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

The regulation at 20 C.F.R. 656.10(d)(1) states, in pertinent part,

In applications filed under §§656.15 (Schedule A), 656.16 (Shepherders) and 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 days. The notice shall be clearly visible and unobstructed while posted and shall 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).

The regulation at 20 C.F.R. § 656.10(d)(3) states,

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 local 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 regulation at 20 C.F.R. § 656.15 states that an employer must apply for a labor certification for a Schedule A occupation by filing an application in duplicate with the appropriate DHS (Department of Homeland Security) office that will include:

Evidence that notice of filing the Application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in 20 C.F.R. § 656.10(d).

The regulation at 20 C.F.R. § 656.40(c) states,

Validity period. The SWA [State Workforce Agency] 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 recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

In this case, the Form I-140 visa petition was filed on July 11, 2005, which is the priority date of the instant petition. With the petition counsel submitted a "Job Posting Notice." That notice corresponded otherwise to the requirements of the regulations, but states that it was posted from June 1, 2005 to June 20, 2005. As the visa petition was filed on July 11, 2005, the notice of filing does not indicate that it was provided to the petitioner's employees 30 or more days prior to filing as required by 20 C.F.R. § 656.10(d)(3)(iv).

On August 30, 2005, the director requested that the petitioner submit evidence that notice of the position had been posted in accordance with 20 C.F.R. § 656.10(d). The director also requested that the petitioner provide a PWD.

In response, counsel submitted another Job Posting Notice and a photocopy of a PWD. The additional posting notice submitted is almost identical to the first, but indicates that it was posted from May 2, 2005 to May 13, 2005.

On the PWD the California Employment Development Department, which is the appropriate State Workforce Agency (SWA), indicated that the predominant wage for the proffered position in the area of intended employment was then \$26.80 per hour. The form indicates that the validity period of that determination was "the calendar year in which [the determination] was issued." The research analyst dated his signature August 31, 2005.

On April 20, 2006, the Director, California Service Center, denied the petition. The director found that the visa petition in this matter was filed before the PWD became valid, and that the petitioner had not, therefore, complied with the requirements of 20 C.F.R. § 656.40(c). The director also found that the petitioner had failed to post a notice of the proffered position at least 30 days prior to submission of the visa petition, contrary to the requirements of 20 C.F.R. § 656.10(d)(3)(iv). In that decision the director made no reference to the attestation on the additional posting notice submitted in response to the request for evidence, that states that the notice was posted from May 2, 2005 to May 13, 2005.

On appeal, counsel argued that, by its terms, the PWD submitted was valid throughout the 2005 calendar year, that is, from January 1, 2005 to December 31, 2005.

As to the posting of the proffered position, counsel asserted that the petitioner has an "on-going posting notice procedure." Whether counsel meant to state that the notice of the proffered position is continuously posted at the petitioner's place of business is unclear. If so, counsel neglected to state when the notice, which counsel implied remained posted on the day of the appeal, was first posted.

In any event, the assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Counsel is required to support with evidence the assertion that the notice of proffered position was posted in accordance with the regulations, rather than his own implication or assertion.

The version of the posting of the proffered position that was submitted in response to the request for evidence, however, does state that the notice was posted from May 2, 2005 to May 13, 2005, a period of ten consecutive business days, inclusively counted. Further, that posting period began and ended between 30 and 180 days prior to the filing of the visa application in this case, as required by 20 C.F.R. § 656.10(d)(3)(iv).

The evidence submitted shows that the petitioner posted the notice of the proffered position in accordance with the regulations. The petitioner has therefore overcome that basis of the denial of the instant visa petition. The remaining issue is whether the PWD was valid when the visa petition was filed on July 11, 2005 as required by 20 C.F.R. § 656.40(c).

The language of the PWD indicates that the validity period of the determination is “the calendar year in which [the determination] was issued.” This language is susceptible to more than one interpretation. It may mean, as the director apparently interpreted it, that the determination remains valid for one calendar year beginning on the date when it is issued.

Counsel favors another interpretation. In common usage a calendar year runs from January 1 to December 31 of the same year. Pursuant to this interpretation, the PWD in this case, which determination was made on August 31, 2005, would be valid throughout the period from January 1, 2005 and December 31, 2005. Counsel’s interpretation also has considerable strength, notwithstanding that pursuant to that interpretation the PWD would be valid for a period of time prior to its issuance.

To reconcile this dispute, this office contacted the Employment Development Department (EDD) of the State of California through its website at <http://www.edd.ca.gov>. The California EDD is the SWA that issued the PWD at issue. The adjudications officer in charge of the case stated,

I am adjudicating a case involving a California EDD Prevailing Wage Determination. The Survey date is 1/2005. The top of the form is date stamped JUL 26 2005 . . . . The form stipulates that it is valid during “The calendar year in which issued.” It was submitted in support of a visa [petition] filed on July 11, 2005.

Should this PWD be considered to have been valid on July 11, 2005?

A representative of the California EDD responded,

The date of the determination would be the analyst’s signature date. It would have been valid from then until the next anticipated update of the FLC Data Center data which was January 1, 2006.

The SWA has indicated that the PWD that supports the instant petition was valid beginning on the analyst's signature date, which is August 31, 2005, and continuing through December 31, 2005. It was not; therefore, valid on July 11, 2005, the date the visa petition was submitted to Citizenship and Immigration Services. Pursuant to 20 C.F.R. § 656.40(c) the visa petition may not be approved. The petition was correctly denied on this basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.