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Office: NEBRASKA SERVICE CENTER

Date:

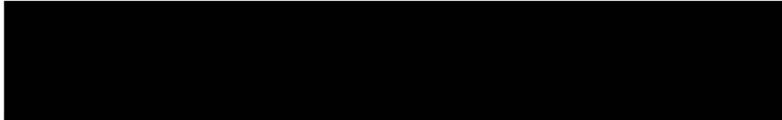
SEP 12 2007

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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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be summarily dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The acting director determined that the petitioner had not demonstrated that it had provided a notice of the proffered position to its employees as required by 20 C.F.R. § 656.10(d) and failed to provide a prevailing wage determination as required by 20 C.F.R. § 656.40, and denied the petition accordingly.

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. § 656.5, Schedule A, Group I. As required by statute, a Form 9089 Application for Permanent Employment Certification accompanied the petition. The acting director determined that the evidence submitted does not demonstrate that notice of filing the Application for Alien Certification was provided to the petitioner's employees or their bargaining representative as prescribed in 20 C.F.R. § 656.10(d) and did not, therefore, demonstrate that the instant petition is qualified for treatment under Schedule A as the petitioner claimed.

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. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated that the proffered position in this case is qualified for Schedule A treatment.¹

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.

¹ If the petitioner were not claiming eligibility pursuant to Schedule A it could have, in the alternative, provided a Form 9089 Application for Permanent Employment Certification approved by the Department of Labor. In the instant case, as the record does not include such an approved labor certification, the petitioner must show that the proffered position is amenable to treatment pursuant to Schedule A.

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 states, in pertinent part,

(a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer.

As to petitions filed pursuant to Schedule A, the regulation at 20 C.F.R. § 656.15 states, in pertinent part,

(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.

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 business 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).

Although the regulations previously stated the required length of posting as “ten consecutive days,” that requirement was recently revised to “10 consecutive business days.” The revised regulation became effective on March 28, 2005. The petition in this matter was filed on December 1, 2005, when the new regulatory language was in effect. The new regulatory language, therefore, governs this petition, and the petitioner is obliged to show that the notice was posted for ten consecutive business days.

With the petition counsel submitted a notice of the proffered position. The notice describes the proffered position in accordance with the requirements in the regulations. A letter dated June 14, 2005, on the petitioner’s letterhead, from [REDACTED] HRC Nursing, indicates that it was posted “in the Medical Unit at Poudre Valley Health System” from June 1, 2005 to June 13, 2005, which the certification characterizes as including 10 business days.

On January 18, 2006, the Acting director, Nebraska Service Center, denied the petition. The acting director noted that, as June 4, 5, 11, and 12 fell on weekends, the period of posting to which the petitioner’s June 14, 2005 letter attests, from June 1, 2005 to June 13, 2005, does not encompass the requisite ten working days.²

Counsel submitted a Form I-290B appeal in this matter on February 17, 2006. In the section reserved for the reason for filing the appeal, counsel inserted, “The notice of filing complies with the regulatory requirements.” On the appeal counsel also stated that she would submit a brief or additional evidence within 30 days.

This office received no brief or additional evidence prior to June 12, 2007, when it sent counsel a facsimile transmission. In that fax this office noted that, contrary to counsel’s assertion, it had not received a brief or any additional evidence. The fax further stated that, if counsel had submitted anything during the interim, she should resubmit it.

Counsel returned that fax. On it, she indicated that she had not submitted any additional evidence or a brief. Under her signature counsel wrote, “Please adjudicate on the record,” then crossed out that caption.

Subsequently, counsel submitted a letter dated June 23, 2007. The first paragraph of that letter reads,

I am re-sending [sic] you the letter that we sent to you on March 10, 2006 with supporting information regarding the above case. My client, Florence Awachie,³ has some additional information that she would like to send to you and I enclose it with this letter.

² Although 20 C.F.R. § 656.10 does not define the term “business day” for the purposes of posting, CIS and DOL rely on the definition at 29 C.F.R. § 2510.3-102(e). Consistent with common usage, that definition does not include Saturdays or Sundays as business days.

³ This office notes that the appellant in this case is the petitioner, Poudre Valley Hospital, rather than the beneficiary, Florence Awachie, who has no standing in this proceeding. 8 C.F.R. § 103.3(a)(1)(iii)(B) and 8 C.F.R. § 103.3(a)(2)(v).

With that letter counsel submitted her own letter, dated March 10, 2006, and two affidavits, each dated March 9, 2006.

In her March 20, 2006 letter counsel stated that following chronology of the posting of the proffered position: (1) [REDACTED], the petitioner's clinical recruiter, prepared the notice and gave it to [REDACTED], clinical director of medical specialty services, on or about May 30, 2006, (2) [REDACTED] posted the notice on June 1, 2005, (3) on June 14, 2005 [REDACTED] contacted [REDACTED] to ask whether the notice was still posted, and was informed that it was, (4) [REDACTED] attested to the posting, but incorrectly implied that the posting had ended on June 13, 2007, and (5) the notice was removed some days after June 14, 2007.

The two affidavits both bear a notary's attestation stating that they were sworn to and signed on March 9, 2006. One of those affidavits is from [REDACTED] who attested, from her point of view, to counsel's assertions. The other is from [REDACTED], who attested to the same facts from her point of view.

In her faxed response to this office's faxed inquiry, counsel indicated that she had submitted no evidence between filing the appeal on February 17, 2006 and receiving this office's facsimile, on or after it was sent on June 12, 2007. The return fax further indicates that, when she received this office's fax, counsel initially wanted the appeal adjudicated on the evidence of record. Subsequently, counsel amended her version of events such that she had sent evidence on March 10, 2006. Given that contradiction, and the fact that the March 10, 2006 letter and accompanying affidavits were not previously in the record, this office does not find credible the assertion that the letter and affidavits were sent to this office on March 10, 2006 or at any other time prior to this office's June 12, 2007 fax.⁴

Further, the affidavits imply that, on March 9, 2006, [REDACTED] and [REDACTED] were able to swear, based on their memories, that the posting notice was not removed on June 13, [REDACTED] as the June 14, 2005 letter states, nor on June 14, but on some later date. This office does not trust this fortuitous and convenient memory, nearly nine months after the fact.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In short, this office also does not find credible the amended chronology of the posting of the proffered position.

⁴ This office's June 12, 2007 fax stated,

The regulations do not allow an applicant or petitioner an open-ended or indefinite period in which to supplement an appeal once it has been filed. Therefore, this facsimile is not and should not be construed as requesting or permitting the petitioner and/or its counsel to submit a late brief and/or evidence in response to this request. If a brief and/or evidence were not filed directly with the AAO within the period indicated on the Form I-209B, please check the box below and return this form to the Administrative Appeals Office by facsimile transmission.

Counsel checked the appropriate box and return the fax as directed.

The regulations require that the notice be posted for at least ten consecutive working days and that evidence of such posting be submitted with the Application for Alien Employment Certification. The evidence submitted does not credibly demonstrate that the petitioner complied with the regulations. The petition was correctly denied for this reason, which has not been overcome on appeal.

Further, as the director observed, the petitioner failed to provide a prevailing wage determination, produced in accordance with 20 C.F.R. § 656.40, as required by 20 C.F.R. § 656.40. The petition was correctly denied for this additional reason, which, again, has not been overcome on appeal.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.